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THE  
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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION

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denounced by section 5480, Rev. St. U. S., as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873 (U. S. Comp. St. 1901, p. 3696). To reverse the judgment of conviction he has sued out a writ of error from this court, and assigns as the only ground for reversal that the indictment against him and others does not state facts sufficient to constitute a public offense against the laws of the United States. The points raised were saved in the trial court both by demurrer and motion in arrest.

We think most of the objections to the indictment arise by reason of failure on the part of counsel to appreciate the fact that McConkey was not indicted for violating the provisions of section 5480, and that it was not necessary, in order to convict him under section 5440, to show a completed offense under said section 5480. The language of the indictment, other than matters of form, is as follows:

"The grand jurors of the United States of America, within and for said district and division, in the name and by authority of the said United States of America, upon their oath present that heretofore, to wit, on or about the 1st day of September, A. D. 1907, and prior to all the days and dates herein-after mentioned. James Mulhall, Felix Nathanson, Charles B. Gregg, and E. V. McConkey, whose true Christian name is to the grand jurors unknown, all late of the city of Minneapolis, in the county of Hennepin, in the state and district of Minnesota and Fourth division thereof, and within the jurisdiction of this court, did then and there unlawfully, wrongfully, feloniously, and knowingly conspire, combine, confederate, and agree together to commit the acts made an offense and crime against the United States by section 5480 of the Revised Statutes of the United States, and the acts amendatory thereof, that is to say: That the said persons and each of them did then and there conspire, combine, confederate, and agree together in devising and intending to devise a certain scheme and artifice to defraud divers persons to the grand jurors unknown, to be effected through and by means of the post office establishment of the United States, which said scheme and artifice to defraud was as follows, to wit: That the said James Mulhall, Felix Nathanson, Charles B. Gregg, and E. V. McConkey should associate themselves together as wholesale and retail dealers in certain merchandise and farm produce, under the firm name and style of the Nicollet Creamery Company, in the said city of Minneapolis, Minnesota, and that the said James Mulhall, Felix Nathanson, Charles B. Gregg, and E. V. McConkey should induce said divers persons unknown as aforesaid to send to them, as the said Nicollet Creamery Company, shipments of merchandise and farm produce upon the representations made by them, the said James Mulhall, Felix Nathanson, Charles B. Gregg, and E. V. McConkey, as the said Nicollet Creamery Company, that they would purchase and pay for such merchandise and farm produce, and in case such merchandise and farm produce should be sent by said divers persons aforesaid, and received by them, the said James Mulhall, Felix Nathanson, Charles B. Gregg, and E. V. McConkey, as the said Nicollet Creamery Company, not to pay them for such merchandise and farm produce, but to fraudulently convert the same to the use and benefit of them, the said James Mulhall, Felix Nathanson, Charles B. Gregg, and E. V. McConkey, and thereby defraud the divers persons aforesaid so sending such merchandise and farm produce out of the value of the same, which said scheme and artifice to defraud, so devised as aforesaid, was, as a part thereof, at the time of the devising thereof and afterwards, intended by the said James Mulhall, Felix Nathanson, Charles B. Gregg, and E. V. McConkey to be effected by opening correspondence and communication with those divers persons unknown as aforesaid through and by means of the post office establishment of the United States, and by inciting those persons unknown as aforesaid to open communication with them, the said Nicollet Creamery Company, through and by means of the post office establishment of the United States; and said James Mulhall, Felix Nathanson, Charles B. Gregg, and E. V. McConkey, as a part of the said conspiracy,

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OF THE

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<sup>1</sup> Appointed February 2, 1909.

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<sup>2</sup> Died August 3, 1909.



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# CASES

## ARGUED AND DETERMINED

IN THE

### UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

SCHURMEIER et al. v. CONNECTICUT MUT. LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. April 26, 1909.)

No. 2,753.

**1. COURTS (§ 359\*)—JURISDICTION OF FEDERAL COURTS—ACTION TO ESTABLISH CLAIM AGAINST ESTATE.**

A foreign creditor may establish his claim in the courts of the United States against the personal representatives of a decedent, though the laws of the state in terms limit such right to proceedings in the local probate courts, but in such case the federal court administers the state laws and is bound by the same rules that govern the local tribunals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939-949; Dec. Dig. § 359.\*]

Probate jurisdiction of federal courts, see note to Bedford Quarries Co. v. Thomlinson, 36 C. C. A. 276.]

**2. EXECUTORS AND ADMINISTRATORS (§ 225\*)—PROVING CLAIMS AGAINST ESTATE—LIMITATION.**

Gen. St. Minn. 1894, § 4509, provides that the probate court shall by order fix the time within which claims may be presented against the estate of a decedent, which shall not be less than six months nor more than one year, and that no claim shall be received after the expiration of such time "unless for good cause shown the court may in its discretion receive, hear and allow such claim, \* \* \* but no claim shall be received or allowed unless presented within one year and six months from the time when notice of the order was given." *Held*, that such limitation relates to the time the claim is presented, and not to the time of trial and judgment, nor to the time the court judicially determines whether good cause for extension exists, and that the commencement of an action on a claim in a federal court by a foreign creditor is a presentation of the claim within the statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 789; Dec. Dig. § 225.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 225\*)—CLAIMS AGAINST ESTATE—JURISDICTION TO ALLOW—LIMITATION.**

A foreign creditor proceeding under such statute brought an action at law on a claim against the estate of a decedent in a federal court after the time fixed for filing claims by the probate court had expired, but with-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in 18 months from the time the order was made. It did not allege any reason for the failure to sooner present the claim, and a judgment in its favor was reversed by the appellate court on the grounds that the claim could be allowed only on a finding that there was good cause for the delay and that jurisdiction to make such finding was in equity only. After the cause was remanded, the 18 months having then expired, by leave of court it was transferred to the equity side, and the complaint was recast into a bill in equity alleging grounds for the delay. *Held*, that by the filing of the original complaint the court acquired general jurisdiction of the cause and to allow the transfer and amendment of the pleadings, which, as they did not change the cause of action, did not constitute the bringing of a new suit, but related back to the time of the commencement of the action, and that the power of the court to consider and allow the claim was not barred by limitation.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 789; Dec. Dig. § 225.\*]

4. EXECUTORS AND ADMINISTRATORS (§ 225\*)—PROVING CLAIMS AGAINST ESTATE—LIMITATION.

Complainant held notes of a decedent, secured by a mortgage, which did not mature until after the time fixed by the probate court for filing claims against the estate had expired. The mortgage was then foreclosed, and the property, which the decedent had transferred, was sold, leaving a deficiency, to recover which action was brought in a federal court against the executors. Under Gen. St. Minn. 1894, § 4509, the court had power to allow the claim if presented within 18 months after the order for filing claims was made "for good cause shown." *Held*, that under the liberal construction of such provision by the Supreme Court of the state, and in view of the facts that the estate was not closed and that there was no defense on the merits, the facts shown were sufficient to authorize its consideration and allowance.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 789; Dec. Dig. § 225.\*]

Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Minnesota.

See, also, 124 Fed. 865, 60 C. C. A. 51; 137 Fed. 42, 69 C. C. A. 22.

Harris Richardson (Harold C. Kerr, on the brief), for appellants.

George W. Markham (James E. Markham, on the brief), for appellee.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

HOOK, Circuit Judge. The principal question in this case is whether the claim of the insurance company upon which it obtained a decree in the Circuit Court is barred by the limitations in the Minnesota statute (Gen. St. 1894, §§ 4509 and 4511) relating to the presentation and allowance of claims against estates of deceased persons. The statute provides that in granting letters testamentary or of administration the probate court shall make an order limiting the time for presentation of claims of creditors to not less than six months nor more than one year from the date of the order, that no claims shall be received after the time limited, except that "for good cause shown the court may in its discretion" grant additional time not extending beyond eighteen months from the time notice of the original order is

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

given, and that all claims arising upon contract not presented within the time prescribed shall be forever barred.

When letters testamentary were issued to Schurmeier's executors the probate court of Ramsey county, Minn., having cognizance of the matter, fixed six months as the period for presentation of claims, and notice of the order was duly given. The insurance company did not present its claim or sue thereon within the period so fixed, but later and within the additional year allowable for good cause brought an action at law in the circuit court. A judgment of that court in favor of the insurance company was reversed because no excuse for the delay appeared in the record. 124 Fed. 865, 60 C. C. A. 51. An amended complaint was then filed and another judgment obtained in the Circuit Court, which was also reversed. 137 Fed. 42, 69 C. C. A. 22. It was held upon the authority of *Security Trust Co. v. Bank*, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147, that, as no action was begun within the period first fixed by the probate court, the remedy thereafter was in equity, not at law. When the cause was remanded upon the second reversal the insurance company applied to the Circuit Court to transfer it to the equity side, the application was granted, and the complaint at law was reformed into a bill in equity. A final hearing in equity resulted in a decree for the insurance company, from which the executors took the appeal now before us.

As already observed, when the action at law was begun in the Circuit Court, the additional year allowable for good cause had not expired. The complaint of the insurance company contained no averments excusing its delay beyond the six months fixed by the order of the probate court. In the answer of the executors the Minnesota statute and the order were relied on, and it was averred that no cause for an extension of time existed. The company demurred to the answer, the demurrer was sustained, and, the executors declining to replead, judgment was rendered against them. It will thus be seen that the first judgment of the Circuit Court, reversed by this court, proceeded upon the assumption that the action could be brought and maintained after the six months had expired and without any ground or cause for an extension of the time. In the opinion of this court (124 Fed. 865, 60 C. C. A. 51) *Security Trust Co. v. Bank*, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147, is cited as controlling authority upon this question, but the other rule announced in that case, that after the first period fixed by the probate court had expired the remedy was in equity, was not definitely pointed out. On the contrary, this court said:

"As the record now stands, upon the authority of that case the judgment of the court below must be reversed and the demurrer overruled, but with leave to the plaintiff to reply to the answer or to amend its complaint, stating its cause of action at law or in equity, as it may be advised, and with leave to the defendants to answer or otherwise plead to such amended complaint."

Thus three courses were suggested as being open to the insurance company: (1) A reply to the answer in the pending law action in which the executors averred that no cause for an extension existed, (2) an amendment of the complaint at law, or (3) a recasting of the complaint with appropriate amendments into a bill in equity. Act.

upon this, an amended complaint at law was filed; and it is but fair to say that counsel, failing to examine the opinion of the Supreme Court in *Security Trust Co. v. Bank*, supra, may have been misled by the direction above quoted. It is plainly disclosed in that opinion that the remedy was in equity. On the other hand, it is doubtful that prejudice could result, because when the judgment was reversed the eighteen months prescribed by the statute had already passed, and, if the delay in showing cause for an extension beyond the six months was fatal, it was fatal then, and the adoption of a wrong course afterwards added nothing to it.

The amended complaint at law, the second judgment in favor of the insurance company, the second reversal by this court, the transfer of the cause from the law to the equity side of the Circuit Court, the reformation of the pleadings, the final hearing, and the decree from which this appeal was taken, all occurred more than eighteen months after publication of the notice of the order for the presentation of claims. The reliance of the insurance company is upon the connection of these successive steps for the establishment of its demand with the action originally begun within the eighteen months, and upon the existence of sufficient cause for the delay beyond the first six months of that period. In approaching the situation so presented, it is important to notice some settled principles of law and some facts clearly shown in the case in hand. A foreign creditor may establish his claim in the courts of the United States against the personal representatives of a decedent though the laws of the state in terms limit such right to proceedings in the local probate courts. In such case, however, the courts of the United States administer the state laws and are bound by the same rules that govern the local tribunals. *Security Trust Co. v. Bank*, supra. In the case before us the requisite grounds of federal jurisdiction, diversity of citizenship, and amount in controversy are present, and, passing for the moment the matter of legal or equitable cognizance, the insurance company, therefore, had a lawful right to proceed in the Circuit Court. Under the Minnesota statute the probate court in which the administration of the estate was pending, having fixed six months for the presentation of claims, was authorized thereafter to grant an additional year for good cause shown. The Circuit Court of the United States sitting in equity was possessed of like authority. *Schurmeier's Executors v. Insurance Co.*, 137 Fed. 42, 69 C. C. A. 22. The limitations of the Minnesota statute involved in this case relate to the time the claim is presented for allowance, not to the time of trial and judgment, nor to the time the court judicially determines whether good cause for an extension existed. In other words, if a claim is "presented" within the six months or eighteen months, as the case may be, the proceeding takes its orderly judicial course, and it is not important that the questions connected with its allowance remain undetermined until after the time has expired. The bringing of an action upon a claim in a Circuit Court of the United States having jurisdiction has the same effect as a proceeding in the probate court, and is a "presentation" of the claim to all intents and purposes as if it had been presented to the probate court. The estate of the deceased has not been closed.



When the action was brought in the Circuit Court the estate was in active course of administration; claims against it were allowed by the probate court months afterwards. In this particular the case differs from that of *Security Trust Co. v. Bank*, supra. The claim of the insurance company is a just one. When the action was begun there was no substantial defense to it save in the failure to present it within the six months fixed by the probate court, and the question whether there was good cause for the delay.

The determination of the principal question stated at the outset, therefore, depends upon the existence of sufficient cause within the meaning of the statute for an extension of time for the presentation of the claim, the effect of the failure to set forth such cause in the pleadings within the eighteen months, and the effect of first proceeding at law and the subsequent transfer of the cause to the equity side of the court. The Minnesota statute, and a similar one of Wisconsin from which the former was doubtless taken, have been construed by the courts of those states very liberally in favor of creditors whose claims were just and whose delay had not worked hardship to others. In *State ex rel. v. Probate Court*, 67 Minn. 51, 54, 69 N. W. 609, 610, it was said:

"The sole object for limiting the time for the presentation of claims is to secure the prompt settlement of estates. In the present case there is not even a suggestion that the granting of relator's application would in any way delay or prejudicially interfere with the settlement of the estate, or cause it any possible injury, except to subject it to the chance of having to pay a just claim. Under the circumstances, to refuse relator the privilege of presenting its claim would be unreasonably harsh."

And in *State ex rel. v. Probate Court*, 79 Minn. 257, 258, 82 N. W. 580, the court said:

"Courts are very liberal in relieving parties from defaults of this kind, especially when no injury can result to innocent parties. They are not only relieved from their own excusable negligence, but from like negligence of their attorneys as well. In this case it does not appear that the administration of the estate will be in any way hindered or delayed, and it does not appear that any other person interested in the estate will or can be in any manner prejudiced, by granting the application."

*Smith v. Grady*, 68 Wis. 215, 31 N. W. 477, has points of resemblance to the case at bar. There a creditor sought the allowance of a foreign judgment, but the county court, sitting in probate, denied it upon the ground that the judgment was void on its face, and the decision was successively affirmed by the circuit court and the Supreme Court of the state. While the appeal of the creditor was pending in the circuit court, and after the period fixed for the presentation of claims had expired, he asked the county court to extend the time so he might present the demand upon which the void judgment had been rendered. The application was denied. The Supreme Court of Wisconsin, reversing the decisions of the lower courts, held that the creditor had proceeded with diligence, was not guilty of laches in mistaking his remedy, and was entitled to relief. In the case in 79 Minn. 257, 82 N. W. 580, the court cited as an authority sustaining its conclusion *Baxter v. Chute*, 50 Minn. 165, 52 N. W. 379, 36 Am. St. Rep. 633, in which a statutory provision authorizing the opening up of a default

in an action because of mistake or excusable neglect was held to embrace a mistake of law on the part of counsel. In view of the decisions of the state courts, we think the delay of the insurance company was excusable and that it had good cause for an extension of time. The mortgage debt held by the insurance company did not become due until after the six months fixed for the presentation of claims had expired. The deceased debtor had sold the mortgaged property shortly before his death, and it was to the interest of his estate that the property be followed, a foreclosure be had, and the proceeds applied before resorting to funds in the hands of the executors. Indeed, the statute (Gen. St. Minn. 1894, § 4529) prohibited payment of a secured claim "until the creditor shall first have exhausted his security, or shall have released or surrendered the same"; and, though the claim might have been previously presented and allowed for the full amount, the closing of the estate would have been delayed, and the mortgagee possibly debarred from exercising a power of sale contained in the mortgage. Gen. St. Minn. 1894, § 6029. Again, the course of the insurance company was in conformity with what was supposed to be the settled doctrine of the courts of the United States having jurisdiction in Minnesota. The Circuit Court had previously held broadly that a creditor whose citizenship and claim were such as to entitle him to invoke its jurisdiction might as of right bring his action at law therein at any time during the eighteen months mentioned in the statute; and this court affirmed that ruling. *Security Trust Co. v. Dent*, 104 Fed. 380, 43 C. C. A. 594; *Security Trust Co. v. Bank*, 104 Fed. 1007, 43 C. C. A. 683. The action of the insurance company was brought before that limitation had run, but after it had run the Supreme Court held that the view of this court and the Circuit Court could not be sustained, and that after the expiration of the time first fixed by the probate court further indulgence depended upon the existence of good cause. 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147. We think that the condition of the administration of the estate, that it was still open and claims were being audited and allowed, that the claim of the insurance company was not due, that it was secured by a lien upon property then owned by a third party, the enforcement of which with application of the proceeds was prerequisite to payment from the estate of any deficiency, that the claim finally asserted was a just one subject to no substantial defense, that the misconception of the correct procedure was due to the decisions referred to, all considered, very naturally produced the delay, and constituted sufficient cause for an extension of time. In this particular we think the case is well within the letter and spirit of the statute as construed and applied by the state court.

Good cause for an extension of time existing, the failure to aver it in the pleadings until after the eighteen months had expired was not fatal. This is a necessary deduction from the opinion of this court on the first writ of error, for when the opinion was delivered the time had run, and yet methods of asserting the grounds for an extension were suggested. The claim of the insurance company was founded upon its contract, not upon the statutory limitation of the time for its presentation in a judicial proceeding, nor upon the reasons for an enlarge-

ment of such time. The limitation of the statute is defensive in character; it is not one of the elements and constitutes no part of the claim itself. Nor is it self-assertive; on the contrary, it must be affirmatively invoked by him who seeks its aid. In this particular it is like the ordinary statutory limitation, which may be waived. A pleading showing the lapse of time and silent as to cause for extending or enlarging it may be demurrable, but if not challenged it will support a valid judgment. An amendment to such a pleading forestalling a defense by showing grounds satisfying or avoiding the statute does not set forth a new cause of action; therefore it relates back to the time the action was begun. A pleading may be amended after the period of limitation has run by the averment of facts taking the case out of the statute. See *Johnson v. Waters*, 111 U. S. 640, 672, 4 Sup. Ct. 619, 28 L. Ed. 547.

There remains for consideration the transfer of the cause from the law to the equity side of the court and the recasting of the pleadings after the eighteen months had run. The court already had jurisdiction of the subject-matter of the controversy and of the parties. By this we mean jurisdiction in its general sense, and have in mind the fundamental grounds prescribed by Congress, the absence of which cannot be waived or cured by consent or stipulation of the parties. If such grounds exist when an action is begun, though they are not shown in the record, a Circuit Court nevertheless lawfully acquires cognizance of the cause, and may allow an amendment supplying the necessary averments. This may be done after a judgment has been reversed by an appellate court because of the apparent lack of jurisdiction, and after the period prescribed by a statute of limitations has fully run and the action if commenced anew could not be maintained. *Carnegie, Phipps & Co. v. Hulbert*, 70 Fed. 209, 16 C. C. A. 498; *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248. Such amendments do not introduce a new cause of action, and, as they simply bring upon the record facts existing when the action was begun, they relate back to that time. A Circuit Court of the United States exercises jurisdiction both at law and in equity, and, while the distinction is important and is carefully preserved, we do not think that if a party misconceives his remedy the court is powerless in aid of justice to direct a transfer of the cause to the proper docket, and thereafter, with appropriate changes as to form, to allow it to proceed as though originally lodged there. An order to that effect is no more radical than one permitting an amendment showing for the first time fundamental statutory grounds for invoking the jurisdiction of the court for any purpose; and, as we have seen, the practice of granting orders of the latter character has been approved. It not infrequently happens that an action involving both legal and equitable rights and remedies is removed to a Circuit Court of the United States from a court of a state in which the statutes provide simply for a civil action without distinction between law and equity, and that difficult questions arise in the Circuit Court as to the proper docketing and disposition of the case. It would be a harsh rule that an error of judgment in such matter rendered proceedings on the wrong side of the court wholly void, and that the statutes of limitation continued to run as though no action were pending. In

this respect there is no difference between a cause removed to a Circuit Court and one originally begun there. If the requisite diversity of citizenship exists or a federal question is involved, and the prescribed amount or value is in controversy, the cause is pending in the Circuit Court, and an error committed by entertaining it on the wrong docket is an error in the exercise of jurisdiction which the court has power to correct. Broad powers of amendment of process, pleadings, orders, and judgments are conferred by act of Congress, and should be liberally exercised in the interest of justice. We commonly speak of a court of law and a court of equity as though they were separate and distinct tribunals, but a Circuit Court with its dual jurisdiction is but a single court, and its material constitution is the same when it sits to-day in the trial of an action at law and to-morrow in hearing a suit in equity. There are not two courts created by different laws with judges holding under different commissions. In *United States Bank v. Lyon County* (C. C.) 48 Fed. 632, 633, it was said:

"Therefore the transfer of a cause from the equity to the law docket of the same Circuit Court is not transferring the case from the jurisdiction of one court to that of another and distinct tribunal, but, in effect, is merely directing that it be placed upon the proper docket, so as to be proceeded with according to the rules governing the practice in that branch of the court."

And after referring to a provision of the state Constitution perpetuating the distinction between law and equity jurisdiction, and to a provision of the state statute that an error made in the form of action should not work an abatement, but the cause should be transferred to the proper docket, the court further observed:

"Why may not this court follow this statutory enactment as a proper rule of action, when it finds that a case, proper for an action at law, has been commenced in form of a suit in equity? If the cause of action is one cognizable in a Circuit Court of the United States, and is brought in that court, but an error is committed in bringing it in equitable instead of legal form, why is it not within the power of the court to order that in this particular the form of the action may be amended, and the cause be entered upon the proper docket? Why put the parties to the delay and expense necessarily caused by a dismissal and recommencement of the proceeding, when the same can be saved by following the rule enacted in the state statute, and adopting the same as the proper practice in the federal court? In sustaining the demurrer to the bill, the ruling was not that the Circuit Court did not have jurisdiction, but that the case was not a proper one for equitable cognizance, because an adequate remedy could be had at law. It was not held that the complainant did not have a cause of action, but only that the form of the proceeding was erroneous, in that it should have been at law, and not in equity."

In the case at bar the original cause of action of the insurance company was purely a legal one. Resort to equity became necessary only to escape the subsequent bar of a limitation which might or might not be urged. If it had not been urged, a judgment at law would have been valid and entitled to recognition when presented to the probate court for a place in the schedule of liabilities. We think the Circuit Court acted within its power in permitting the transfer.

The decree is affirmed.

SANBORN, Circuit Judge (dissenting). In my opinion the conclusion in this case conflicts with the decisions of the Supreme Court in

Security Trust Company v. Black River National Bank, 187 U. S. 211, 229, 237, 23 Sup. Ct. 52, 47 L. Ed. 147, and Union Pacific Ry. Co. v. Wyler, 158 U. S. 290, 296, 15 Sup. Ct. 877, 39 L. Ed. 983, and with the decisions of this court in Schurmeier v. Connecticut Mutual Life Ins. Co., 137 Fed. 42, 47, 69 C. C. A. 22, 27, and Whalen v. Gordon, 95 Fed. 305, 309, 37 C. C. A. 70, 74, and the insurance company was not entitled to any relief in this suit: First, because after July 18, 1902 the date of the expiration of the eighteen months, it had no right to commence or maintain a suit upon the cause of action upon which it has secured relief, the cause of action for a decree that the court should for good cause receive and hear its claim after the expiration of the six months fixed by the order of the probate court, and no suit was instituted upon this cause of action until August 5, 1905, when the bill in equity was filed under the order of the court below of July 10, 1905, that the defeated action at law should thenceforth be a suit in equity; second, because the amendment of August, 1905, whereby for the first time there was introduced into this action the cause of action in equity upon which the recovery herein is based, did not relate back to the time of the filing of the original complaint at law, and the new cause of action had expired and was barred on July 18, 1903, more than three years before it was introduced into the case; third, because the transformation of the action at law which had expired into a maintainable suit in equity by the order of the court below against the objection of the successful party in the action at law was erroneous and ultra vires; and, fourth, because the insurance company was guilty of culpable laches.

1. When a man dies, his property vests in the state in trust for his creditors, heirs, and devisees, on the conditions and subject to the limitations prescribed by its statutes of limitation, descent, and distribution, which occupy the place of a deed of trust between private parties. His moral obligation to pay his debts and every personal attribute of the claims of his creditors die with his person, and in place of all these the law substitutes equitable estates, claims, not in personam, but in rem, to shares in the property he owned. It is upon the fact that the administration of the estate of a dead man is only the enforcement of a trust that the jurisdiction of a federal court to enforce the rights of creditors, heirs, and legatees to shares therein is based. It is derived from the jurisdiction of the court of chancery of England to administer trusts. 1 Story's Equity Jurisprudence, § 532; Attorney General v. Cornthwaite, 2 Cox, Ch. 44; Hagan v. Walker, 14 How. 28, 14 L. Ed. 312; Adams, Equity, 257. "In the court of chancery executors and administrators are considered as trustees, and that court exercises original jurisdiction over them in favor of creditors, legatees, and heirs, in reference to the proper execution of their trust." Green's Adm'x v. Creighton, 23 How. 90, 93, 16 L. Ed. 419; Borer v. Chapman, 119 U. S. 587, 598, 599, 7 Sup. Ct. 342, 30 L. Ed. 532; Continental National Bank v. Heilman (C. C.) 81 Fed. 36, 43.

A proceeding to administer upon the estate of a deceased person is a proceeding, not in personam but in rem, to administer a trust. The property is the defendant, the executors and administrators are trus-

tees, and all who are entitled to any share of the estate are cestuis que trust. *Grignon's Lessee v. Astor*, 2 How. 319, 327, 11 L. Ed. 283; *Sheldon's Lessee v. Newton*, 3 Ohio St. 494, 503.

The creditors of the deceased become cestuis que trust, their claims are equitable estates in the trust property, and the statutes of administration which dictate the time and manner of the presentation and allowance of their claims prescribe conditions precedent to the existence and enforcement of these equitable estates in the property of which the deceased died seised, which is held in trust for them. While such statutes are commonly called statutes of limitation, and while they do limit the time within which claims may be presented, they are in reality rules of property, and hence they may not, like ordinary statutes of limitation, be lawfully waived, ignored, or disregarded by courts, administrators, executors, heirs, or claimants, because they are conditions of the trust and to waive or to disregard them is to violate the trust. *Security Trust Company v. Black River National Bank*, 187 U. S. 211, 229, 23 Sup. Ct. 52, 47 L. Ed. 147; *Pulliam v. Pulliam* (C. C.) 10 Fed. 53, 61, 69, 71, 73, 75, 76. In the *Trust Company's Case* the Supreme Court adopted the opinion of Judge Hammond upon this subject, and said:

"In *Pulliam v. Pulliam* (C. C.) 10 Fed. 53, 78, the distinction between ordinary statutes of limitation and statutes of administration of the estates of decedents limiting the time within which creditors must prove their claims is pointed out in the respect that the latter are rules of property as well as statutes of limitation."

Let us turn to the opinion in *Pulliam v. Pulliam* in order to see clearly how that distinction was declared. Joel L. Pulliam held a just claim against the estate of John N. Pulliam, deceased, which he had failed to present for allowance within the time prescribed for its presentation by the administration statutes of Tennessee. After that time expired he collected upon a claim of the estate against a third party \$9,246.02, the executor of the estate undertook to waive the statute, accounted for this money by permitting Joel to apply it upon his claim against the estate, took vouchers from him for that payment, and thus accounted for the money "in good faith under a mistaken view of the law." Page 61. The court held that both the executor and Joel were liable to pay back this money, because its payment upon the barred claim was a breach of trust. Page 73. The reasons why neither the executor, the administrator, nor the court may lawfully waive or disregard such statutes are clearly and convincingly stated by Judge Hammond, and his opinion is lucid and instructive. Discussing the claim that though the statute had run, the moral obligation to pay the just debt might, as in the case of ordinary statutes of limitation, sustain a new promise, a payment, or a waiver, he said:

"There is undoubtedly a principle (and it was that misled me at the former hearing) that a debt barred by the statute of limitations, or discharged in bankruptcy, will, nevertheless, support a payment, or a new promise to pay, after the bar has attached or the discharge has taken effect. But this must be confined to the ordinary statute of limitations, and cannot be said of the statutes in favor of dead men's estates. As to a new promise to pay, the executor or administrator cannot make a valid one after the bar of these statutes has attached, and it is settled that he cannot waive this statute, while

he may the ordinary statute of limitations. *Batson v. Murrell*, 10 Humph. (Tenn.) 301, 302, 51 Am. Dec. 707; *Brown v. Porter*, 7 Humph. (Tenn.) 373, 383, 384; *Byrn v. Fleming*, 3 Head (Tenn.) 658, 662, 663; *Wharton v. Marberry*, 3 Sneed (Tenn.) 603, 607, 608; *Wooldridge v. Page*, 9 Baxt. (Tenn.) 325, 332, 333; *Woodfin v. Anderson*, 2 Tenn. Ch. 331. \* \* \* A discharge in bankruptcy effectually extinguishes a debt, and yet it will support a new promise, or an actual payment, because while a man lives there is a moral obligation on him to pay his debts, whether the legal obligation be extinguished or only barred, and in that sense the debt is never extinguished. But non constat that this is so when a man is dead; that moral obligation perishes with him, and survives neither to his executor nor his heir as a matter of law, though he may, by will, confer it upon them. Anciently his property went to the first taker, or was absorbed by the church for pious uses; but the law-making power interfered, and by statute imposed on his property a trust for the benefit of his creditors. In this view the proceedings to recover the debt are in a large sense proceedings in rem against the property. It has never been denied that the Legislature may attach such conditions as it chooses to this trust. These statutes attach a condition precedent that a creditor must proceed within two or three years, as the case may be, to enforce his claim. If he does not, the heir or legatee takes the property absolutely discharged of all further trust for the benefit of the creditors, and may follow it into whose-soever hands it goes."

In view of these principles of the law, it was in my opinion indispensable to the statement of a good cause of action in this case that the creditor should plead a compliance with the condition precedent prescribed by the Minnesota statute, and, if it failed to do so and that condition had not been fulfilled, neither the executors nor the courts could, on account of the failure of the former to plead a noncompliance or on account of their silence, waive the condition as living debtors might have waived the bar of ordinary statutes of limitation.

The statute of Minnesota provided:

"At the time of granting letters testamentary, or of administration, the court shall make an order limiting the time within which creditors may present claims against the deceased for examination and allowance. \* \* \* No claim or demand shall be received after the expiration of the time so limited unless for good cause shown the court may in its discretion receive, hear and allow such claim upon notice to the executor or administrator; but no claim shall be received or allowed unless presented within one year and six months from the time when notice of the order is given." Gen. St. Minn. 1894, § 4509.

Any claim not thus presented is forever barred. Section 4511. This statute prescribed two conditions precedent by compliance with which a creditor might secure an equitable estate in the property of the deceased. First, he might do so by presenting his claim to the probate court or by commencing an action at law in the federal court within the time limited by the order, in this case prior to June 27, 1901; second, he might do so by an application to the probate court or by the commencement of a suit in equity in the federal court wherein he pleaded good cause why the court should receive his claim within eighteen months after the notice of the order, in this case prior to July 18, 1902. The second condition could be complied with only by presenting to the probate court within the eighteen months a petition which stated good cause and prayed that the court would receive the claim, or by exhibiting in the federal court before July 18, 1902, a bill in equity wherein such good cause was set forth, and an appeal was made to the chancellor to receive the claim. "An application to the

federal court to decree an extension of time beyond the period previously prescribed by the probate court would have to be made by a bill in equity showing good cause." *Security Trust Company v. Black River National Bank*, 187 U. S. 237, 23 Sup. Ct. 52, 47 L. Ed. 147.

This statute was derived from the state of Wisconsin, and, when the time fixed by it expired without such an application, not only was the claim of the creditor barred, but the right of action thereon was extinguished, and the property vested absolutely in the other creditors, or heirs, or devisees. *Austin v. Saveland's Estate*, 77 Wis. 108, 45 N. W. 955, 956; *Carpenter v. Murphey*, 57 Wis. 541, 15 N. W. 798; *Winter v. Winter*, 101 Wis. 494, 77 N. W. 883, 884.

In the case at bar the insurance company's claim was not presented within the time limited by the order of the probate court, and the possible cause of action that might have arisen upon the presentation of the claim was extinguished on June 27, 1901. There remained the possibility of a compliance with the second condition. Upon this subject the Supreme Court of Minnesota had stated that there could be no liability of the property of a deceased person in such a case unless there had been a compliance with that condition. *Hunt v. Burns*, 90 Minn. 172, 95 N. W. 1110, 1112, and cases there cited. "Where the application is made within the time limited and good cause is shown, it should be granted." *Massachusetts Mutual Life Ins. Co. v. Estate of Elliot*, 24 Minn. 134. The inference and the statute are conclusive that, when no application which pleads good cause is presented within the eighteen months, no application can be granted. "By the express provision of section 102 (4509), no claim or demand against an estate can be received after the expiration of the period of time originally fixed therefor, except for good cause shown. If cause be shown, the authority rests in the court, upon due notice to the executor or administrator, to receive and pass upon the claim or demand. When the court is asked to exercise its discretion, there must be presented not only a claim or demand against the estate, but good cause for opening the default and for relieving the applicant from apparent neglect as well. \* \* \* No effort was made to comply with section 104 (4511), and until this was done the court would not be justified in either extending the time, or in considering that any claim or demand had been presented which it could receive or pass upon." *Gibson v. Brennan*, 46 Minn. 92, 94, 48 N. W. 460. No application was made in this case to any court to receive it, nor was any cause shown for receiving or considering any claim prior to July 18, 1902, but an action at law was commenced on February 7, 1902, against the executors in the court below upon a complaint which set forth no cause for the receipt or consideration of the claim by the court and prayed for no such relief. The cause of action stated in that complaint had expired on July 27, 1901, and the action could not be maintained. *Security Trust Company v. Black River National Bank*, 187 U. S. 236, 23 Sup. Ct. 52, 47 L. Ed. 147. The filing of that complaint, and the issue and service of the summons based upon it, did not constitute the commencement of the suit upon the cause of action for the receipt and consideration of the claim by the insurance company notwithstanding the expiration of the time limited by the order, because the averment of good cause



for the granting of that relief and the prayer for it were indispensable to a statement of it. Such a statement and application prior to July 18, 1902, were conditions precedent to the existence of that cause of action, and the burden of pleading and proving compliance with that condition rested upon the insurance company.

Again, such a statement of good cause and such an application for relief would have been indispensable to the cause of action in the probate court which made the order and which took judicial notice of it. Hence it was equally indispensable in the court below, which was administering the Minnesota law and stood in the shoes of the probate court.

And, finally, this cause of action could be maintained in the federal court in a suit in equity only, and the averments of the expiration of the time limited and of good cause for the receiving and consideration of the claim notwithstanding that expiration were indispensable to the statement of any cause of action in equity, because they alone disclosed the fact that the insurance company had no adequate remedy at law. Moreover, in a suit in equity matter in avoidance of the statute of limitations, or of any other like defense, must be pleaded in the bill.

For these reasons, the complaint filed in 1902 did not plead and was not based upon the cause of action in equity for a receipt and consideration of the claim notwithstanding the expiration of the time limited, and the commencement of the action upon it was not the beginning of a suit upon the equity cause. The result is that no suit was ever commenced upon that cause of action before August 5, 1905, when the bill in equity was filed, more than two years after that cause of action had expired.

2. When the eighteen months expired, the cause of action at law was dead, because it had not been commenced within the six months limited by the order of the probate court, and the cause of action in equity had expired, because no suit had been commenced upon it and no application for relief on account of it had been made within the eighteen months. Thereupon in July, 1905, the court granted a motion of the insurance company to permit it to amend its complaint in the action at law by pleading therein the cause of action in equity and praying for the receipt and consideration of its claim notwithstanding its failure to present it within the six months limited. The only purpose of this amendment was to avoid the condition and limitation of the statute, which was fatal to a suit upon this cause of action in equity commenced at any time after July 18, 1902. The insurance company sought by this amendment to take advantage of the general rule that an amendment relates back to the filing of the original complaint, so that the running of the statute against the new cause of action therein pleaded would cease on February 7, 1902, when the complaint on the action at law was filed, more than three years before this new cause of action was introduced. "But," says the Supreme Court, "this rule from its very reason applies only to an amendment which does not create a new cause of action." The principle is that as the running of the statute is interrupted by the suit and summons, so far as the cause of action then propounded is

concerned, it interrupts as to all matters subsequently alleged by way of amendment which are part thereof. But where the cause of action relied upon in an amendment is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule no longer applies." *Union Pacific Railway Co. v. Wyler*, 158 U. S. 285, 297, 15 Sup. Ct. 877, 39 L. Ed. 983; *Railway Company v. Cox*, 145 U. S. 593, 601, 606, 12 Sup. Ct. 905, 36 L. Ed. 829; *Sicard v. Davis*, 6 Pet. 124, 8 L. Ed. 342. And this court has repeatedly held that an amendment which introduces a new and different cause of action, and makes a new and different demand, not before introduced, or made in the pending suit, does not relate back to the beginning of the action, so as to stop the running of the statute, but is equivalent to a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed. *Whalen v. Gordon*, 95 Fed. 305, 309, 37 C. C. A. 70, 74; *Van De Haar v. Van Domseler*, 56 Iowa, 671, 676, 10 N. W. 227; *Jacobs v. Insurance Co.*, 86 Iowa, 145, 53 N. W. 101; *Buel v. Transfer Co.*, 45 Mo. 563; *Scovill v. Glasner*, 79 Mo. 449, 453; *Crofford v. Cothran*, 2 Sneed (Tenn.) 492; *Railroad Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278; *Eylenfeldt v. Steel Co.*, 165 Ill. 185, 46 N. E. 266; *Railroad Co. v. Campbell*, 170 Ill. 163, 167, 49 N. E. 314; *Christy v. Farlin*, 49 Mich. 319, 13 N. W. 607; *Flatley v. Railroad Co.*, 9 Heisk. (Tenn.) 230, 237; *Buntin v. Railway Co. (C. C.)* 41 Fed. 744, 749; *Newton v. Allis*, 12 Wis. 378; *Railroad Co. v. Smith*, 81 Ala. 229, 1 South. 723. The authorities cited by the majority do not conflict with this rule. In *Johnson v. Waters*, 111 U. S. 640, 670, 672, 4 Sup. Ct. 619, 28 L. Ed. 547, the amendment did not introduce any new cause of action nor plead any new facts taking the case out of the statute of limitations which were not admitted by the answer before the amendment. See middle of page 672. In *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248, and *Carnegie, Phipps & Co. v. Hulbert*, 70 Fed. 209, 16 C. C. A. 498, no new cause of action was introduced by the amendments, and in the latter case that fact is particularly noted at page 506. The fact that an amendment was made to the complaint at law on June 2, 1903, wherein the facts were pleaded upon which the insurance company relied in the subsequent amendment in the bill in equity, is not material, because the amendment of 1903 was useless in the action at law, and, if it had introduced the cause of action in equity, that cause could not have been maintained, because it had expired on July 18, 1902, months before the amendment was made.

It is no answer to the established rule here invoked that the cause of action at law and the cause of action in equity were founded on the same contract and transaction and sought the recovery of the same amount of money. So were the two causes in *Whalen v. Gordon*, 95 Fed. 305, 37 C. C. A. 70, and in many other cases in which this question is decided, and the two causes in *Union Pacific Railway Co. v. Wyler*, 158 U. S. 285, 297, 15 Sup. Ct. 877, 39 L. Ed. 983, were founded upon the same tort. The tests of identity of causes of action under this rule are: Will the same evidence sustain each? Will a judgment against the first bar the second? In the case at bar both these ques-

tions must be answered in the negative. The evidence requisite to sustain the original cause of action not only would not sustain, but would defeat, the second cause, because it would demonstrate that the claim was filed within the time originally limited, and that the insurance company had an adequate remedy at law. And a judgment against the first cause of action not only would not bar the second cause, but the defeat of the first cause was indispensable to the maintenance of the second cause, for the latter could be maintained only in case the insurance company had no adequate remedy at law. *Schurmeier v. Connecticut Mutual Life Ins. Co.*, 137 Fed. 42, 46, 47, 69 C. C. A. 22, 26, 27. The cause of action in equity was a new and different cause from that stated in the complaint at law. It had expired long before it was introduced by the amendment. Therefore that amendment did not relate back to the time of the commencement of the action upon the first cause, and the cause of action in equity remained dead and barred.

3. On July 11, 1905, upon the petition of the insurance company, the court below made an order that the action at law should become a suit in equity. The only purpose of this order was to disregard and avoid the condition precedent and the limitation upon the claim or equitable estate of the insurance company by the use of the fiction of relation by endeavoring to cause the new cause of action to relate back to the commencement of the action upon the old cause. By reason of the rule which has just been considered, this order was ineffectual to accomplish that end.

Moreover, it was an excessive and erroneous exercise of the power of a federal court for it to undertake to transform a defeated action at law, against the protest of the successful defendant, into a suit in equity. There is one decision in the books that a suit in equity which failed might be transformed into an action at law by an order of the court. *United States Bank v. Lyon County* (C. C.) 48 Fed. 632, 635. It was rendered by Judge Shiras in 1892, and, so far as I can learn, it has never since been cited or followed. In his opinion in that case he said:

"I deem the question one of exceeding doubt, in a case brought originally in this court, and it can only be settled by an adjudication of the higher tribunal."

In that case the statute of limitations had not run against the action at law, and the only reason Judge Shiras gave for the order was that it would save the plaintiff the delay and expense of commencing a new action. Of this reason the Supreme Court has said, in a case that was removed from a state court:

"If this position were sound, it would allow a federal court of equity to entertain a purely legal action, transferred from a state court, on the mere ground, if it were not done, the plaintiff would have to commence a new proceeding. It surely does not need argument or authority to show that the jurisdiction of a federal court is not to be determined by any such consideration." *Thompson v. Railroad Companies*, 6 Wall. 134, 138, 18 L. Ed. 765.

So the power of a federal court to transform a suit in equity into an action at law is sustained by the doubting opinion of a single able and learned judge for a reason that the Supreme Court has decided is

not sound. In the case last cited from the Supreme Court an action at law was removed from the state court. The federal court undertook to transform it into a suit in equity, and after a bill had been filed in it rendered a decree thereon for the complainants. The Supreme Court reversed the decree, and remanded the action to the court below with directions that it should proceed as it was originally commenced, as an action at law.

Notwithstanding the fact that in the national courts the same judges in the same courtrooms administer rights and remedies in actions at law and in suits in equity, that which this court said when this case was last here still seems to me to be true. "In the federal courts an action at law cannot be maintained in equity, nor is an equitable cause of action or an equitable defense available at law. While in many of the states statutes exist which permit the joinder of causes of action at law and in equity in the same suit, this course is not permissible in the federal courts. In truth, the difference between causes of action at law and in equity is matter of substance and not of form, and no legislative enactment can really remove it. In the national courts this ineradicable difference is as sedulously preserved in the forms and practice available for their maintenance as it is in the natures of the causes themselves and in the principles upon which they rest. A legal cause of action may not be sustained in equity, because there is an adequate remedy at law, and it is only when there is no such remedy that a suit in equity can be maintained. Equitable causes and defenses are not available in actions at law, because they invoke the judgment and appeal to the conscience of the chancellor, and the free exercise of that judgment and conscience is forbidden in actions at law by the rule which entitles either party to a trial of all the issues of fact by a jury. *Bagnell v. Broderick*, 13 Pet. 436, 10 L. Ed. 235; *Foster v. Mora*, 98 U. S. 425, 428, 25 L. Ed. 191; *Scott v. Armstrong*, 146 U. S. 499, 512, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Lindsay v. Bank*, 156 U. S. 485, 493, 15 Sup. Ct. 472, 39 L. Ed. 505; *Schoolfield v. Rhodes*, 82 Fed. 153, 155, 27 C. C. A. 95, 97; *Davis v. Davis*, 72 Fed. 81, 83, 18 C. C. A. 438, 440; *Highland Boy Gold Min. Co. v. Strickley*, 116 Fed. 852, 854, 54 C. C. A. 186, 188." *Schurmeier v. Connecticut Mutual Life Ins. Co.*, 137 Fed. 42, 46, 69 C. C. A. 22, 26.

The union of legal and equitable causes of action in one suit is prohibited by section 913, Rev. St. (U. S. Comp. St. 1901, p. 683), and in removal cases, when such a union is permitted in the state courts from which they come, the causes of action must be separated into distinct actions at law and suits in equity in the national courts. *Hurt v. Hollingsworth*, 100 U. S. 100, 103, 25 L. Ed. 569; *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 651, 10 Sup. Ct. 965, 34 L. Ed. 295; *Dillon on Removal of Causes*, § 84. In the national courts legal causes of action either on removal or in original cases must be prosecuted in actions at law where the parties may have a trial by jury, and causes of action in equity and equitable defenses must be prosecuted in suits in equity where appeal may be made to the conscience of the chancellor. *Buzard v. Houston*, 119 U. S. 347, 351, 7 Sup. Ct. 249, 30 L. Ed. 451; *Scott v. Armstrong*, 146 U. S. 499, 512, 13 Sup. Ct. 148, 36 L. Ed. 1059.

And the federal courts may not lawfully transform by order or amendment against the objection of a defendant an original action at law into a suit in equity, or an original suit in equity into an action at law, because such a course of action would be to subject the defendant to a wholly different system of administration of rights and remedies from that to which he was liable under the original process. *Blalock v. Equitable Life Assur. Soc. (C. C.)* 73 Fed. 655, 660, 661; *Stevens v. Brooks*, 23 Wis. 196, 199; *Kavanagh v. O'Neill*, 53 Wis. 101, 10 N. W. 369, 370; *Carmichael v. Argard*, 52 Wis. 607, 9 N. W. 470, 471; *Hayward v. Hapgood*, 4 Gray (Mass.) 437; *Gray v. Brown*, 15 How. Prac. (N. Y.) 555; *Sheldon v. Adams*, 18 Abbott's Prac. (N. Y.) 405.

The process originally served upon the defendants required them to show cause why judgment should not be rendered against them for \$7,075.90. They answered that it should not be because the insurance company had not presented its claim within the time limited by the order of the probate court, and had not within the eighteen months prescribed by the statutes applied to any court to receive and consider its claim for good cause notwithstanding the expiration of the time limited. That answer presented a complete defense, and it defeated the cause of action. After that defeat the court could not lawfully require the defendant to answer the new cause of action in equity by a mere order that the defeated action at law should be transformed by amendment into a suit in equity. They were entitled to a judgment of dismissal of their action at law. If this is a mistaken view of the law and of the practice, courts and lawyers from the foundation of our judicial system have been uselessly dismissing actions at law and bringing new suits in equity upon the same claims, and vice versa, when the first cause of action failed and the second existed, when they might have grafted the second upon the first by a mere motion. It does not seem to be probable that this practice, universal for more than a century in the national courts, with the single exception, so far as I can learn, of the hesitating order of Judge Shiras, has been baseless.

4. It seems clear to me, for the reasons that have been stated, that the claim of this insurance company ceased to be, and the cause of action in equity upon it expired, on July 18, 1902, because the company had then failed to comply with the condition precedent upon which alone the claim and the cause of action could thereafter exist. Hence in my opinion the subsequent acts of the company could not revive either the claim or the cause of action, and they are immaterial.

But if I am mistaken in this view, and if the acts of the company after July 18, 1902, are of any importance, it seems to me to have been guilty of such laches that it may not lawfully obtain relief in this action. If the administration statutes had been mere ordinary statutes of limitation, suits in equity upon claims affected by them would be barred by laches in the federal courts in ordinary cases in the same time that like suits would be barred under the administration statutes in the state courts, and that time was July 18, 1902, in this case. *Kelley v. Boettcher*, 85 Fed. 55, 62, 29 C. C. A. 14, 21. This suit in equity was not commenced until more than three years thereafter and this delay appears to constitute gross laches. No case has been found in which any

court of the state of Minnesota has ever sustained an application to the probate court filed after the expiration of the eighteen months to receive or consider a creditor's claim which was not presented within the time limited by the order of the probate court. In *State ex rel. v. Probate Court*, 67 Minn. 51, 54, 69 N. W. 609, 908, *State ex rel. v. Probate Court*, 79 Minn. 257, 258, 82 N. W. 580, and *Smith v. Grady*, 68 Wis. 215, 31 N. W. 477, cited by the majority, the applications in the Minnesota cases were filed within the eighteen months, in the first case within seven months and in the second within four months after the times respectively limited by the orders of the probate court expired, and in the Wisconsin case the dates are not given.

In *Massachusetts Mutual Life Ins. Co. v. Estate of Elliot*, 24 Minn. 134, the Supreme Court of Minnesota declared that the prompt and speedy settlement of estates is a general prevailing and conspicuous purpose of our probate law, and that the provision under which applications for further time are made is exceptional and infringes upon that general purpose. In *St. Croix Boom Corporation v. Brown*, 47 Minn. 281, 284, 50 N. W. 197, that court held that an application made within the eighteen months, but two months after the time limited by the order of the probate court, was too late.

The insurance company filed its complaint upon the cause of action at law in this case on February 7, 1902. On February 27, 1902, the executors filed an answer in which they set forth the administration statutes of Minnesota, the order of the probate court which limited the time for the presentation of the claim of the insurance company, and they pleaded that the company could not recover because it had not applied to any court to receive and consider its claim after the time limited had expired. Here was express notice to the company of the law and of the true interpretation of it more than four months before the time within which the application might have been made expired; but the company made no application pursuant to the requirement of the statute. On December 1, 1902, the Supreme Court decided in *Security Trust Company v. Black River National Bank*, 187 U. S. 237, 23 Sup. Ct. 52, 47 L. Ed. 147, that the application must be made to the probate court, or by means of a suit in equity in the federal court to receive and consider such claims, before a recovery could be had upon them, and that no action at law upon them could be maintained in the federal courts; but the insurance company made no such application and commenced no such suit. On May 12, 1903, this court defeated the action at law, and cited that decision of the Supreme Court, so that the insurance company then knew the opinion of the Supreme Court that an application to the probate court, or a suit in equity in the federal court, was indispensable to its success; but it made no application and commenced no suit in equity until August 5, 1905, more than two years after that knowledge.

There are cases in the books in which courts of equity have relieved parties from mistakes of law. Many of them are cases where opposing parties have misled or deceived those who are relieved by false or mistaken representations. In the case at bar the executors notified the insurance company of the law more than four months before the time to file their application for relief, or to commence their

suit in equity, expired. The general rule is that mistakes of law furnish no ground for relief in equity and no excuse for laches. The statute in the case at bar was clear and plain; the timely application which it clearly required was possible and easy. In cases of this character it cannot be that because a litigant is of the opinion that a statute does not mean what it plainly reads, or because he has an erroneous opinion of the law, equity will relieve him from resulting loss or excuse his failure to comply with it. If such were the rule, every defeated litigant would be entitled to equitable relief. In my opinion, the failure of the insurance company from February, 27, 1903, when the answer of the executors plainly stated the requirement of the law, until August 5, 1905, to make the application which the statute demanded, was such gross and culpable negligence that upon that ground alone relief in equity should be denied to it. *Morgan v. Hamlet*, 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043; *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134; *Continental National Bank v. Heilman*, 86 Fed. 514, 30 C. C. A. 232; *Bickford v. McComb* (C. C.) 88 Fed. 428, 433.

Finally, the effect of the decision of this case is to give to a citizen of another state fifty-four months in which to present its application for good cause to the federal court to receive and consider its claim, notwithstanding its failure to file it within the time limited by the order of the probate court, while citizens of Minnesota are limited to eighteen months. The result is in this case, and if this precedent be followed it will be the result in other cases, that:

"The rights of those interested in the estate who are citizens of the state where the administration is conducted are materially changed, and the limitation which governs them does not apply to the foreign creditor who happens to be a citizen of another state." *Yonley v. Lavender*, 21 Wall. 276, 280, 22 L. Ed. 536.

The Supreme Court has repeatedly held that this must not be the rule, that administration laws are not merely rules of practice for the courts, but laws limiting the rights of the parties, and that they must be observed by the federal courts in the enforcement of individual rights, so that the rights of citizens of other states shall be the same as those of citizens of the state of the administration in similar circumstances. *Yonley v. Lavender*, 21 Wall. 276, 280, 22 L. Ed. 536; *Security Trust Company v. Black River National Bank*, 187 U. S. 211, 231, 23 Sup. Ct. 52, 47 L. Ed. 147.

It appears to me that in order to accomplish that result, to comply with the practice and rules which have been considered, and to follow the decisions of the Supreme Court which have been cited, the judgment in this case should be reversed.

Very respectfully,  
 J. M. SCHURMEIER,  
 Attorney for Plaintiff.

WITNESSES my hand and seal of office at St. Paul, Minnesota, this 10th day of June, 1906.

J. M. SCHURMEIER, Clerk of Court.

EL PASO LIVE STOCK COMMISSION CO. v. COLORADO LIVE STOCK  
COMMISSION CO.†

(Circuit Court of Appeals, Eighth Circuit. April 27, 1909.)

No. 2,855.

PRINCIPAL AND AGENT (§ 103\*)—RIGHTS OF THIRD PERSONS—ACTS DONE IN RELIANCE OF STATEMENTS BY AGENT—IMPLIED AUTHORITY.

Plaintiff sold a herd of 1,300 cattle to a third person, who gave a draft on defendant, a live stock commission company, for \$2,000 to apply on the purchase price. This draft plaintiff took to a bank and requested the cashier to telephone defendant and ascertain whether it would pay the draft. On being told by the cashier that the draft was given for cattle which had been shipped, defendant agreed to and did pay the draft. Two days later, having been told by the bank that the draft would be paid, plaintiff made a partial delivery of the cattle, which were shipped to defendant by the purchaser, who gave another draft on defendant for over \$10,000 in full payment therefor. Defendant received the cattle, but, on being advised of the second draft, refused to pay it or to surrender the cattle on demand to plaintiff without repayment of the \$2,000. Defendant had no knowledge of the actual transaction, but supposed the draft to have been given in whole or part payment for cattle which had been shipped to it; nor had it any such relations with the purchaser as would authorize him to make the drafts. *Held*, that plaintiff was bound by the statements made by the bank as its agent, and chargeable with knowledge that defendant accepted and paid the first draft on such statements, and in reliance on the supposed shipment to it of the cattle, to which it had the right to look for security and repayment, and that the plaintiff was not entitled to recover the cattle without repayment of the amount of such draft.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 103.\*]

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

John H. Knaebel, for plaintiff in error.

L. F. Twitchell (Frank C. Goudy, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This was an action in replevin. The parties were arranged in the Circuit Court as they are arranged here, the plaintiff in error being the plaintiff and the defendant in error being the defendant, and will be hereafter referred to as plaintiff and defendant, respectively.

The record shows that on the 17th of September, 1906, the plaintiff had about 1,300 head of Mexican cattle in a pasture, known as the "Hall pasture," near Fountain, Colo.; that on that day A. G. Putnam purchased these cattle from Charles F. Hunt, president of the plaintiff company, agreeing by an oral agreement to pay therefor the sum of \$13.75 per head, excluding the calves, which were to be delivered with the other cattle without additional charge therefor. The

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied July 12, 1909.



negotiations for the sale and purchase of these cattle were carried on at the Pike's Peak Club in the city of Colorado Springs, and, after an agreement had been reached between the parties as to price per head to be paid for the cattle, conditions of delivery, and time of delivery, Putnam gave Hunt a draft on the defendant company for \$2,000 to apply upon the purchase price of the cattle. The negotiations were completed, as the record shows, about 12 o'clock noon on the 17th day of September, and that, immediately upon its receipt from Putnam, Hunt took the draft to the Exchange National Bank of Colorado Springs and asked the bank to telephone the drawee, the defendant, and inquire if the draft would be honored.

Hunt testified:

"Q. About what hour of the day of the \$2,000 draft was it handed to you by Mr. Putnam? A. I think it was about 12 o'clock; we went over to lunch together; I think it was about 12 o'clock at noon. Q. Where were the cattle at that time? A. Running at large in the pasture. Q. Did you take that draft as a matter of course, without inquiry, or did you inquire about it? A. I immediately went to the bank. Q. What bank? A. The Exchange National Bank of Colorado Springs, and deposited it to the credit of my company. I asked them to telephone the drawee, the Colorado Live Stock Commission Company, if he would honor the draft, and the bank cashier reported to me that they had—"

At this point objection was made, and the witness then said:

"They reported favorably; the draft was paid."

On cross-examination, he testified:

"Q. You say the trade was finally consummated at the Pike's Peak Club? A. Yes, sir, on the 17th. Q. And by that trade he was going to take all of your cattle? A. That was the trade. Q. He gave you, then, a payment of \$2,000 by this draft? A. Yes, sir. Q. That \$2,000 was to apply upon the purchase price of the cattle? A. Yes, sir. Q. That was on the 17th? A. Yes, sir, the 17th. Q. And that same afternoon, was it, that you deposited the draft—or the next day? A. The same day before I went to lunch. I walked down to the bank and had them telephone, and made the deposit. Q. That was in the Exchange National Bank? A. The Exchange National Bank; yes, sir. Q. You stated that you requested them, at the time of depositing it, to telephone to the Colorado Live Stock Commission Company, upon whom it was drawn? A. I did. Q. Did they telephone before they entered it as a credit upon your book? A. They did not. Q. Do you know which one telephoned? A. I don't know which telephoned; the cashier is the gentleman with whom I talked. Q. How long after that before they reported to you that they had telephoned with reference to the draft? A. I think it was that evening, if not the next morning before I returned to the pasture."

And after being cross-examined as to some other matters, he was again asked on cross-examination:

"Q. Referring for a moment to the telephone conversation by the cashier or employé of the Exchange Bank at the time this \$2,000 draft was given, will you state just what you told him to telephone? A. I can state it as I remember it? Q. Yes. A. The import of it, was that I asked him to telephone the Colorado Live Stock Commission Company if they would honor this draft—Mr. Putnam's—of \$2,000. Q. Was there anything said at the time about its being for cattle? A. Nothing at all. Q. You didn't say anything at that time? A. I did to the bank, yes; I told the bank I had sold my cattle; what they said I don't know. Q. You don't know what they

said at the time? A. No. Q. But did they telephone for you? A. Yes, sir. Q. In regard to this draft? A. They said so."

Elijah Bosserman, president of the defendant company, testified on direct examination:

"Q. I show you Exhibit C, which is a draft for \$2,000 on the Colorado Live Stock Commission Company, and drawn in favor of the plaintiff in this case, dated September 17, 1906, signed by A. G. Putnam. When did you first have knowledge of that draft? A. I first had knowledge of that draft through, I suppose it was, the Exchange Bank at Colorado Springs that called me up on the phone. Q. Well, some one did call you up on the phone? A. Yes, sir. Q. Did they state what bank it was? A. I think it was the Exchange Bank; they said, 'This is the Exchange National Bank,' or something to that effect. \* \* \* Q. Did the bank, at the time it telephoned you, say that this draft was drawn by A. G. Putnam, and did they say what it was drawn for? A. Yes, sir. Q. What did they say it was drawn for when they asked you if you would pay it? A. They said it was for the payment of cattle. I asked them if they had made shipment, and they told me, 'Yes.' Q. So when the draft came in it was paid? A. Yes, sir."

And on cross-examination:

"Q. You paid that draft on the faith of the credit of the bank at Colorado Springs, or on the faith of the signature of A. G. Putnam? A. They told me it was for cattle, and I paid it; I told them I would pay it if it was for cattle for immediate shipment, which they told me it was. Q. Who told you that? A. The bank; he said he was cashier of the bank."

The draft was paid on the 19th of September at Denver, and, on the 20th, Putnam drew another draft on the defendant for the sum of \$10,615, and on the same day 25 cars of cattle, numbering substantially 843 head, were shipped by Putnam, consigned to the defendant. The cattle arrived at Denver on the morning of the 21st, and on that day the defendant was informed by Putnam that he had drawn a second draft for \$10,615. This was the first information received by defendant that any such draft had been drawn. The defendant declined to pay it, and it was protested. Hunt came to Denver, made demand upon defendant for the cattle, which the defendant declined to surrender until the \$2,000, the amount of the first draft, which it had paid was returned; this Hunt refused to do and brought this action to recover possession of the cattle.

The sole question, under the facts disclosed by the record, is whether the plaintiff was entitled to the possession of the cattle without refunding the \$2,000 paid to the plaintiff by the defendant upon the first draft. It would be interesting indeed to here review the learning upon the rights of consignors, consignees, and factor men and the rules of law applicable to the right of rescission between parties to contracts, and to notice at some length the very able discussion of the cases relating to these subjects found in the briefs of counsel, but in the view we have taken of this case it becomes unnecessary to do so. It must be borne in mind that the defendant was not a party, but a stranger, to this contract between Putnam and the plaintiff; that it had no information which would tend in the slightest degree to cause it to suspect that such a contract had been made, or that any draft other than the \$2,000 draft was involved in the transaction; or that any other number of cattle, in excess of the number which the

\$2,000 would pay for, had been purchased by Putnam from the plaintiff.

Mr. Bosserman testified, in explanation of how he came to honor the \$2,000 draft, that he supposed that Mr. Putnam had bought some bulls and cows for substantially that amount. Neither was there anything in the course of dealing between the parties, as disclosed by the record, tending to show that Mr. Putnam or any one else had the right to suppose that any such credit as that represented by the second draft would be extended to him by the defendant. It is true the record shows that on former occasions the defendant had advanced money to Putnam to purchase cattle, in small amounts, never to exceed two or three thousand dollars, and then always upon cattle for immediate delivery and when he had made arrangements beforehand for the credit. When the 843 head of cattle were received, in view of the assurances given by the bank at the time the draft for \$2,000 was paid, that the cattle were for immediate delivery, the former course of dealing between Putnam and the defendant, and from the fact that it had no intimation that any other draft had been drawn, Mr. Bosserman might well have thought that the only interest the defendant had in the cattle was in the number purchased by the money advanced by defendant, and that Mr. Putnam had made other arrangements for the balance.

We think it clearly appears from the record that, if the defendant had been fully informed of the entire transaction, it would have declined to honor the first draft for \$2,000. It was not so informed, but was led to believe that the \$2,000 was to be applied in payment for cattle to be immediately shipped. It is true that Mr. Hunt said that he did not expressly authorize the bank to assure the defendant that the money was to be applied in payment for cattle to be immediately shipped. His testimony upon that question, when called in rebuttal, was:

"Q. Did you ever send any message to the defendant, or authorize any bank, or individual, to send any message to the effect that the \$2,000 draft was drawn against any shipment of cattle? A. I never did, sir, in regard to that."

And on cross-examination, while on the stand in rebuttal, he testified:

"Q. You testified this morning, didn't you, that you told the bank to call up Mr. Bosserman and see about the \$2,000 draft? A. Yes, sir. Q. And see whether it would be paid? A. Yes, sir. Q. I believe you also testified that you had told the bank that you had sold the cattle? A. Yes, sir, that I had sold my herd."

He did, however, authorize the cashier of the bank to make the inquiry, and the record shows that he proceeded no further toward carrying out the contract until he received a report from the bank, and he nowhere tells us what that report was, except, in a general way, that it was favorable, and although called in rebuttal, after Mr. Bosserman had testified as to the condition upon which the draft would be paid, he does not say that the bank did not communicate that fact, and all that Mr. Bosserman said upon the subject to him.

No principle is better settled than, as said in *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618:

"That he, who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted."

This doctrine, while it originated in courts of equity, has often been applied to cases arising in courts of law. *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. Ed. 618; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79.

If Hunt had himself telephoned to the defendant instead of asking the bank to do it, and received the answer which the bank received and gave the assurance which the bank gave, there could be no doubt, we take it, in the mind of any one, but that he would be estopped from denying that the money was to be applied in payment for cattle for immediate shipment, to the amount of the draft, and that the defendant had the right to be reimbursed out of the proceeds of the sale of the cattle shipped to it. Did the fact that he authorized the bank to communicate with the defendant instead of doing it himself change his position or release him from the obligation to refund this money? We think not. He handed the draft to the cashier of the Exchange National Bank, informed him that he had sold his cattle, and authorized the cashier to ascertain whether or not the draft would be paid, and did not move further in the matter until he received the report of the cashier. We think it is safe to assume, in the absence of any denial by him, and from the knowledge common to every one as to the manner in which banks conduct their business to avoid personal liability, that the report of the cashier advised him fully of the condition upon which the draft would be paid.

It has been often decided:

"That, where one holds another out to the world as his agent, in determining the liability of the principal the question is not what authority was intended to be given to the agent, but what authority was a third person dealing with him justified, from the acts of the principal, in believing was given to him." *Griggs v. Seldon*, 58 Vt. 561, 5 Atl. 504; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; *Dodge v. McDonnell*, 14 Wis. 553; *Webster v. Wray*, 17 Neb. 579, 24 N. W. 207; *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224, 53 N. W. 1061; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Carmichael v. Buck*, 10 Rich. (S. C.) 333, 70 Am. Dec. 226; *Howell v. Graff*, 25 Neb. 130, 41 N. W. 142; *Milne v. Klen*, 44 N. J. Eq. 378, 14 Atl. 646; *Stovall v. Com.*, 84 Va. 246, 4 S. E. 379; *Routh v. Agricultural Bank of Mississippi*, 12 Smed. & M. (Miss.) 161.

The only interest the defendant had in the cattle was either in separate cattle amounting in value to \$2,000, or in the total number shipped to the extent of its special interest of \$2,000, and we do not think it can be said that it was obliged to separate the cattle when the cattle were all demanded by the plaintiff before the replevin suit was brought, because it was not known by the defendant in what way the cattle had come, and the distinct understanding with the plaintiff was that the draft for \$2,000 was paid on condition that the cattle would be shipped immediately for its protection in the payment of it. We say "the distinct understanding with the plaintiff," because the plaintiff authorized the cashier of the bank to speak for him and in-

quire about the draft before he entered upon a delivery of the cattle, and, when the inquiry was made, it was made in pursuance of the authorization of Hunt; when the answer came, it was in pursuance of the inquiry, and it must be held, therefore, that all were fully authorized.

The judgment of the Circuit Court is affirmed.

SANBORN, Circuit Judge (dissenting). Among the terms of the agreement of sale of the cattle were these, that they should be shipped in two lots, 25 car loads in the first lot and the remainder in the second lot, that each lot should be paid for in full upon its delivery, and that the draft for \$2,000 should be applied in part payment of the second lot. It was upon this contract that the draft for \$2,000 on the defendant was given to the plaintiff on the purchase of Putnam on September 17, 1906. Under this agreement on September 19, 1906, the plaintiff took the draft for \$10,615, drawn by the purchaser, Putnam, in payment for the 25 car loads which upon that day were shipped by direction of Putnam to the defendant. This draft in payment for the cattle was not paid, and the title and the right to the possession of these cattle remained in the vendor. Where the agreement of sale is that the property shall be paid for on delivery, and the purchaser gives a check or draft at the time of delivery, pursuant to the agreement which is not paid, the sale is on condition that the vendor retains the right of possession, and that he may replevy the property as soon as the check or draft is dishonored. *Matthews v. Cowan*, 59 Ill. 341, 347; *Sprague Canning Co. v. Fuller*, 86 C. C. A. 46, 49, 158 Fed. 588, 591; *Morris v. Rexford*, 18 N. Y. 552, 555; *Russell v. Minor*, 22 Wend. (N. Y.) 659, 664; *Paul v. Reed*, 52 N. H. 136, 138; 24 Amer. & Eng. Encyclopedia of Law, 1052, 1053, note 1; *Wells v. Merle & Heaney Mfg. Co.*, 66 Ill. App. 292, 295; *Ames v. Moir*, 130 Ill. 582, 591, 22 N. E. 535; *The Elgee Cotton Cases*, 89 U. S. 180, 188, 196, 22 L. Ed. 863. And where a part payment has been made and delivery follows, but the check or note for the remainder of the payment is dishonored, the right of possession still remains in the vendor, and replevin will lie until the property is paid for in full. *Baker v. McDonald*, 74 Neb. 595, 104 N. W. 923, 1 L. R. A. (N. S.) 474.

When the cattle arrived and were tendered to the defendant, it knew that they were purchased and delivered upon condition that the draft for \$10,615 should be paid. It, however, declined to pay this draft because the cattle were not in its opinion worth so much money, but nevertheless took and held possession of all these cattle worth over \$10,000 to secure to itself the repayment of the \$2,000 which it had paid upon the first draft. The defendant was not a bona fide purchaser of the cattle from Putnam, the vendee, because it knew the condition of their sale before it received them, and it could not have obtained from him any better title or right of possession than he had, and his title and right of possession were subject to the condition that the plaintiff held both until the \$10,615 were paid. *Harkness v. Russell*, 118 U. S. 667, 681, 7 Sup. Ct. 51, 30 L. Ed. 285; *Canadian Bank of Commerce v. McCrea*, 106 Ill. 281, 285, 286; *Coggill v. Hartford & New Haven R. R. Co.*, 3 Gray (Mass.) 545, 550.

But it is said that the plaintiff is estopped from asserting its title and from recovering possession of its cattle from the defendant until it repays to the defendant the \$2,000 which the latter paid upon the first draft, by reason of the facts that after the agreement of sale had been made and before the delivery of the cattle the plaintiff informed its bank that it had sold its herd of cattle, asked the bank to inquire of the defendant whether or not the vendee's draft upon it for \$2,000 would be paid, the bank inquired, the defendant answered that it would pay the draft if it was drawn for cattle for immediate shipment, and the bank, although the plaintiff had never authorized it, or any individual, to state that the draft was drawn against any shipment of cattle or to make any other statement about the sale, told the defendant that the draft was for cattle bought for immediate shipment and that the cattle had been shipped, although they had not been, and the plaintiff had not stated that they had been. Thereupon the defendant paid the draft in reliance upon the statement of the bank that it was drawn for cattle bought for immediate shipment. My mind refuses to assent to the conclusion that these facts raise such an equitable estoppel as deprived the plaintiff of its legal title and right to the possession of its cattle, or that it bound it to repay the \$2,000, or that it fastened a lien upon its cattle for that amount.

1. The statement of the plaintiff to the bank that it had sold its herd of cattle and its request that the bank would ask the defendant if Putnam's draft for the \$2,000 would be paid gave no actual or apparent authority to the bank to make on behalf of the plaintiff any statement or representation, much less any false statement or representation, which the plaintiff had not communicated to it in relation to the sale of the cattle, and for that reason the plaintiff, it seems to me, was not bound by any statements of the bank. If A. makes a sale of property for \$15,000 to B. on condition that B. shall pay for it in full before it is delivered, and B. gives him a draft upon C. for \$2,000, and A. tells his bank that he has sold his property, asks it to inquire of C. if the draft for \$2,000 will be paid, does that authorize the bank to deprive C. of the entire value of his draft by making statements about A.'s sale of his property which A. never made and never directed the bank to make? It is common practice for payees of drafts on distant drawees to ask their banks to inquire of the drawees whether or not the drafts will be paid, but no authority in the banks to make statements regarding the property of the payees which will deprive them of that property or compel them to repay the money due them on such drafts can in my opinion be lawfully inferred from such requests. A direction to or a request of the bank by the payee to make the controlling statement, it seems to me, would be indispensable to an estoppel of the payee by such a statement.

2. More than a statement or conduct which leads another to do what he would not otherwise have done is indispensable to an equitable estoppel which will destroy the lawful title of the owner to property, although the maintenance of such title may subject another to loss, or injury, or disappointment of expectations upon which he acted. Either a willful intent to deceive, or such gross negligence of the rights of others as is tantamount thereto, is essential to such an estop-

pel. Truthful statements and conduct made with ordinary care will not raise such an estoppel. There must be some moral turpitude or some breach of duty. *Henshaw v. Bissell*, 18 Wall. 255, 271, 21 L. Ed. 835; *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 335, 336, 23 L. Ed. 927; *Steel v. Smelting Co.*, 106 U. S. 447, 455, 1 Sup. Ct. 389, 27 L. Ed. 226; *Bank v. Farwell*, 7 C. C. A. 391, 394, 396, 58 Fed. 633, 636, 639; *Given v. Times-Republic Printing Co.*, 52 C. C. A. 40, 43, 114 Fed. 92, 95.

The cases of *Dickerson v. Colgrove*, 100 U. S. 578, 580, 25 L. Ed. 618, and *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79, do not conflict with this rule. In the *Dickerson Case* Edmund Chauncey and Sarah Kline owned equal undivided parts in a tract of land which Sarah sold and conveyed by warranty deed to Lowell Morton, who went into possession of the property in 1854. Lowell caused his brother Eleazer to write Chauncey and to ask him if he made any claim to the premises. Chauncey in response sent a letter in 1856 to Sarah Kline, his sister, the contents of which were communicated to Lowell Morton, in which he wrote:

"You can tell Mr. Morton for me he need not fear anything from me. Thank God I am well off here, and you can claim all there. This letter will be enough for him."

In reliance upon this letter, Morton conveyed the lands by warranty deeds to others, who improved them. In 1865 Chauncey conveyed his undivided interest to Dickerson and another, and in 1873 Dickerson and another brought ejectment and were held to be estopped by Chauncey's letter. If the plaintiff in this action had written a letter to the bank to the effect that it would claim nothing under the draft for \$2,000, or that it would repay to the defendant whatever it paid upon this draft, or that if the defendant would pay the draft it should have a lien upon the plaintiff's cattle for that amount superior to its claim for the purchase price of them, and if the plaintiff had directed the bank to tell the defendant the contents of this letter, this case would be analogous to *Dickerson v. Colgrove*.

In *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79, a trustee appointed by the court under a creditors' bill against the debtor, Kirk, sold certain of his lands, and the sale was confirmed by the court. Before the trustee made his deed Kirk appeared in the court and objected to the allowance of simple contract debts in the distribution of the proceeds of the sale. But those debts were allowed, and thereafter on December 14, 1865, the trustee conveyed the lands to the purchaser, Hamilton, who paid \$4,000 for them and went into possession of them. Kirk resided on an adjoining lot, but he never objected to the sale or claimed that there was any defect therein, or claimed any title to the property until 1872, when he brought ejectment, although he knew that Hamilton was erecting a building upon the lots which cost him \$4,000 in the intervening years. The court held these acts constituted a clear fraud, and that he was estopped to recover the property. In each of these cases the plaintiffs were guilty of actual and willful deceit. They owed to the defendants the duty to tell the truth about their claims to the property which the defendants were purchasing and

improving, and they made misrepresentations which deceived the defendants to their injury. They were both guilty of moral turpitude and of breaches of duty. But in the case at bar the plaintiff owed the defendant no duty to disclose the nature of his transaction or the terms of his sale. It was dealing with the defendant at arm's length. It was not asking the defendant to pay the draft for \$2,000. It was not the guarantor of the payment of that draft or surety in any sense for the drawee. It was the vendor of its cattle; Putnam was the vendee. Putnam was the drawer of the draft; he was its guarantor, and he it was that was requesting the defendant to pay the \$2,000, not on the plaintiff's, but on Putnam's, account. The plaintiff, the vendor, stood on one side and Putnam and the defendant on the other side of this transaction, and to each of the latter the rule caveat emptor was applicable in all its force. The plaintiff's inquiry whether or not the draft would be paid was not a request for its payment, but a mere request for information. It was the owner of its cattle. One of the conditions of its contract of sale was that they should be paid for in full at or before their delivery, and that it should be entitled to their possession until they were paid for in full, and the record discloses no evidence that the defendant ever made any statement or representation inconsistent with the existence of that condition, and hence none that ever could estop it from enforcing the condition. The only statement the evidence shows that it made, that it had sold its herd of cattle, and even the bank's unauthorized statement that the cattle had been bought for immediate shipment and that they had been shipped, were all consistent with the condition of the sale, and the rule of caveat emptor placed on the defendant the burden to ascertain the terms of the sale if it deemed them material.

In *Henshaw v. Bissell*, 18 Wall. 255, 271, 21 L. Ed. 835, the Supreme Court said:

"There is, therefore, no case for the application of the doctrine of equitable estoppel. For its application there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud. An estoppel in pais is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury."

In *Brant v. Virginia Coal & Iron Company*, 93 U. S. 326, 335, 336, 23 L. Ed. 927, the Supreme Court again said:

"It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud.' 1 Story's Eq. 391. To the same purport is the language of the adjudged cases. Thus, it is said by the Supreme Court of Pennsylvania that 'the primary ground of



the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up.' *Hill v. Eppley*, 31 Pa. 334; *Henshaw v. Bissell*, 18 Wall. 271, 21 L. Ed. 835; *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 368; *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157; *Commonwealth v. Moltz*, 10 Pa. 531, 51 Am. Dec. 499; *Copeland v. Copeland*, 28 Me. 539; *Delaplaine v. Hitchcock*, 6 Hill (N. Y.) 16; *Havwes v. Marchant*, 1 Curt. 136, Fed. Cas. No. 6,240; *Zuchtman v. Roberts*, 109 Mass. 53, 12 Am. Rep. 663. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established."

If, after the payment of the \$2,000 and before the cattle were shipped, the defendant had brought an action for the cattle, it could have recovered neither the cattle nor any lien upon them until it paid the balance of the purchase price, the \$10,615, and it acquired no rights by the delivery which was conditioned by the payment of that amount. The plaintiff did nothing inconsistent with this condition, nothing but to tell its bank that it had sold its cattle and to ask it to inquire whether or not the draft for \$2,000 would be paid. I am unable to perceive any moral turpitude or any negligence whatever in these acts, or in the fact that the plaintiff subsequently continued to assert its legal rights under its legal contract. In my opinion it was guilty of no moral turpitude and of no breach of duty which should deprive it of the \$2,000 which it had the legal right to receive, or of its cattle, which it had the right to hold until the purchase price for them was paid, or of the right to enforce its contract of sale, under which it was entitled to hold both the cattle and the \$2,000 until the full purchase price of the former was paid to it, and I think the judgment below should be reversed.

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CITY OF AKRON v. BARBER ASPHALT PAVING CO.

BARBER ASPHALT PAVING CO. v. CITY OF AKRON.

(Circuit Court of Appeals, Sixth Circuit. May 28, 1909.)

Nos. 1,881-1,892.

1. MUNICIPAL CORPORATIONS (§ 375\*) — CONTRACT FOR PAVING — GUARANTY OF WORK AND STIPULATION FOR REPAIRS—VALIDITY.

In an action by a city on a guaranty, in a contract for paving, that the contractor would keep the pavement in repair for 10 years, where the contractor received payment for the work in full it has no interest in the source from which the money was obtained which entitles it to set up as a defense that the contract was illegal because the city made a special assessment on abutting property for the entire contract price of the work although it had no power to levy such assessment for repairs, it having undoubted power to contract for the repairs and to pay for the same from its general fund.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 375.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MUNICIPAL CORPORATIONS (§§ 488, 489\*)—CONTRACTS FOR PAVING—STIPULATION TO REPAIR—ESTOPPEL OF CONTRACTOR.

A city which levied and collected a special assessment to meet its obligation on a contract for paving a street would be estopped to set up the illegality of the assessment to defeat recovery by the contractor on such contract, and for the same reason, where it has paid the contractor in full, the latter is also estopped to plead such illegality to avoid the contract when sued on a guaranty to keep the pavement in repair contained therein.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §§ 488, 489.\*]

3. MUNICIPAL CORPORATIONS (§ 368\*)—CONTRACT FOR PAVING—STIPULATION TO KEEP IN REPAIR—CONSTRUCTION.

Where, at the time a contract for paving a street was made which contained a guaranty by the contractor to maintain the pavement in good condition for 10 years, making all necessary repairs without further charge, a street railroad was being operated on the street, the contract must be presumed to have been made in the light of such fact, and the contractor cannot avoid obligation on its guaranty on the ground that the pavement was broken because of the insufficiency of the foundation of the street railway tracks, nor because during the 10 years the city renewed the grant to the street railway company, nor because heavier cars were used by such company, all of which must be presumed to have been within the contemplation of the parties.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 901; Dec. Dig. § 368.\*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

In 1897 the city of Akron and the Barber Asphalt Paving Company entered into a contract whereby the latter agreed, under a certain guaranty for a period of 10 years from the date of opening to traffic, to improve Howard street between Main and Federal (formerly Tallmadge) streets of that city with stone curbing, and paving with genuine Trinidad pitch lake asphalt. There was at the time a double-track street railroad extending through the portion of Howard street so to be improved. Other tracks intersected these tracks at several intervening cross streets. During the progress of the improvement, the paving company prepared and sold material to the street car company for the foundations to be placed under its tracks, and the latter company constructed such foundations. The paving company furnished the rest of the materials and constructed a foundation six inches in thickness, together with the asphalt surface along the length of the improvement, and also across the roadway between the curbs, including the spaces within the extreme outside rails of the double-track railroad and its intersecting railroads.

The paving company seems to have kept its guaranty to the satisfaction of the city until 1904, by restoring defects or broken portions. Differences then arose between the city and the paving company in regard to the condition of the street; the city complaining that the guaranty had not been kept, and the paving company claiming that the fault was due to insufficient foundations under street car tracks, for which the city was responsible, and that larger and heavier cars were being operated over the tracks than were in use at the time the asphalt contract was made, and that all this so injuriously affected the asphalt paving as to render efforts to keep it in good condition useless. The paving company in 1905 refused to do more. The city thereupon restored the street, at a cost of more than \$21,000.

In February, 1906, the city brought an action in the common pleas court of Summit county, Ohio, against the paving company, to recover the money so expended. The action was for alleged breach of the covenants of guaranty of the contract, the city alleging that the paving improvement had been opened for traffic October 30, 1897, and that defendant had been paid in

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

full, according to the contract. Afterwards, on April 6, 1906, upon petition of defendant asphalt company, alleging that it was a corporation organized under the laws of West Virginia, the cause was removed to the Circuit Court of the United States for the Northern District of Ohio, Eastern Division. Later the asphalt company answered, admitting that in September, 1897, it entered into the contract; that the pavement was completed and opened for traffic on October 30, 1897; that the city had paid defendant the contract price; and that in the years 1904 and 1905 the surface of the pavement became defective. The rest of the answer amounts to a denial of the allegations of the petition not admitted, excepting a charge that whatever damage the city had suffered was by its own neglect, misconduct, and default. Subsequently, three amended answers were filed, also motions to strike out certain of the defenses. Upon the granting of motions to strike out, a bill of exceptions was allowed the asphalt company. Reply was filed, and the cause was tried twice to court and jury, the verdict in each instance being in favor of the city, the first one for \$11,422, which, on motion of the company, was set aside and a new trial ordered; the second verdict was for \$7,000.

Motions of both city and company for new trials were overruled. Judgment being entered on verdict, the city was allowed bill of exceptions setting out all the evidence. A writ of error was allowed each party, and each is prosecuting error in this court. The assignments of error, so far as necessary, are referred to in the opinion.

Jonathan Taylor, for City of Akron.

S. H. Tolles and M. M. Townley, for Barber Asphalt Paving Co.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). Generally stated, two questions are urged: One is, whether the city had power to make the contract; the other is, what defects the contract of guaranty was meant to embrace. The company presents the former, and the city the latter.

It is claimed by the paving company that the contract is void, because: First, it is ultra vires, for the reason that it is a contract embracing repairs at the expense of abutting lot owners through assessment, while at the date of the contract the only power possessed by the city to assess was for improvements. Second, the contract is alleged to have been let without competitive bidding. Third, no certificate of either the city auditor or city clerk, showing that the required money was in the treasury and duly credited, had been filed.

The paving company at the trial offered in evidence the resolution of council to improve Howard street. Objection to the offer was sustained, and this, with admission of the contract in evidence, is made the subject of one of the company's assignments of error. The resolution provided that the cost and expense of the improvement should be assessed upon abutting lots in proportion to benefits, that the assessment should be payable in five annual installments and that bonds should be issued in anticipation of collection.

Distinction is urged between the power of assessment for improvement and for repair. Counsel cite decisions from states other than Ohio which show that this question would be material if made directly against the assessment by abutting lot owners. Our attention has been called to only one decision where the rights of such owners were not involved. *Portland v. Bituminous Paving Co.*, 33 Or. 307,

52 Pac. 28, 44 L. R. A. 527, 72 Am. St. Rep. 713. In the note to that case as reported in 44 L. R. A. 527, the other decisions relied on by counsel are cited. In view of the statutory powers of the city of Akron and the Ohio decisions to which we shall refer later, we need not consider the Portland Case.

In determining whether the paving company is in a position entitling it to question the power of the city to include—if it did include—in the assessment against the lot owners the cost of repairs, some admitted facts should be observed. In the first place, the paving company admits that it has been paid in full. In the next place, this objection challenges the source from which the money so paid and received came. We do not discover that mention was made of the assessment in the contract or specifications. Apparently the money, not its origin, was the material feature.

The argument concedes that there was power in the city to levy an assessment for the improvement of the street, as distinguished from its repair. Rev. St. Ohio 1897, §§ 2304, 2263, 2264, 2274, 2284. It also concedes that the city had power to levy an assessment for street repairs, but points out limitations as to mode and time. Rev. St. Ohio 1897, §§ 2307, 2311. It is thereupon urged that it was customary to pay for repairs out of the general fund. This concedes, as necessarily it must be conceded, that there was power in the city to raise a general fund by taxation, for otherwise the power and duty to repair could not be carried out. Rev. St. Ohio 1897, § 1692, par. 18; *Id.* 2640. Manifestly, there was power in the city to pay for both paving and repairs from the general fund.

Here, then, were two sources of authority in the city to raise money to pay for street work, one of the sources confessedly embracing street repairs. The first source was through sale of the bonds to be issued in anticipation of an assessment as before pointed out (Rev. St. Ohio 1897, § 2704); the other, the general fund. The last analysis, then, is not that the city did not possess authority to provide for repairs, but that it did not formally exercise the proper power. Now, as against any one merely receiving the money, this was but a mistake at most in choice of power. How does such a mistake, if mistake it was, concern the paving company, and, besides, is not the company met by estoppel?

As regards the interest of the paving company in the source from which the money paid under the contract was derived, but little additional need be said. It may be assumed that, if the lot owners had seasonably objected, they might have avoided the assessment so far as it may have included repairs. The limitation, if there was any as to repairs, must have been imposed for the protection of the lot owners. But one may waive a right—that is, a civil right—even though it be secured by constitutional provision. We discover no evidence of objection on the part of any of the lot owners. They must then be treated as having waived such rights as they may have had in this respect. It would be an abuse of the law to ignore the attitude of the lot owners, and place a stranger to their rights in the position they might have taken originally. That would be to use rights waived by the lot owners as a shield for a person who never

had any interest in those rights, or any authority either to enforce or waive them.

As to estoppel: In *Mt. Vernon v. State*, 71 Ohio St. 428, 73 N. E. 515, 104 Am. St. Rep. 783, a proceeding in mandamus, the relator sought a writ to require the city council to pass an ordinance providing for the issuance and sale of city bonds, and out of the proceeds to pay relator the cost of an improvement which was made and completed under a contract between the city and relator. The writ was denied, but not for any reason important here. In the answer of the city, it was alleged that the contract was made by virtue of a special act of the Legislature empowering cities of the class and grade of *Mt. Vernon* to improve streets with vitrified brick, asphalt, etc., and to pay one-half the cost through the issue of bonds, and that this act was violative of the Constitution of Ohio; also that the city clerk had not certified that the money required was in the treasury and credited.

After referring to the change of ruling touching municipal classification, and to the fact that the act in question had not been before the court, it was assumed "that the act would have been held by this court to have been unconstitutional." The relator insisted upon estoppel as against the city, because it had received the benefits of full performance of the contract on the part of relator. Of this it was said in the opinion (page 448 of 71 Ohio St., page 518 of 73 N. E. [104 Am. St. Rep. 783]):

"It may be accepted as the law that there can be no estoppel where there is an entire absence of power; but the answer to that in this case is that the corporation was not acting *ultra vires*, that is, without any power whatever under the act in question or from any other source."

Four of the judges, one dissenting, concurred in the first paragraph of the syllabus (page 428 of 71 Ohio St., page 515 of 73 N. E. [104 Am. St. Rep. 783]):

"Where a municipal corporation has entered into a contract with an individual under and by virtue of a statute which is unconstitutional, and the subject-matter of the contract is not *ultra vires*, illegal, or *malum prohibitum*, and the facts are such, as against the corporation, as would estop an individual from setting up as a defense the unconstitutionality of the statute, the municipal corporation will also be so estopped."

The theory of that decision was that, although the proceedings under which the contract of improvement was made were taken pursuant to an act which the court treated for the purpose of the case as unconstitutional, yet the city could, through different proceedings taken under other statutes, have made a valid contract. The distinction is between the total absence of power and the irregular exercise of power.

Moreover, long before the contract now in question was executed, it was settled by decisions of the Supreme Court of Ohio that persons may by their conduct estop themselves from contesting liability upon assessments levied in proceedings taken under an unconstitutional statute. Some of the decisions are cited and reasons stated in the *Mt. Vernon Case*, 71 Ohio St. 449, 73 N. E. 515, 104 Am. St. Rep. 783. The doctrine has been followed by the Supreme Court of the United States. In *Shepard v. Barron*, 194 U. S. 553, 567, 24 Sup.

Ct. 737, 741, 48 L. Ed. 1115, the validity of an assessment levied by the county commissioners of Franklin county, Ohio, was contested, upon the grounds that it was levied under an unconstitutional statute, and according to feet frontage instead of benefits. The property holders had petitioned for the improvement, and otherwise promoted it. Mr. Justice Peckham said:

"On principles of general law, we are satisfied that the plaintiffs are not in a position to assert the unconstitutionality of the act under which they petitioned that proceedings should be taken and that the assessment should be made in accordance with those provisions. This principle has been recognized in Ohio many times. See *State v. Mitchell*, 31 Ohio St. 592, 609; *Tone v. Columbus*, 89 Ohio St. 281, 296, 48 Am. Rep. 438; *City of Columbus v. Sohl*, 44 Ohio St. 479, 481, 8 N. E. 299; *City of Columbus v. Slyh*, 44 Ohio St. 484, 8 N. E. 302; *Mott v. Hubbard*, 59 Ohio St. 199, 211, 53 N. E. 47."

If the owners of the lots along Howard street had petitioned for its improvement and had induced the adoption of the very proceedings which were passed by council in authorizing the contract, it is clear that they would not be heard to question the assessment. Moreover, the resolution to improve Howard street provided, as before stated, that the assessment should be payable in five annual installments. The present action was brought eight years after the assessment might have been levied. Suppose the assessment had been levied in due course, and the lot owners had voluntarily paid it in full; then, whether we consider the lot owners as estopped to deny liability upon the assessment, or the city as having collected the assessment, the city would be in no position to resist payment if it were in default. The contention of the paving company would, however, even if it be in default, place it in a better position than the city would be if it were in default. The mutuality of estoppel is a complete answer to any such theory.

Turning now to the question touching competitive bidding, we think the objection relates to the interpretation of a portion of a statute which in terms has been settled by the Supreme Court of Ohio. *Ampt v. Cincinnati*, 6 Ohio N. P. 208, affirmed 60 Ohio St. 621, 54 N. E. 1097. See *Yaryan v. Toledo*, 8 Ohio Cir. Ct. R. (N. S.) 1, affirmed 76 Ohio St. 584, 81 N. E. 1199. The same thing must be said of the objection as to certificates of the city auditor and city clerk. *Cincinnati v. Holmes, Adm'r, et al.*, 56 Ohio St. 104, 46 N. E. 514, reversing *Holmes v. Avondale*, 11 Ohio Cir. Ct. R. 430, the name of Cincinnati having been substituted for Avondale by reason of annexation. The act in question in that case was enacted under a special classification; and this was true of the act now under consideration. It is true that, in applying the Holmes decision, reliance must be placed upon the bond issue provided for in the rejected resolution to improve; but in *Mt. Vernon v. State*, supra, the act treated as unconstitutional, in terms excluded application of section 2702; yet the court, finding power in the city otherwise than under the unconstitutional act, denied the contention upon this point. Besides, in the present instance, the money had in fact been paid and received before suit was brought.

We therefore hold: (1) That the paving company has no interest in or right to question the source from which the city derived the

money paid and received under the contract; and (2) that the company is estopped to deny that the city duly exercised its appropriate power when it authorized and entered into the contract.

The remaining question concerns the scope and effect of the contract. The controversy in the court below seems to have hinged upon the single question, whether the paving company could be held for breakages of the pavement caused by defects in the foundations under the street car tracks? The city claimed that the whole pavement was in such condition as to require resurfacing, and sought accordingly to recover the whole cost. The court below allowed testimony to be offered showing the condition of the tracks and their foundations, and also the effect of operating cars over them which were heavier than those in use when the contract was made. It was claimed that the tracks would yield to the weight of the cars and so break the adjoining paving and expose the pavement to the introduction and effects, between foundation and asphalt, of water and frost. The ruling in substance was that the city could not recover for the cost of restoring the portions which were injured in this way. The city's assignments of error should, we think, be tested by reference to the issue thus made.

The paving company in terms agreed, for stated prices per units of measurements of materials and labor, to furnish all material and do all work necessary to complete in every respect, in a good and substantial manner, ready for use, the improvement of Howard street; and this was to be in accordance with its "proposal, specifications and explanations." The specifications contain, among other things, the following guaranty:

"The pavement will be laid under proper official inspection. It will be guaranteed for periods of five and ten and fifteen years from the date when it is opened to traffic, and during said period all defects in the pavement due to its proper use as a roadway will be repaired and made good without additional expense."

The pleadings show, and it appears to have been accepted as true at the trial, that the period of 10 years mentioned in the guaranty was adopted. And bearing the same date as that of the proposal, and addressed like it to the council of the city of Akron, and signed by the paving company through the same agency as appears in the signature to the proposal and likewise to the contract, was a communication, which we conceive to be one of the "explanations" mentioned in the contract. In this instrument it is stated:

"Our understanding of our guarantee is a pavement at all times during any guarantee period that may be selected \* \* \* in as perfect a condition as the day it was laid, and that the pavement when turned over to the city, at the end of such guarantee or maintenance period, shall show seventy-five (75) per cent. of the original thickness called for in the contract, and if for any reason the pavement is less than seventy-five (75) per cent. of its original thickness, then the pavement shall be renewed to such thickness before our bond is released."

As showing how the parties to the contract understood the guaranty, we think it competent to refer to the language of this "explanation," for, as before mentioned, it seems to have been made part of

the contract. The language there employed amounted to a guaranty that the pavement should at all times during the period of 10 years be "in as perfect condition as the day it was laid," and that at the end of the period the pavement should "show seventy-five (75) per cent. of the original thickness called for in the contract." But apart from that instrument, we think the effect of the contract was to obligate the paving company to furnish a pavement which should be in good and substantial condition for traffic throughout a period of 10 years.

Can failure of performance of such a contract be excused on the ground that the foundations of the street car tracks were out of repair? We understand from the charge of the court that performance was excused to the extent that the pavement was impaired by defects in these foundations. The conditions existing at the date of the execution of the contract must be considered. There are several references made to railroads in the papers constituting the contract. Among these references is one to the street railways in Howard street, where the city reserved the right in awarding the contract either to include or exclude paving in the space between the rails and one foot outside thereof. Clearly, then, the parties had the subject of street car tracks in mind. But it nowhere appears in the contract, as we understand it, that performance of the paving company's covenant was to be excused by reason of defects existing in the track foundations during the life of the guaranty.

The parties seemed, at the time the work was begun, to understand that the city was not required actively to concern itself about the track foundations. As mentioned in the statement, foundations for the car tracks appear from the testimony to have been laid by the street car company, while the paving company was engaged in its work upon the improvement. Indeed, the paving company furnished and mixed the materials for the track foundations; and it does not appear to have made any objection to the foundations as laid. With the knowledge the paving company thus obtained of the foundations, and its apparent acquiescence in their sufficiency, it proceeded to construct the pavement foundations and to place the asphalt surface thereon throughout the length and breadth of the improvement, including the spaces between the street car rails. This was done, although, according to evidence offered and received at the trial, it was shown that at the date of the paving company's contract the council could require the street car company to repave the spaces between the rails of the tracks with the same kind and quality of material as that designed by the city to be placed outside of the tracks, and thereafter to keep such spaces in repair. But here, again, we discover no provision in the contract which in terms would excuse performance of the paving company's covenant of guaranty on account of any failure or neglect of the city to require the street car company to keep in repair either the paving between rails or the track foundations.

In *Railroad Co. v. Smith*, 21 Wall. 255, 263, 22 L. Ed. 513, a question arose as to the obligatory force of a covenant to construct a swinging drawbridge over a river, in accordance with plan and trac-



ings, for a stipulated price. The railroad company had caused the pier on which the bridge was to swing to be constructed, and the contract in question seems to have been simply for the bridge. The action was on the contract for the price, and the company alleged, among other things, a defective construction of the bridge, and claimed by way of recoupment to deduct damages. The court below instructed the jury that for any defects in the pier the defendant was alone chargeable, and that, if the difficulty in turning the bridge arose from a defect in the pier and not in the bridge, no damages could be recovered. The evidence showed that the pier had been built under the supervision of an agent of the bridge contractors, and in accordance with his directions. This same agent was superintendent in the construction of the bridge. Mr. Justice Field, speaking of this agent and also of the defect in the pier, said:

"His adoption of the pier as built was, therefore, directly within the sphere of his agency. The alleged defect in the pier, if any existed, consisted in its variation from a level as it was originally laid, and of course, as justly observed by counsel, was patent to the builders at the inception and at every stage of the construction. Under such circumstances, the contractors can no more justify their proceeding with the work without satisfying themselves of the fitness of the pier for the superstructure intended than they could justify the erection of the bridge at some other point on the river. In the case of *Jones v. Dermott*, 2 Wall. 7, 17 L. Ed. 762, it was held that the performance of a contract to build a house for another on his soil, and that the work should be executed, finished, and ready for occupation and be delivered over on a specified day, was not excused by the fact that there was a latent defect in the soil in consequence of which the walls sank and cracked, and the house became uninhabitable and dangerous, and had to be partially taken down and rebuilt on artificial foundations. The present is a much stronger case for the application of the same principle. Here there was no latent defect discovered after the work was commenced. Whatever defect there was, was necessarily known to the agent of the contractors under whose supervision both the pier and the bridge were constructed. His knowledge in this particular was their knowledge. The contract called for the construction of a bridge upon which the cars of the company could cross, and implied that the bridge should be serviceable for that purpose and capable of being used with the like facility and ease as similar bridges properly constructed are used. If the condition of the pier, by its variation from a level or any other cause, prevented this result from being attained, it was the duty of the contractors to insist upon its alteration, or to make the necessary alteration themselves."

We have seen that the paving company had knowledge of the existence of the tracks when the contract was executed, and of the construction of the track foundations when the pavement was made. The paving company, as it seems to us, is in no better position than the bridge contractors were in *Railroad Co. v. Smith*. If, as there pointed out by Mr. Justice Field, performance is not excusable by reason of a latent defect discovered after the contract is made, it is plainly not so where the difficulty was known, or by the exercise of ordinary precautions could have been discovered, before the execution of the contract. It was the duty of the paving company, then, either to insist upon having the contract provide against performance of the covenant of guaranty in any case of imperfect tracks or track foundations, or to make good its covenant in the form adopted.

It was long ago settled that, if performance of a contract by one of the parties to it is rendered impossible by the act of the other

party, such act will excuse performance. *Dermott v. Jones*, 2 Wall. 1, 7, 17 L. Ed. 762; *United States v. Gleason*, 175 U. S. 588, 602, 20 Sup. Ct. 228, 44 L. Ed. 284. According to the evidence, however, it was not impossible for the paving company to make its guaranty good. It may be true that performance was rendered more expensive on account of the condition of the track foundations, but that is not enough. *Jacksonville, etc., Ry. v. Hooper*, 160 U. S. 515, 527, 16 Sup. Ct. 379, 40 L. Ed. 515; *Choteau v. United States*, 95 U. S. 61, 68, 24 L. Ed. 371. It would require a new provision to be introduced into the contract to escape these rules of law. While it is not meant to sanction municipal neglect, if neglect there was, yet, as said by Mr. Justice Swayne in *The Harriman*, 9 Wall. 173, 19 L. Ed. 629:

"It is the province of the courts to enforce contracts, not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function."

The contention that the statutory duty of the city to keep its streets in repair was, under a familiar general rule, imported into the paving contract, and that the city's failure to require the track foundations to be kept in repair excused performance of the contract for that reason, does not advance the argument. Regarding matters like track foundations, whose presence and condition were known to the parties originally, as before pointed out, and whose disrepair was occasioned by use, we think the paving company's undertaking operated practically, as between the company and the city, to relieve the city for a period of 10 years from the active discharge of its statutory duty to repair this portion of Howard street. To hold that the company, in respect of a matter of this character, could set up a general statutory duty of the city against the company's express obligation to furnish a pavement which should be in good and substantial condition for 10 years, would, we think, be to violate settled principles of contract.

In regard to the city's renewal of the street car grant, as well as of the introduction of heavier cars upon the tracks, they must, we think, as matter of law, be treated as having been within the contemplation of the paving company when signing the contract. The tracks were in the street and cars were being operated over them, and no provision was made respecting either dimensions or weight. Nothing violative of any statute is claimed in regard either to the renewal of grant or the size and weight of the cars. Those matters were plainly sanctioned by the law, and they involved only such street uses as every one dealing with streets must anticipate. *Rev. St. Ohio* 1897, §§ 3438, 3443-11.

Since the judgment will have to be reversed and a new trial awarded, we do not think it proper to express anything in regard to the city's assignments of error concerning the measure of damages, further than to say that recovery cannot involve any cost or expense incurred for a better or more enduring pavement than the one the company agreed to furnish during the time covered by its failure in that respect.

The assignments of error of the paving company will be overruled, and the judgment in favor of the city will be reversed and a new trial awarded; the paving company to pay the costs in each proceeding in error.

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STATE OF KANSAS v. MERIWETHER et al.

(Circuit Court of Appeals, Eighth Circuit. June 2, 1909.)

No. 2,980.

APPEAL AND ERROR (§§ 634, 654\*)—UNITED STATES CIRCUIT COURT OF APPEALS—PROCEDURE—SUPPLYING OMISSIONS IN RECORD.

Under Rev. St. § 698 (U. S. Comp. St. 1901, p. 568), and rule 14 of the Circuit Court of Appeals (150 Fed. xxviii; 79 C. C. A. xxviii), it devolves on an appellant to see to it that a record is brought up to such court showing such of the proceedings of the trial court as are necessary for the proper presentation of the errors assigned, and for want of such a record the court has power to dismiss the appeal. This power, however, ought not generally to be exercised unless the omission arose from negligence or indifference, and instead, where good faith is shown, the appellee will be directed to designate such additional papers, documents, and proof used on the hearing below as he deems necessary for a proper presentation of the case, and the appellant will be ordered to file the same as a part of the record under penalty of a dismissal of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2775, 2819-2822; Dec. Dig. §§ 634, 654.\*]

Appeal from the Circuit Court of the United States for the District of Kansas.

F. S. Jackson and L. W. Keplinger (A. L. Berger, on the brief), for appellant.

R. E. Ball, for appellees.

Before ADAMS, Circuit Judge, and CARLAND, District Judge.

ADAMS, Circuit Judge. This cause presents the question whether Hunter M. Meriwether or the state of Kansas is entitled to certain money resulting from the condemnation for public use of a certain tract of land in Wyandotte county, Kan., by a railroad company. Whether the one or the other is entitled to it depends upon which of them was the owner of the land at the time of the condemnation. This land is situated near the fork of the Missouri and Kansas rivers, and is conceded to have been a part of a tract originally in 1857 patented to one Armstrong, from whom by mesne conveyances Meriwether de-rains title.

After issue was joined, this cause, which was in the nature of a bill of interpleader, was referred to a special master to take the evidence and report the facts and conclusions of law for the consideration of the court. In due time the master made his report, disclosing that many witnesses had testified in the case and that records of weather bureau, reports of river commissions, plats, patents, maps, deeds, and other documentary evidence had been given in evidence and considered by

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

him, all of which he stated he returned to the court as a part of his report. He then made certain findings of fact, and stated as a conclusion of law that the defendant Meriwether was entitled to receive the money resulting from the condemnation and appropriation of the land by the railway company. His report, with exceptions thereto, which were filed before the master and overruled by him in due time, came before the court for hearing, when the report was approved and confirmed, and the fund in question ordered paid to Meriwether. From this decree the state of Kansas alone appeals. In its præcipe for a transcript it directed the clerk of the trial court to send up the pleadings, certain orders of the court, report of the special master, exceptions of the state of Kansas, and the decree. Obeying that direction, the clerk sent nothing more than what was called for; nor even that, for we fail to find the exceptions. Neither the testimony of the witnesses nor the numerous plats, reports, maps, or other documents introduced in evidence were certified here. Practically all we have is the pleadings, findings, and conclusions of the special master and the decree of the court below confirming the same.

The master's findings of fact show that in 1857, when the land was patented to Armstrong, the southern bank of the Missouri river formed the northern boundary of the patented tract, and that the land now in controversy came to within a distance of from 300 to 600 feet from the river bank as it then was; that afterwards the Missouri river encroached upon the southern bank, overran and carried away the surface of the patented land so far southwardly as to involve the land in dispute; that steps were taken to avert its progress by riprapping the bank, which proved fairly efficacious, but that the channel of the river had before then been so diverted southwardly that it came close up to the riprap bank; that the channel continued to flow there, covering the lower strata of the land in controversy from about 1869 to 1887, when it began to recede and a sand-bar accretion began to appear; that the channel, which for years had been navigable along and close to the riprap bank, ceased to be there navigable, and soon thereafter the commercial and navigable channel had receded towards its original location northwardly several hundred feet away from the land in controversy; that as this channel receded the sand bar increased, and firm land again appeared where before there had been water covering the channel and bed of the river.

It is claimed that the special master found that the land in controversy was formed by accretion in the full legal significance of that word, and that therefore the findings support the decree, but a careful scrutiny of the findings fails to convince us that any such distinct finding was made. It is true the master says:

"The defendant and cross-petitioner Hunter M. Meriwether is the fee owner by a direct line of conveyances from Silas Armstrong, patentee from the United States, for the land bordering on the south bank of the Missouri river between the land of Jane W. Stark mentioned in the preceding finding and the state line, *with all accretions thereto.*"

The italicized words do not in our opinion amount to a finding that the lands in controversy were formed by accretion. The finding at best states a conclusion resulting from prior findings, and fails to show that

the word "accretions" there employed is referable to the land in dispute.

There is also a finding that an island had formed in the river on the Missouri side of the state line which became submerged at high water, and that the land in controversy now lies on the southern and descending slope of the sand formation on the west and southern side of that island. It appears to us that all the questions which are thus only vaguely referred to in the findings relating to title by accretion, whether on the island or mainland, are inextricably interwoven with the greater question whether the land was originally carried away by avulsion or by erosion; and as to this there is no finding whatsoever.

The land, as already said, originally belonged to Meriwether's grantor, and if the state ever acquired title it was because the land had for 20 years or more constituted the bed of the river, which, being navigable, under well-recognized law belonged to the state. If the river by reason of a flood or other sudden inundation violently cut a new channel through and thereby submerged the land so as to make it for a time only the bed of the river, that fact did not operate to divest Meriwether's title and invest the same in the state. If, on the other hand, the river encroached upon the land by the gradual and imperceptible process of erosion only, the title of the state followed wherever the bed of the river went. For a statement of this doctrine and a résumé of cases concerning it, reference may be made to the kindred case of *Fowler v. Wood*, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534. Whether, therefore, the occupation of the land by the river was brought about one way or the other became a vital, if not decisive, issue of fact in this case. The findings of fact are silent on this important issue, and on other questions they are not specific enough to enable us to properly hear and dispose of the case.

A motion by the appellee Meriwether to dismiss the appeal because the transcript of the record is defective in these particulars first requires consideration.

The statute (section 698, Rev. St. [U. S. Comp. St. 1901, p. 568]), provides that:

"Upon the appeal of any cause in equity, \* \* \* a transcript of the record, as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on hearing of the appeal, shall be transferred to the Supreme Court."

This statute by provisions of the act establishing Circuit Courts of Appeal (Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 488]), is made applicable to appeals taken to this court.

Rule 14 of this court (150 Fed. xxviii; 79 C. C. A. xxviii), in recognition of the statutory obligation just referred to, provides:

"No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court, shall be filed."

This statute and rule afford ample latitude for the parties to eliminate such part of the proceedings as may not be necessary for the proper presentation of the cause in the appellate court; but as the filing of a transcript of such parts of the record "as may be necessary on hearing of the appeal" is a jurisdictional necessity (*Hill v. Railroad*

Company, 129 U. S. 170, 9 Sup. Ct. 269, 32 L. Ed. 651; *Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp.*, 61 Fed. 237, 9 C. C. A. 468), it devolves upon the party taking the appeal to see to it that a record is brought here showing such of the proceedings in the trial court as is necessary for a proper presentation of the errors assigned (*Railway Company v. Stewart*, 95 U. S. 279, 284, 24 L. Ed. 431; *Teller v. United States*, 49 C. C. A. 263, 111 Fed. 119). For want of such a record the appellate court has the power to dismiss the appeal for want of prosecution. *Keene v. Whittaker*, 13 Pet. 459, 10 L. Ed. 246; *Redfield v. Parks*, 130 U. S. 623, 9 Sup. Ct. 642, 32 L. Ed. 1053; *Meyer v. Implement Co.*, 29 C. C. A. 465, 85 Fed. 874. This power, however, ought not generally to be exercised unless the situation discloses that the interests of justice would thereby be promoted, or that the indifference or negligence of the appellant warrants it as a disciplinary measure. The common remedy to cure a defective transcript on a suggestion of a diminution of the record is a writ of certiorari addressed to the trial court commanding it to send up a full transcript of its proceedings, but as this might involve certifying of much evidence unnecessary for the hearing in the appellate court, and might also be attended with delay, a practice more simple and consonant with justice has been approved.

In *Railroad Company v. Schutte*, 100 U. S. 644, 25 L. Ed. 605, there was a motion to dismiss the appeal because of a defective record. The court there said:

"It is now alleged that many important papers and documents used on the hearing below, and necessary for the proper determination of the cause here, have been omitted from the transcript as filed. While we desire to encourage in every proper way all attempts made in good faith to exclude immaterial matter from the transcripts brought here on appeals or writs of error, it will not do to permit the appellant or the plaintiff in error to make up a record to suit himself, without any regard to the wishes of his opponents or the rules and practice of the court. We therefore order that the appellees file with the clerk of this court and with the counsel for the appellant, on or before the 1st day of February next, a statement of the papers, documents, and proofs used on the hearing below, and omitted in the transcript now on file, which they deem necessary for the proper presentation of the cause; and that unless the appellant shall, on or before the 15th day of March, file in this court as part of the record copies of such papers, duly certified by the clerk of the Circuit Court or his deputy, under the seal of the court, this appeal be dismissed. If in this way unnecessary papers are brought up, we will, on application, make such order in respect to costs as may under the circumstances be proper."

The same practice, denominated by Judge Lurton as a less rigorous rule, is followed by the Circuit Court of Appeals for the Sixth Circuit in *Cunningham v. German Ins. Bank*, 43 C. C. A. 377, 103 Fed. 932.

We find in the appellees' brief the following:

"Meriwether not only claimed by the most specific assertions that the property in question was an accretion to the land which he owned on the shore, but that it was a part of the same land. He was entitled to, and did show, by the most indisputable evidence that he owned the land by a record title; that it was washed away by a rapid process of avulsion, and that it was reformed by natural accretions to the original shore. All of these propositions were not only set forth in most indisputable claims, but were established beyond all question by the evidence introduced."

If this assertion is correct, the production of the evidence will fully supply the defects in the findings to which we have called attention. If it is not correct, it will doubtless be sufficient to enable us to proceed to a final hearing of the cause and to reach a conclusion one way or the other.

Rather than to sustain appellees' motion to dismiss this appeal, we have concluded to adopt the more conservative practice approved in *Railroad Company v. Schutte*. An order will accordingly be made that the appellees on or before the 1st day of July, 1909, file in this court a written specification of the papers, documents, and proof used on the hearing below and omitted from the transcript now on file which they deem necessary for the proper presentation of the cause to this court, and deliver a copy thereof to counsel for the appellant; and that unless the appellant shall on or before the 1st day of September, 1909, file in this court as part of the record, copies of such papers, documents or proof duly certified by the clerk of that court or his deputy under the seal of that court, this appeal will be dismissed.

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GUARDIAN TRUST CO. v. KANSAS CITY SOUTHERN RY. CO. et al.†

(Circuit Court of Appeals, Eighth Circuit. April 2, 1909.)

No. 2,827.

1. COURTS (§ 508\*)—CONFLICT OF JURISDICTION—SUBSEQUENT ACTIONS FOR SAME CAUSE IN ANOTHER JURISDICTION NOT STATED—FACTS—CONCLUSION.

In a suit in the United States Circuit Court founded on a creditors' bill against the Belt Company, a debtor, the Trust Company, a secured creditor, and others, the Southern Company, a purchaser at foreclosure sales, intervened. The purpose of the suit was to apply the property which the Trust Company had received from the Belt Company and from others to the payment of the claims of the creditors of the latter company. The issue of the state of the accounts between the Trust Company and the Belt Company had arisen, and they had stipulated that there should be an accounting between them in the creditors' suit, and that judgment for the amount due should be rendered against the party found to be the debtor. The Belt Company had alleged that certain of its promissory notes held by the Trust Company were void, and prayed that they be canceled. The Southern Company had intervened and claimed the property which the Trust Company had received from the Belt Company and from the other corporations. Thereupon the Trust Company brought three actions at law in a state court against the Southern Company, on the grounds that the Belt Company was indebted to it upon the promissory notes and upon an open account, and that the Gulf Company was also indebted to it, and that the Southern Company had assumed and agreed to pay to it all these debts. Upon these facts the Southern Company, upon a dependent bill in the equity suit, secured an injunction against the prosecution of the actions at law in the state court. *Held*:

(1) The prosecutions of the actions at law would not prevent the effectual decision of the issues and the administration of the rights and remedies involved in the equity suit.

(2) It would not withdraw or interfere with the legal custody of any specific property which the national court had acquired, or prevent in any degree its subsequent disposition of that property.

(3) The Trust Company had the legal right to prosecute its actions at law in the state court, and the issue of the injunction was an error.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1430; Dec. Dig. § 508.\*]

\*For other cases, see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

†Rehearing denied June 5, 1909.

**2. COURTS (§ 508\*)—INJUNCTION—PERSONAL ACTIONS FOR SAME CAUSE IN ANOTHER JURISDICTION NO GROUND FOR.**

The pendency in another jurisdiction of an action in personam for the same cause which involves no claim to or lien upon any specific property in the possession or under the dominion of a national court of equity, and no issue of which it has acquired exclusive jurisdiction, presents no ground for a dependent bill or an injunction to stay the action at law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1430; Dec. Dig. § 508.\*]

**3. COURTS (§ 475\*)—INJUNCTION—WHEN ISSUED TO PROTECT JURISDICTION AGAINST PROCEEDINGS IN OTHER COURTS.**

A court may, by means of a dependent bill and by the use of injunctions and writs of assistance, prevent the prosecution in other courts by the parties to a suit before it of all subsequent actions at law or suits in equity, (1) which will prevent its effectual determination of the issues and its administration of the rights and remedies of which it has acquired exclusive jurisdiction in the litigation before it, or (2) which will withdraw or interfere with the dominion it has acquired over specific property to such an extent that its determination of the controversy about it and the enforcement of its ultimate decree concerning it may be in any degree prevented.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 475.\*]

**4. ACTION (§ 53\*)—SPLITTING CAUSE OF ACTION—INJUNCTION.**

Where a complainant presents a part of the existing and known facts which it claims entitles it to an injunction, and fails to secure it, and subsequently presents by another bill the other part of those facts, thereby splitting its cause of action, it exhibits a lack of diligence which is fatal to its second application.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. § 53.\*]

**5. APPEAL AND ERROR (§ 1175\*)—DETERMINATION AND DISPOSITION OF CAUSE—BILL WITHOUT EQUITY MAY BE DISMISSED ON APPEAL FROM INJUNCTION.**

Where, on appeal from an order granting a temporary injunction, or appointing a receiver, it clearly appears that there is no equity in the bill, the appellate court may consider and determine that question and direct its dismissal in order to save the parties to the suit further expense resulting from the endeavor to secure impossible relief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4581; Dec. Dig. § 1175.\*]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Western District of Missouri.

This is an appeal from an order which enjoined the Guardian Trust Company, a corporation, from prosecuting three actions at law against the Kansas City Southern Railway Company, another corporation, which the Trust Company had commenced on March 15, 1905, March 28, 1905, and July 2, 1906, in the circuit court of the county of Jackson, in the state of Missouri, to recover personal judgments against the Southern Company for about \$545,000. The first and second actions were founded upon the claim of the Trust Company that the Kansas City Suburban Belt Railroad Company originally owed it about \$500,000, and that the Southern Company had assumed and agreed to pay that debt. The third action was based upon the claim of the Trust Company that the Kansas City, Pittsburg & Gulf Railroad Company originally owed it several thousand dollars, and that the Southern Company had assumed and agreed to pay that debt.

The Southern Company had succeeded to the rights and had assumed the liabilities of a committee of reorganization which had purchased at foreclo-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



sure sales in March, 1900, and in December, 1901, the property of the Gulf Company and the property of the Belt Company, respectively, and it was in those years that the Trust Company alleged that its causes of action against the Southern Company accrued. The injunction in this case was issued upon a dependent bill filed on November 16, 1907, by the Southern Company, the Belt Company, and its receiver, in a creditors' suit instituted by the Cambria Steel Company, a judgment creditor of the Belt Company, on September 6, 1900, for the purpose of subjecting the property of the Belt Company to the payment of the judgment of the Cambria Company and to the payment of claims of other creditors of the Belt Company similarly situated. In that suit the Cambria Company made the Belt Company and the Trust Company, but neither the Gulf Company nor the Southern Company, parties defendant, alleged that the Trust Company held the promissory notes of the Belt Company, and that by the account books of the companies the Belt Company appeared to be heavily indebted to the former upon the notes and upon open accounts, and that the Trust Company held a large amount of property which had been delivered to it by the Belt Company to secure this indebtedness, but that in fact the Belt Company was not indebted to the Trust Company, but the latter owed the former, and the Cambria Company prayed for an accounting between the Trust Company and the Belt Company, for the payment of any balance owing by the Trust Company to the Belt Company, for the application of the property which the Trust Company had received from the Belt Company to the payment of the creditors of the latter, for an injunction, and for other relief. Thereupon the court issued a restraining order which forbade the Trust Company to assign, pledge, or dispose of any of the property mentioned in the bill. The Trust Company denied by its answer the equities of the bill, and prayed that it be dismissed. On November 20, 1901, the Belt Company, the Trust Company, and their receivers, stipulated in the Cambria Company's suit that the accounting between the Trust Company and the Belt Company should be expedited, and that a judgment for the amount found due should be rendered against the debtor in that suit. The receivers of the Belt Company then filed a cross-bill in which they alleged that the promissory notes, which evidence a part of the indebtedness of the Belt Company to the Trust Company which the latter company avers in its actions at law was assumed by the Southern Company, were without consideration, and they prayed for an accounting, that these notes be delivered up and canceled, and that they recover of the Trust Company the amount that it should be found indebted to the Belt Company. The Trust Company answered this cross-bill that the notes were made for a valuable and full consideration, that the Belt Company was indebted to it upon the notes and upon other accounts, that the Trust Company was entitled to all the property it had ever received from the Belt Company; and it prayed that its title to that property might be protected, and that it might have judgment against the Belt Company and its receivers for the amount due it.

On February 27, 1905, under a stipulation with the Trust Company and others, the Southern Company filed its intervening petition in the Cambria Company's case, and on May 1st its amended intervening petition, wherein it set forth certain property that had been received by the Trust Company at various times, alleged that by virtue of the foreclosures of the mortgages of the Belt Company, of the Gulf Company, and of other corporations, under which it had become the purchaser, it was entitled to some of this property, to the proceeds of another part of it, and to the value of still another part of it; and it prayed for a recovery thereof from the Trust Company. The Trust Company by an answer denied all the equities of this intervening petition, alleged that the Belt Company was indebted to it, that the Southern Company had assumed and agreed to pay that indebtedness, and prayed that the intervening petition of the Southern Company be dismissed. Meanwhile the three actions at law had been brought in the state court, and in August, 1905, the Southern Company filed a bill in equity and obtained a temporary injunction from the court below against the prosecution of the first two actions at law, and in May, 1906, the order granting that injunction was reversed by this court. *Guardian Trust Company v. Kansas City Southern Ry. Co.*, 76 C. C. A. 615, 146 Fed. 337.

The Southern Company answered in the actions at law, and in May, 1907, it made a motion to stay the proceedings therein upon the same grounds upon which the bill for this injunction rests. The state court denied the motion in June, 1907, and against the protest of the Southern Company upon a second motion of the Trust Company, and after a hearing on September 14, 1907, it set the actions at law for trial on December 2, 1907. On November 16, 1907, the bill for this injunction was filed by the Southern Company and its assistants, the Belt Company and its receiver.

The transcript of the record in this case is voluminous—it comprises 742 printed pages—but no other facts are disclosed therein which can in any way modify the decision which those that have been recited compel.

George H. English, Jr., and Edward P. Gates (John A. Sea, on the brief), for appellant.

Samuel W. Moore and F. H. Wood, for appellees.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). The cause of action in the suit brought by the Cambria Company, so far as the Trust Company, the Belt Company, and the Southern Company and their receivers are concerned, is the misappropriation by the Trust Company of property which it received from the Belt Company and other corporations, and the relief sought is the recovery from the Trust Company of that property, or of its proceeds, or of its value. The causes of action in the three cases in the state court are the debts of the Southern Company to the Trust Company, and the only relief sought in those actions consists of personal judgments against the Southern Company. The suit in equity is not upon the same cause of action as any of the actions at law. The Trust Company has not in the equity suit prayed or in any way sought to obtain a judgment against the Southern Company on account of any of the causes of action pleaded in the actions at law in the state court.

Counsel for the Southern Company say that the indebtedness of the Belt Company to the Trust Company, and the cancellation of the notes which evidence a part of that alleged debt which the Trust Company claims was assumed by the Southern Company, are at issue and will be ultimately determined upon the accounting in the equity suit, and they argue that if those issues should be determined against the Trust Company in that suit there would be no basis for the alleged assumption of a debt of the Belt Company by the Southern Company, or for any judgments against them. Be it so, but the suit in equity was brought and is pending in the United States Circuit Court for the Western District of Missouri. The actions at law were subsequently commenced and are pending in another jurisdiction, in the circuit court of the county of Jackson of the state of Missouri. Even if the subsequent actions at law were between the same parties and involved the same cause of action, as they do not, these facts would furnish no ground for an injunction against their prosecution. The existence of an earlier suit in equity between the same parties for the same cause in one jurisdiction will not sustain a plea in abatement or an injunction to stay the prosecution of a later action at law in another jurisdiction, where the prosecution of the later action does not

prevent the determination of the issues and the administration of the rights and remedies involved in the former suit. *Insurance Company v. Brune's Assignee*, 96 U. S. 588, 593, 24 L. Ed. 737; *Franklin v. Conrad-Stanford Co.*, 70 C. C. A. 171, 175, 178, 137 Fed. 737, 741, 744; *Ogden City v. Weaver*, 47 C. C. A. 485, 489, 108 Fed. 564, 568.

In the first case there were two claimants of the moneys owing by the Insurance Company upon two policies of insurance issued to Brune. One of these claimants, Mrs. Barry, brought a suit in equity in the Supreme Court for the city and county of New York against the Insurance Company, Brune, and his assignee, Whitridge, in which she pleaded her claim to the money, and prayed that the company might be enjoined from paying the amount due upon the policies to Brune or to Whitridge, and that it might be compelled to pay it to her. The Insurance Company, Brune, and Whitridge answered the bill, and the parties made an agreement in the suit that the Insurance Company should pay the money into court, where the ownership of it should be adjudicated. Thereafter, and before the adjudication, Whitridge sued the Insurance Company at law upon the policies for the amount due in the United States Circuit Court for the District of Maryland. Thereupon the Insurance Company exhibited its bill in equity in that court, wherein it set forth the prior suit in New York and prayed for an injunction against the prosecution of the subsequent action at law, but the court refused to issue the injunction and dismissed the bill, and the Supreme Court sustained its action. That court said:

"Certain it is that the plea of a suit pending in equity in a foreign jurisdiction will not abate a suit at law in a domestic tribunal. This was shown in a very able decision made by the Supreme Court of Connecticut, in *Hatch v. Spofford*, 22 Conn. 485, 58 Am. Dec. 433, where the authorities are learnedly and logically reviewed. See, also, *Colt v. Partridge*, 7 Metc. (Mass.) 570, and *Blanchard v. Stone*, 16 Vt. 234."

"If, then, a bill in equity pending in a foreign jurisdiction has no effect upon an action at law for the same cause in a domestic forum, even when pleaded in abatement; if, still more, it has no effect when pleaded to another bill in equity, as the authorities show—it is impossible to see how it can be a basis for an injunction against prosecuting a suit at law. It follows that the refusal of an injunction by the Circuit Court was not erroneous."

In the second case a suit in equity had been brought in a state court of Montana to foreclose a mortgage and to procure a judgment against the maker of the mortgage note for the deficiency after the sale. The sale had been made and reported, and there was a docket entry that \$8,805.60 remained unpaid upon the mortgage note, but no decree or judgment had been entered for this amount against the maker of the note, who was a party defendant in the foreclosure suit. The successor in interest of the complainant in that suit then brought an action at law upon the note against its maker in the United States Circuit Court for the District of Utah for the \$8,805.60, and recovered. Judge Marshall said:

"Lastly, it is contended that the foreclosure suit is still pending in the state court of Montana for the purpose of obtaining a deficiency judgment, and that such pending suit is ground for abating this action. This is an action at law in personam. It in no way involves any interference with the conduct of the suit in the state court of Montana, nor does it affect any property within the

jurisdiction of that court. Under these circumstances it is settled by the highest authority that the pendency of an action in a state court is no ground for abating an action subsequently brought in a federal court upon the same cause of action. *Insurance Co. v. Brune's Assignee*, 96 U. S. 588, 24 L. Ed. 737; *Stanton v. Embrey*, 93 U. S. 548, 23 L. Ed. 983; *Ogden City v. Weaver*, 108 Fed. 564, 567, 47 C. C. A. 485."

His decision applies to the case at bar, and it was affirmed by this court.

In *Ogden City v. Weaver*, 47 C. C. A. 485, 489, 108 Fed. 564, 568, the city had brought a suit in equity in the district court for the Third judicial district of the state of Utah against the Bear River Irrigation & Ogden Waterworks Company, called the Irrigation Company, and against the Bear Lake & River Waterworks & Irrigation Company, called the Waterworks Company, and it had obtained an interlocutory decree that a certain contract between the city and Bothwell, under which the companies had been furnishing water to the city, was invalid, and that an accounting should be had between the companies and the city regarding their prior business transactions. In that condition of the equity suit the receivers of the Irrigation Company, who had succeeded to the interests of that company and were bound by all that had been done in the suit in the state court, commenced an action at law against the city upon the Bothwell contract for water furnished to the city thereunder by the Irrigation Company. Counsel for the city contended that the action at law must be stayed on account of the pendency of the suit in equity, but Judge Thayer, delivering the opinion of this court said:

"This contention, however, is based upon a misconception of the character of the present proceeding, which is an action at law, in personam, to recover a sum of money due under a contract. It is not a case which affects the custody of any property over which the state court has first acquired jurisdiction. Neither is it a case which involves any interference with the orderly conduct of the litigation in the state court. It is simply one of those cases, such as frequently occur, where a state court and a federal court, in the exercise of a jurisdiction which rightfully belongs to each, are called upon to determine the same question, and the fact that they may disagree and decide the question differently in no wise interferes with the right of either to proceed. It is well settled that the fact that a suit upon a cause of action is pending in a state court will not sustain a plea of *lis pendens* to a suit upon the same cause of action subsequently filed in a federal court."

It is equally true that the fact that a suit upon a cause of action is pending in a federal court will not sustain a plea of *lis pendens* to a suit upon the same cause of action subsequently filed in a state court.

These decisions of the Supreme Court and of this court answer many arguments of counsel in support of this injunction. They establish the propositions that the averments in the equity suit of no indebtedness of the Belt Company and of the invalidity of the notes, together with the prayers for the accounting and for the cancellation of these notes, did not withdraw from the jurisdiction of the state court or prevent the trial in that court of the issue of debt or no debt in the subsequent actions at law therein, for that question was adjudged in the Cases of *Brune's Assignee* and of *Ogden City*; that the fact that the remedy at law is not as complete, prompt, and adequate as the remedy in equity, by an accounting or otherwise, is no ground for an

injunction against the prosecution of the actions at law in another jurisdiction, for that question was adjudged in the Ogden City Case, and if that fact would sustain such an action, then no action at law for the same cause as a prior suit in equity could be maintained, for the remedy by the latter is always more complete, adequate, and effective than the remedy at law; that the stipulation between the Belt Company and the Trust Company that an accounting between them should be had and a judgment against the debtor should be rendered in the suit in equity furnish no reason for enjoining the prosecution of the subsequent actions at law, for that question was adjudicated in the Case of Brune's Assignee, where there was a similar agreement between the parties to the action at law. By so much the more is the stipulation in this case ineffectual because the Southern Company was not a party to it, nor to the Cambria Company's Case at the time the stipulation was made.

Counsel contend that the restraining order of September 6, 1900, forbade the actions at law. But the limit of the restraint upon the Trust Company by that order was "from in any manner, directly or indirectly, selling, transferring, assigning, pledging, or otherwise disposing, or parting with the possession, or control of, any of the property, assets, notes, stocks, bonds, claims and demands mentioned and referred to in the bill of complaint," and it in no manner prohibited the Trust Company from collecting by suit or otherwise any of the notes, accounts, or claims there mentioned. It did not require the Trust Company to permit the statute of limitations to run upon its causes of action against the Southern Company or others.

Counsel invoke the conceded rules that a court may, by means of a dependent bill and by the use of injunctions, or writs of assistance, prevent the prosecution by the parties to a suit before it of subsequent actions at law or suits in equity, (1) which will prevent its effectual determination of the issues and its administration of the rights and remedies of which it has acquired exclusive jurisdiction in the litigation before it (*Sharon v. Terry* [C. C.] 36 Fed. 337; *Starr v. Chicago, Rock Island & Pacific Railway Company* [C. C.] 110 Fed. 3; *French v. Hay*, 22 Wall. 250, 22 L. Ed. 857; *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497), or (2) which will withdraw or interfere with the legal custody of specific property which it has acquired, so that its determination of the controversy about it and the enforcement of its decree concerning that property may be in any degree prevented (*Farmers' Loan & Trust Company v. Lake Street Elevated R. R. Co.*, 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667; *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; *Central Bank v. Stevens*, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807; *Williams v. Neely*, 67 C. C. A. 171, 185, 134 Fed. 1, 15, 69 L. R. A. 232; *Barber Asphalt Co. v. Morris*, 66 C. C. A. 55, 58, 132 Fed. 945, 948, 67 L. R. A. 761; *Lang v. Choctaw, Oklahoma & Gulf Ry. Co.*, 160 Fed. 355, 360, 87 C. C. A. 307; *Sullivan v. Algrem*, 160 Fed. 366, 370, 87 C. C. A. 318; *Gates v. Bucki*, 4 C. C. A. 116, 124,

53 Fed. 961, 969). But the prosecutions of the actions at law in question in this case cannot in any way prevent the effective determination of the issues or the administration of the rights and remedies involved in the suit in equity in the national court, nor can it interfere with the legal custody of the specific property of which that court has jurisdiction. The liability of the Southern Company to pay the debts, which the Trust Company alleges in the actions at law it has promised to pay, is not in issue and cannot be determined in the suit in equity, and the state court has no jurisdiction over and cannot interfere in those actions in personam with the specific property which is the subject of the litigation in the federal court. This case falls far within the unquestioned rule that the pendency in a state or other court of an action in personam which involves no claim to or lien upon specific property in the possession or under the dominion of a national court of equity, and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it. *Stanton v. Embry*, 93 U. S. 548, 554, 23 L. Ed. 983; *Standley v. Roberts*, 59 Fed. 836, 844, 8 C. C. A. 305, 314; *Barber Asphalt Paving Co. v. Morris*, 66 C. C. A. 55, 58, 132 Fed. 945, 948, 67 L. R. A. 761; *Merritt v. Barge Co.*, 79 Fed. 228, 233, 24 C. C. A. 530, 535; *Green v. Underwood*, 86 Fed. 427, 429, 30 C. C. A. 162, 164; *Hughes v. Green*, 28 C. C. A. 537, 539, 84 Fed. 833, 835; *Hubinger v. Central Trust Co.*, 36 C. C. A. 494, 496, 94 Fed. 788, 790; *City of Ogden v. Weaver*, 108 Fed. 564, 568, 47 C. C. A. 485, 492; *B. & O. Ry. Co. v. Wabash R. Co.*, 57 C. C. A. 322, 324, 119 Fed. 678, 680; *Ball v. Tompkins (C. C.)* 41 Fed. 486, 490; *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 76 C. C. A. 615, 618, 146 Fed. 337, 340.

There is another objection to this injunction. The issue of it was not a matter of right. It rested in the discretion of the court, not in its arbitrary whimsical will, but in its sound judicial discretion, informed and directed by the principles, rules, and practice of equity jurisprudence. The good faith and the reasonable diligence of the moving party and his probable irreparable injury if the injunction was not issued were indispensable conditions to the decision that it should issue. The actions at law which were enjoined were commenced in the state court in March, 1905, and in July, 1906. In the month of July, 1905, the Southern Company filed its first bill to enjoin the prosecution of the first two actions, and obtained an order for a temporary injunction, which was reversed by this court in May, 1906. At the time it filed this first bill all the facts which it now claims entitle it to this second injunction existed and must have been known to it, but it failed to plead them. In May, 1907, the Southern Company made a motion in the state court to stay the progress of the actions at law upon the same grounds which it presented to the court below in the present bill, and the state court denied its motion. In September, 1907, that court set the actions at law pending in it for trial upon the motion of the Trust Company on December 2, 1907. On November 16, 1907, the present bill was filed, and for the first time the Southern Company prayed the court below to stay these actions for the reasons now urged, which had existed during all the time after March, 1905. The failure of that company to present these reasons in its former bill,

the splitting of its cause of action for this injunction which that failure wrought, the unnecessary delay and expense thereby imposed upon the litigants in this suit, establish such a deleterious lack of diligence as appeals with compelling force to the discretion of a court of equity to deny such an injunction. And, when to this inexcusable and expensive delay is added the fact that the Trust Company had the undoubted legal right to prosecute these actions at law so that no legal injury could result to the Southern Company therefrom, the conclusion is irresistible, not only that the injunction was erroneously issued, but that there was no equity in the supplemental bill upon which it is founded.

Where, on an appeal from an order granting or continuing a temporary injunction, or from an order appointing a receiver, the equity of the bill is challenged and the attack upon it appears to be well founded, the power is conferred, and the duty is imposed, upon the appellate court to consider it, and, if it is of the opinion that the relief sought by the bill cannot be granted, to so decide, and thus to save the parties to the suit further expense resulting from the endeavor to secure impossible relief. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 524, 17 Sup. Ct. 407, 41 L. Ed. 810; *Highland Avenue & Belt R. R. Co. v. Columbian Equipment Co.*, 168 U. S. 627, 630, 18 Sup. Ct. 240, 42 L. Ed. 605; *Cabaniss v. Reco Mining Co.*, 116 Fed. 318, 320, 54 C. C. A. 190, 192; *Chicago Wooden Ware Co. v. Miller Ladder Co.*, 133 Fed. 541, 545, 66 C. C. A. 517, 521; *Arkansas Southeastern R. Co. v. Union Sawmill Co.*, 154 Fed. 304, 311, 83 C. C. A. 224, 231; *Mann v. Gaddie*, 158 Fed. 42, 48, 88 C. C. A. 1; *Shubert v. Woodward* (C. C. A.; filed February 4, 1909) 167 Fed. 47.

The order for the issue of the injunction must be reversed, and the case must be remanded to the court below with directions to dismiss the supplemental bill for want of equity; and it is so ordered.

And it is further ordered that the mandate in this case issue ten (10) days after the filing of this opinion.

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### WILFONG et al. v. ONTARIO LAND CO.†

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,630.

#### 1. TAXATION (§ 809\*)—ACTION TO RECOVER PROPERTY SOLD FOR TAXES—CONDITIONS PRECEDENT—PAYMENT OR TENDER OF TAXES—PLEADING.

The statute of Washington (Ballinger's Ann. Codes & St. Wash. §§ 5678-5680; Pierce's Code, §§ 8733-8735) makes it a condition precedent to the maintenance of an action for the recovery of land sold for taxes in the possession of the defendant that all taxes, penalties, interest, and costs paid by the purchaser shall have been fully paid or tendered, and under the decisions of the Supreme Court of the state, which are binding on the federal courts, a failure to allege such payment or tender in the complaint is a fatal defect when due objection is made.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1601; Dec. Dig. § 809.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied May 26, 1909.

2. APPEAL AND ERROR (§ 193\*)—COMPLAINT—FAILURE TO ALLEGE CONDITION PRECEDENT—WAIVER OF OBJECTION.

The objection that a complaint fails to allege a necessary condition precedent is waived if not made in the trial court, and cannot be made for the first time in an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1228; Dec. Dig. § 193.\*]

3. TAXATION (§ 648\*)—FORECLOSURE OF TAX LIEN—CONCLUSIVENESS OF JUDGMENT—WASHINGTON STATUTE.

Ballinger's Ann. Codes & St. Supp. Wash. § 1751b, provides that "after the expiration of five years from the date of delinquency when any property remains on the tax rolls for which no certificate of delinquency has been issued the county treasurer shall proceed to issue certificates of delinquency on said property to the county and shall file said certificates when completed with the clerk of the court, and the treasurer shall thereon \* \* \* proceed to foreclose in the name of the county the tax liens embraced in said certificate." It is further provided that summons may be served by publication, which shall give notice that on a day specified the county will apply for a judgment of foreclosure. The Supreme Court of the state has held that the provision requiring the treasurer to file the certificate of delinquency with the clerk is directory only, and that a failure to so file it before suit does not affect any substantial rights of a defendant nor the jurisdiction of the court to render judgment. Section 1767 of the statute provides that such a judgment shall estop all parties from raising any objections thereto which exist at or before the rendition thereof and could have been presented as a defense, and "shall be conclusive evidence of its regularity and validity in all collateral proceedings except in cases where the tax or assessments have been paid or the real estate was not liable to the tax or assessment." *Held*, that such a judgment was not invalid nor subject to collateral attack because the certificate of delinquency was not filed with the clerk, nor because application for judgment was not filed until the day fixed in the notice and on which the judgment was entered, there being no statutory provision requiring it to be so filed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 648.\*]

Appeal from Circuit Court of the United States for the Southern Division of the Eastern District of Washington.

For opinion below, see 162 Fed. 999.

Benjamin S. Grosscup and Ira P. Englehart, for appellants.

A. L. Agatin, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellee brought a suit to determine adverse claims to certain real property in Capitol addition to North Yakima, Wash., under provisions of the Code of that state. The adverse claims were asserted under tax titles acquired by the appellants by virtue of a decree of the superior court of the state of Washington for Yakima county, foreclosing liens for delinquent taxes in a suit brought by the county against numerous defendants and against many tracts and parcels of land. The decree was rendered by default on September 2, 1902. Service upon the defendants was had by publication only, and there was no personal notice to or appearance by the appellee. The court below held the tax titles void: First, for the defective description of the lands in the tax proceed-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



ings and in the tax deeds; and, second, independently of those defects, for want of jurisdiction in the superior court, in that (1) no certificate of delinquency was ever filed with the clerk of that court, and (2) no complaint, petition, or application on which such foreclosure proceeding was had was filed in that court until the day on which the decree was rendered. As to the defect in the descriptions of the property, the Supreme Court of the state of Washington, in *Ontario Land Co. v. Yordy*, 44 Wash. 239, 87 Pac. 257, in a suit which had been brought to determine the validity of tax titles acquired to certain other property sold under the same decree of foreclosure for delinquent taxes, in which there was the same defect in description, held the descriptions good and sustained the tax titles. On writ of error to the Supreme Court of the United States to review that decision, the judgment was affirmed, and it was held that the tax titles were not void for any defect in the descriptions. *Ontario Land Co. v. Yordy*, 212 U. S. 152, 29 Sup. Ct. 278, 53 L. Ed. —. That decision eliminates the question of defective descriptions from the case which is now before us, and it only remains to inquire whether the tax titles should be held void on account of defects and irregularities in the proceedings of foreclosure. The question of the effect of those irregularities in the proceedings was presented to the Supreme Court of Washington in the *Yordy* Case, but the court declined to pass upon them on the ground that the plaintiff in that suit had not tendered the delinquent taxes as required by Ballinger's Ann. Codes & St. Wash. § 5678 (Pierce's Code, § 8733), and the question is now presented in this case whether we are not precluded from any consideration of them for the reason that the appellee in its bill made no allegation that it had made the tender which is required by that section of the Code.

By section 5678, Ballinger's Ann. Codes & St. it is provided that no action shall be instituted for the recovery of property sold for taxes unless the person desiring to commence such action shall first pay or tender to the officer entitled to receive the same, all taxes, penalties, interests, and costs due and unpaid from such person on the property sought to be recovered. Section 5679 (section 8734) provides that in a suit such as this, for the recovery of land sold for taxes against a person in possession thereof, the plaintiff shall allege in his complaint that "all taxes, penalties, interest and costs paid by the purchaser at the tax sale, his assignees or grantees, have been fully paid or tendered, and the payment refused." Section 5680 (section 8735) provides that the two foregoing sections shall be construed as imposing additional conditions upon the complainant in actions for the recovery of property sold for taxes. The Supreme Court of Washington has held, in cases where objection to the complaint for want of allegation of such tender was raised in the court below, that the statute makes the allegation indispensable to the right of recovery. *Merritt v. Corey*, 22 Wash. 444, 61 Pac. 171; *Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751; *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599; *Ontario Land Co. v. Yordy*, 44 Wash. 239, 87 Pac. 257. That statute, so construed by the courts of the state, is, we think, controlling upon a federal court in that state in a similar proceeding. In *Rice v. Je-*

rome, 97 Fed. 719, 38 C. C. A. 388, the Circuit Court of Appeals for the Eighth Circuit held that the Circuit Court of the United States for the District of Colorado could not disregard the law of that state, which provided that, before lands sold at a tax sale for taxes legally assessed and due can be recovered from the holder of the tax title, the owner must pay the latter the amount for which the lands were sold at the tax sale, together with the interest and penalties provided by the law; that the decisions of the Supreme Court of a state construing and expounding its revenue laws are binding upon the federal courts in that state; and that in such courts such payment or tender is an indispensable condition to the right of the owner to maintain a bill in equity to cancel the tax sale certificates or remove the cloud cast by them upon his title. In *Mendenhall v. Hall*, 134 U. S. 559, 10 Sup. Ct. 616, 33 L. Ed. 1012, in view of the law of Louisiana, which provided that no sale of property for taxes shall be annulled for any informality in the proceedings until the price paid with 10 per cent. interest be tendered to the purchaser, the court said that, if the complainant "had attempted to have the tax sale set aside for mere informality, it would have been a good plea in bar to any suit by him against the purchaser that he had not tendered the amount paid by him with interest thereon." The appellee in its bill in the present case made no averment of actual tender, but it expressed an unconditional offer to abide by the decree of the court and to pay such sum as the court should adjudge due to the appellant as a condition to the relief sought. But the objection that the bill was defective in that respect comes too late. There was no demurrer to the bill and no plea by the defendants in the suit of want of tender, and no suggestion of such a defense appears in the pleadings or record in the case. It is a general rule that the failure to comply with a condition precedent to the right to sue must be raised in the trial court so that opportunity may be afforded to amend, and the objection cannot be raised for the first time on appeal. 2 Cyc. 667, and cases there cited; *Lombard v. McMillan*, 95 Wis. 627, 70 N. W. 673; *Adams v. Burdick et al.*, 68 Iowa, 668, 27 N. W. 911; *Smith v. Bush*, 58 Ga. 121; *Pennypacker v. Umberger*, 22 Pa. 492.

The revenue and taxation laws of Washington (Ballinger's Ann. Codes & St. Supp. § 1749 et seq.), as amended by the Laws of 1901, p. 383, c. 178, provide that, after taxes on real property are delinquent, the county treasurer may make out and issue certificates of delinquency, which shall specify, among other things, the amount of taxes and interest due, and that such certificates may be sold to any person applying therefor upon the payment of their value in principal and interest, and that three years after the date of delinquency the holder of such certificate may give notice to the owner of the property described therein that he will apply to the superior court of the county in which the property is situate for a judgment foreclosing the tax lien against the property, and they prescribe what the notice shall contain, and provide that it shall be served in the same manner as summons in civil actions. They provide further that, after the expiration of five years from the date of delinquency of taxes on property remaining on the tax rolls for which no other certificate of delinquency has been issued,

the county treasurer shall issue certificates of delinquency to the county, and shall file the same, when completed, with the clerk of the court, and shall thereupon proceed to foreclose in the name of the county; and follow the proceeding provided for in the case of foreclosure by an individual, with the exception that summons may be served exclusively by publication. In the present case the certificate of delinquency was never filed with the clerk of the superior court. The summons which was published gave notice that the county was the holder of the certificate of delinquency, and that the same was issued on January 31, 1898, and that the county would apply to the superior court of Yakima county for judgment foreclosing the lien thereof; and the judgment of foreclosure recites that the county is the owner and holder of the certificate of delinquency issued on January 31, 1898. On the day on which the decree of foreclosure was rendered, the county filed its written application for judgment, in which application were set forth the tax proceedings, the description of the property assessed, and a prayer that the county's lien against the property be foreclosed and that judgment be given against each piece, parcel, or tract of land described therein. It is contended that the application should have been filed at the beginning of the proceeding and before the issuance of the summons. We find no ground for so holding. The law does not provide for the filing of such an application. All that is required by the statute in that regard is that the summons shall notify the delinquent taxpayer that the holder of the certificate will apply for judgment of foreclosure. That notice was given in this case, and the county did, in pursuance thereof, file an application for judgment which contained all the essentials of a complaint, and thereby it fully complied with the statutory requirement.

But there is in the statute an express provision that the county treasurer shall file the certificates of delinquency with the clerk of the court, and that the treasurer shall thereupon proceed to foreclose. Does the omission to file that certificate render the foreclosure decree void? The answer depends on whether the provision is mandatory or directory. The Supreme Court of Washington has held that it is the latter. In *Washington Timber, etc., Co. v. Smith*, 34 Wash. 625, 76 Pac. 267, it was held that where in a tax foreclosure the court had jurisdiction, and by a nunc pro tunc order made after the judgment of foreclosure the filing mark on the certificates, which were not filed until 15 days after the first publication of the summons, was altered so as to antedate the first publication, the objection that they were not in fact filed in time relates to a mere irregularity which should have been raised in the foreclosure case, and that, since the summons and its publication complied with the law, the property owner was within the jurisdiction of the court, and was required to take notice of the action, and, not having raised the objection that the certificate was not filed, he was estopped thereafter to raise it, under section 1767 of Ballinger's Ann. Codes & St. Wash. (Pierce's Code, § 8704), which provides that such a judgment shall estop all parties from raising any objections thereto which exist at or before the rendition thereof and could have been presented as a defense to the application therefor, and declares that "the judgment itself shall be conclusive evidence of its regularity and validity in all

collateral proceedings except in cases where the tax or assessments have been paid or the real estate was not liable to the tax or assessment." In *Miller v. Henderson*, 50 Wash. 200, 96 Pac. 1052, the certificate was filed with the clerk of the court six weeks after the judgment of foreclosure, but before the sale. The court, after alluding to the power of taxation, which, it observed, was something more than a mere statutory right, and lay at the very foundation of government itself, said:

"Hence, we have felt that statutory provisions relating to taxation were rather regulations upon the power than the source from which the power is derived, and, being regulations, that they were to be regarded by the court as regulations are usually regarded when the proceedings had under them are attacked collaterally; that is to say, departures from the strict rule prescribed are to be regarded as fatal only where the departure affects some substantial right of the complaining party—where he is denied some substantial right which would have been granted him had the regulation been pursued according to its terms—but to deny relief where the departure complained of does not affect the complaining party either one way or the other. In the present case the delinquency thought to be fatal is of the latter sort. This omission to file the certificate of delinquency in the office of the county clerk prior to the issuance and service of the summons could in no manner affect the rights of the appellants. Nor was the thing itself in any way necessary to constitute due process of law, as the proceeding prescribed by the statute would have been as valid and obligatory without this requirement as with it. It being, therefore, neither essential to the rights of the landowners nor to the legality of the statute, we think the omission of the clerk to comply with it at the time contemplated by the framers of the act did not so far deprive the court of jurisdiction as to require us to hold the sale invalid."

It is to be observed that neither of these decisions goes so far as to hold that the filing of the certificate of delinquency with the court in the foreclosure proceedings may be wholly dispensed with without rendering the proceedings void; but that conclusion, we think, is properly inferable from what was decided, for if the filing of the certificate is not necessary to the jurisdiction of the superior court to proceed with the foreclosure, and if a judgment of foreclosure is valid in a case in which the certificate is filed six weeks after its rendition, it must follow that it is valid if the certificate is never filed. What is the precise office of the certificate of delinquency, and what is its function when filed with the clerk of the court in the foreclosure proceeding? It does not serve as notice to the county treasurer to begin foreclosure proceedings, for he is the officer who issues it. It is not filed as notice to the delinquent taxpayer, for the summons notifies him of the issuance of the certificate. If it be said that it is to be filed with the clerk in order that the delinquent taxpayer may know where to find it of record in case he seeks to ascertain whether it has been issued and foreclosure proceedings have been begun against him, the answer is that he can always ascertain at the office of the county treasurer whether taxes on his property are delinquent and whether a certificate of delinquency has been issued. Nor is the certificate the pleading on which the judgment rests. The application for judgment serves that purpose. But it would appear from the record in the present case that although the certificate was not filed it was exhibited to the court at the time when judgment was rendered, for the judgment entry recites that the plaintiff is the "owner and holder of the certificate of

delinquency," etc. In *Smith v. Newell*, 32 Wash. 369, 73 Pac. 369, the court held that where the owners of property are given their day in court, and an opportunity to question the tax, and the tax appears to be just, the court ought not to declare it void because of the omission of a ministerial officer to perform a statutory duty, unless it involve an injury incapable of correction. The court referred to the fact that the statute provides that no error or informality in the proceedings of any of the officers engaged in the assessment, levying, or collection of taxes shall vitiate or in any manner affect the tax, but that the court may, in the foreclosure action, correct defects and supply omissions made by such officers. The court said:

"This provision of the statute, it seems to us, was intended to enable the courts to correct just such omissions as were made by the treasurer in this instance. It was intended to put it in the power of the court on the hearing of a tax foreclosure suit to render judgment as the evident justice of the case required; that is, it was intended that the court should inquire into the merits of complaints made against tax proceedings, and allow them to prevail only when the matter complained of operated to the injury of the complaining party and is incurable by any judgment that can be entered in the foreclosure proceedings."

The revenue and taxation law of Washington is exceptionally lenient to the delinquent taxpayer, and affords him unusual protection in providing that his property may not be sold for delinquent taxes except upon foreclosure proceedings and after a long period of delinquency—three years in the case of foreclosure by an individual certificate holder, coupled with the requirement that service of the summons shall be had upon the taxpayer, as in the case of civil actions, and five years in the case of foreclosure by the county. The highest court of the state has held that the Legislature intended that the courts should be liberal in enforcing the collection of taxes; that owners of property are bound to take notice of the property which they own, and to know that taxes are due thereon, and to pay the same; that the filing of the certificate of delinquency with the clerk of the court is not essential to due process of law, and might have been dispensed with by the Legislature, and that the omission to file it is but an irregularity which must be objected to, if at all, in the foreclosure proceeding. That construction of the law is binding upon us, and it follows that the judgment must be reversed, and the cause remanded with instruction to dismiss the bill.

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#### UNITED STATES v. SOMMERS.

(Circuit Court of Appeals, Eighth Circuit. May 28, 1909.)

No. 2,918 (1,957).

#### 1. JUDGMENT (§§ 585, 720\*)—RES ADJUDICATA.

Where a court has jurisdiction of the subject-matter and the parties, its judgment is a bar to any subsequent suit upon the same cause of action, and is also, in any suit upon a different cause of action between the same parties, an estoppel as to any matter actually litigated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1092, 1251; Dec. Dig. §§ 585, 720.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. JUDGMENT (§§ 956, 957\*)—PRESUMPTION OF JURISDICTION OF SUBJECT-MATTER.

A District Court being a tribunal of general jurisdiction, it is to be presumed that all matters covered by its judgment were in fact litigated by the parties; and, where such judgment is collaterally attacked, it will not only not be held void in the absence of proof of the evidence and pleadings on which it was based, but it may be doubted whether evidence, however strong, would be received to impeach it on the ground that it did not have jurisdiction of the subject-matter.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1822, 1826; Dec. Dig. §§ 956, 957.\*]

3. JUDGMENT (§ 495\*)—COLLATERAL ATTACK—CUSTOMS FORFEITURE—RES ADJUDICATA.

A District Court decreed in proceedings for the forfeiture of imported goods that no additional duty for undervaluation should be assessed. *Held*, in the absence of evidence to the contrary, that the court would be presumed to have had jurisdiction over this question, and that therefore the question was res adjudicata and could not be raised in collateral proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 933; Dec. Dig. § 495.\*]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

The decision below reversed a decision by the Board of United States General Appraisers (G. A. 6,536; T. D. 27,887).

This is a revenue case which came before the trial court on appeal from the Board of General Appraisers. Appellee's mother-in-law, while traveling in Europe, purchased for him a number of pictures, and shipped them to this country without an invoice. Upon their arrival at St. Louis, he applied through the customs brokerage firm of C. H. Wyman & Co. for their entry. Mr. Thompson of that firm stated in a sworn affidavit which he presented to the customs officer that he knew nothing about the value of the pictures, and asked for an appraisement. The officer submitted the matter to proper appraisers, who made a report fixing the value at \$205. Thereupon the collector demanded that formal entry be made and filed, wherein the actual cost or the foreign market value of the pictures should be stated. Mr. Thompson protested against this, stating that he had no knowledge himself of the value, nor any present means of obtaining such knowledge; but the collector refused to permit the entry unless such a paper was prepared and filed. Thereupon Thompson executed an affidavit wherein the actual cost or foreign market value of the merchandise was stated at the price fixed by the appraisers, \$205, and the duty was liquidated upon that basis, and the pictures delivered. At the same time a bond was given conditioned for the furnishing of a consular invoice. In due time the invoice arrived, and by it the value of the paintings was fixed at \$750. Mr. Sommers, through his brokers, presented this invoice to the collector, and, upon the information thus supplied, the pictures were seized and proceedings instituted for their condemnation and sale upon the ground that they had been fraudulently entered. This cause was tried before the court without a jury, resulting in a judgment in favor of defendant on April 16, 1906. Thereafter, and on June 28, 1906, the entry was reliquidated by the customs authorities, and, in addition to the duty imposed by law upon the pictures at the valuation of \$750, a further duty of 50 per cent. was assessed under Act June 10, 1890, c. 407, § 7, 26 Stat. 134, as amended by Act July 24, 1897, c. 11, § 32, 30 Stat. 211 (U. S. Comp. St. 1901, p. 1893). Upon receiving notice of this action, appellee here, as defendant in the forfeiture case, entered a motion therein in the District Court for modification of the judgment. The parties were fully heard on this motion, and the judgment was set aside and a new judgment entered, which provided that the paintings be "surrendered into the possession of said claim-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant upon payment of the duty due and payable on the true value of the paintings, as shown by the consular invoice, but without the additional duty of 50 per cent. in the nature of a penalty provided for under certain circumstances, and which the court holds should not be applied in this case." Mr. Sommers, in order to get possession of the paintings, paid, before the entry of this judgment, the additional exaction under written protest, and prosecuted this proceeding before the revenue authorities to obtain a return of the money, relying, among other things, upon the amended judgment. The revenue officers all sustained the legality of the additional 50 per cent. duty, and the appellee brought the decision of the Board of General Appraisers before the trial court by appeal. That court reversed the decision of the board, and entered judgment in favor of Sommers for the amount of the additional 50 per cent. duty, and to review that judgment the present appeal is brought.

The opinion filed by the Circuit Court reads as follows:

"TRIEBER, District Judge. The first liquidation was clearly tentative and not final. The true value of the picture imported was unknown to the importer, and was not definitely determined by the appraiser. This is conclusively shown by requiring the importer to execute a bond as set out in the petition. When the consular invoice was produced by the importer, it appeared that the first valuation made by the appraiser, which was \$205, was too low, the cost thereof being \$749.10. After this fact was ascertained the picture was seized by the collector, and an information for forfeiture under Customs Administrative Act June 10, 1890, c. 407, § 7, 26 Stat. 134 (U. S. Comp. St. 1901, p. 1893), was filed. Upon the hearing of that cause it was held by the court that there was no cause for the forfeiture, and the pictures directed to be delivered to the plaintiff without the 50 per cent. penalty. Thereupon, on June 29, 1906, more than one year after the first appraisement had been made, a new liquidation was made by the collector in conformity with the consular invoice and a penalty of 50 per cent. interposed on the increased valuation. Upon these facts I am of the opinion that the collector had the power to make the second liquidation, the first having been merely conditional and for the purpose of enabling the importer to obtain the picture. Whatever mistake there was in the first appraisement was an innocent one of fact, not only upon the part of the importer, but also of the appraisers. There can be no doubt but that nothing was done by the importer or his agent which would warrant a finding that it was intended to perpetrate a fraud on the government. On the contrary, the evidence shows that there was a frank and true statement of the facts made by the importer.

"For these reasons, the last liquidation is in fact the only one, and, being so, the importer cannot plead the one-year statute of limitations, nor is the government entitled to any penalty on the increased valuation. The judgment of the court is that the government is entitled to duties on the picture at a valuation of \$749.10, but no penalties. Judgment will be entered accordingly."

Truman P. Young, Asst. U. S. Atty. (Henry W. Blodgett, U. S. Atty., on the brief).

Joseph H. Zumbalen (Ferriss, Zumbalen & Ferriss, on the brief), for importer.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

AMIDON, District Judge (after stating the facts as above). Could the judgment from which we have quoted above be collaterally attacked? It was presented to the Board of General Appraisers, and they disposed of it in the following language:

"So much as was said by the learned judge in reference to the amount of duties payable on the merchandise must be construed as obiter dictum, and of no binding force."

Judicial opinions may be narrowed by the principle referred to by the learned board, but we are not aware that the judgments and decrees of courts can be pared down by the doctrine of obiter dicta. In dealing with judgments the only question is, had the court jurisdiction of the subject-matter and the parties? If it had, its judgment is a bar to any subsequent suit upon the same cause of action, and is also, in any suit upon a different cause of action, between the same parties, an estoppel as to any matter actually litigated. *Cromwell v. County of Sac*, 94 U. S. 361, 24 L. Ed. 195; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 400, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954. The cause of action here asserted by the government is that it is entitled to the 50 per cent. additional duty. That claim is denied by the appellee. This is the only controversy presented by the record or discussed by counsel. That matter is unquestionably covered by the judgment in the forfeiture case, both negatively and affirmatively. It was there first adjudged that Mr. Sommers was entitled to a return of his paintings, "upon payment of the duty due and payable on the true value of the paintings, as shown by the consular invoice." Second, it was adjudged that claimant was entitled to a return of the paintings, without the payment of "the additional duty of 50 per cent. in the nature of a penalty provided for under certain circumstances, and which the court holds should not be applied in this case." Unless that judgment is void, it establishes beyond question that the government was not entitled to the 50 per cent. duty, and that the appellee is entitled to a return of the money which was exacted of him without authority of law.

But it is said that the judgment is void because the only issue in the forfeiture case was whether the entry was fraudulent, and the pictures for that reason subject to forfeiture. The difficulty with that contention, however, is that we have neither the pleadings nor the evidence in that case before us. The court being a court of general jurisdiction, we are bound to presume that all matters covered by its judgment were in fact litigated by the parties. In the absence of all showing, we cannot assume that the court undertook to pass upon matters which were not submitted to it for decision. No doubt, if a court by mere *brutum fulmen* should assume to adjudicate matters wholly outside the actual litigation, its judgment would be void; but such conduct is so foreign to the ordinary proceedings of courts of record that it may be seriously doubted whether evidence, however strong, would be received to impeach a judgment collaterally upon such grounds. Certainly a judgment cannot be so overthrown upon a mere speculative inference as to what the issues might have been. That, however, is all we have before us in the present case. Our attention is directed to the grounds of an ordinary suit for forfeiture, and the frame of the pleadings therein; and we are asked to hold as a matter of law that in the forfeiture suit here involved no other matters could possibly have been litigated by the parties. The premise does not support the conclusion. It is open to litigants to restrict or enlarge their issues within wide discretionary limits. Surely it was competent for the government and the claimant in the forfeiture case to litigate the question not only whether the entry was fraudulent, but also whether the paintings, in



the absence of fraud, were subject to the additional 50 per cent. duty. Even if the evidence showed that there was no fraudulent intent, still the customs officers would have been entitled, and it would have been their duty, to retain possession of the paintings until all sums due thereon were paid to the government. Those officers proceeded upon that basis. They assessed the new duties and the penalty against the paintings, and retained them in their possession for the purpose of enforcing payment of this claim. Under such a situation, we are bound to presume that every matter covered by the judgment was in fact litigated by the parties. Indeed, the course of events, as disclosed by the record, contains persuasive evidence that what we are thus bound to hold as a legal presumption actually took place as a matter of fact. As above stated, the original judgment was rendered on April 16, 1906. The entry was reliquidated by the customs officers, and the additional duties and penalties imposed on June 28, 1906. Thereupon the claimant moved to modify the judgment. Why? Manifestly that it might be extended so as to cover all matters in dispute between him and the government. The second judgment recites that the parties were heard upon this motion, and that it is based "upon the pleadings and proofs adduced." Upon such a showing the original judgment was vacated and set aside, and the new judgment entered. Thus, not only the presumption of law, but the showing disclosed by the record, established that the judgment embodies only such matters as were actually litigated by the parties. Such being the case, the rights of the parties in the present controversy there became *res adjudicata*, and upon that determination the paintings were not subject to the additional duty of 50 per cent., and the appellee here was entitled to a return of his money.

The decree must be affirmed.

RINER, District Judge (concurring). This is an appeal from a decree of the circuit court for the Eastern District of Missouri denying the right of the government to collect an additional duty of 50 per cent. upon the entry of certain merchandise consigned to David Sommers at St. Louis. The goods consisted of a case of paintings, three in number, imported October 30, 1902, by steamer Moltke from Hamberg, and arrived at the port of St. Louis in November, 1902. C. H. Wyman & Co., as agent for Sommers, made an entry of the merchandise November 17, 1902. The application for the entry was made by Mr. Thompson, a member of the firm of Charles H. Wyman & Co., under oath, to enter the goods without a certified invoice, no invoice having been received, stating in the affidavit that the paintings were imported by Charles H. Wyman & Co., and that the value was unknown to them.

The record shows that the pictures were sent to Sommers by Mrs. Drey, his mother-in-law, who was then in Europe, and that he did not know their value, and, as he had received no communication whatever from her, had no means of ascertaining their value. Upon the filing of the application the deputy collector at the port of St. Louis ordered the goods appraised, and the local appraiser returned their value at \$205, and the entry was liquidated December 15, 1902,

the duties being based on the appraised value, \$205. The entry made by Charles H. Wyman & Co., as agent for the consignee, was in the form prescribed by sections 4 and 5 of the customs administrative act (Act June 10, 1890, c. 407, 26 Stat. 131, 132 [U. S. Comp. St. 1901, pp. 1888, 1889]). In this entry the value of the pictures was stated to be \$205, as found and returned by the local appraiser. The entry was made in this form upon the demand of the collector. Mr. Wyman, of the firm of Charles H. Wyman & Co., at the time objected to making the entry and declaration in this form, on the ground that the value stated in the entry, \$205, was the appraiser's valuation and not the importer's, and that the statements in the entry as to invoices and bills of lading having been submitted were untrue in fact. The collector, however, insisted that the entry and declaration would have to be made in that form to secure the delivery of the goods. He also demanded a bond to produce the consular invoices within a specified time. Within the time prescribed in the bond, Mr. Sommers furnished the collector with consular invoices which showed that Mrs. Drey had paid \$749.10 for the pictures.

On April 20, 1908, and soon after the consular invoice was received, the collector requested a reappraisement of the goods, and they were reappraised by General Appraiser Howell at the sum of 3,150 marks, or \$750, which he found to be the market value or the wholesale price at the period of exportation to the United States. The reappraisement was then stamped upon the original entry, the goods seized, and a suit was begun to forfeit the goods on the ground that they had been entered by the importer at an undervaluation. This suit resulted in a judgment in favor of the importer, the court holding that there had been no undervaluation by the importer, and directing that the paintings be surrendered into the possession of the claimant upon payment of the actual duty due, "but without the additional duty of 50 per cent." After the decision in the forfeiture case, but before the entry of the judgment, the collector, on the 29th of June, 1906, reliquidated the entry, assessing duty on the value of the goods as shown by the reappraisement, and adding 50 per cent. additional duty. Whereupon, within the time provided by law, the importer filed his protest against this reliquidation, which protest was overruled by the Board of United States General Appraisers. Within 30 days thereafter, the importer filed his petition for review of the board's decision, and upon a hearing the Circuit Court entered the decree here complained of.

The sole question presented for decision by this record is whether the collector of customs at the port of St. Louis had the right, under the facts disclosed by the record, to assess the additional duty of 50 per cent. provided for by section 7 of the act of June 10, 1890, as amended July 24, 1897. I think it is entirely clear that the entry in this case was not made, and could not have been made, under sections 4 and 5 of the act of June 10, 1890. Section 4 of that act prohibits an entry to be made in the absence of a certified invoice upon an affidavit, unless the affidavit is accompanied by a statement in the form of an invoice, or otherwise, showing the actual cost of the merchandise imported, if purchased, or, if obtained otherwise than by

purchase, the actual market value or wholesale price thereof, at the time of exportation to the United States, in the principal markets of the country from which the same has been imported. The statement required by this section could not be made by the importer or his agent in this instance, because he had no information whatever upon the subject, and so stated to the collector at the time the entry was made. Neither could the declaration required by section 5 be made, because no invoice had been received. Sections 2788 and 2926 of the Revised Statutes (U. S. Comp. St. 1901, pp. 1869, 1929) provide, I think, for an entry such as we have here, and are not in conflict with the provisions of the act of June 30, 1890, because they provide for a case not therein provided for, viz., where it is impossible for the importer to make either the affidavit or statement required by sections 4 and 5 of that act. Section 2788 (U. S. Comp. St. 1901, p. 1869), provides that:

"Where the particulars of any merchandise are unknown in lieu of the entry prescribed by section 2785, an entry thereof shall be made and received according to the circumstances of the case; the party making the same declaring upon oath all that he knows or believes concerning the quality and particulars of the merchandise; and that he has no other knowledge or information concerning the same."

Section 2926 (U. S. Comp. St. 1901, p. 1929), provides:

"That all merchandise of which incomplete entry has been made, or an entry without the specifications of particulars, either for want of invoice, or any other cause," shall be placed in some warehouse to be designated by the collector at the expense and risk of the owner, "until the particulars, cost or value, as the case may require, shall have been ascertained either by the exhibition of the original invoices thereof, or by appraisement, at the option of the owner, importer or consignee; and until the duties thereon shall have been paid, or secured to be paid, and a permit granted by the collector for the delivery thereof."

Liquidation means the ascertainment of the duties due the United States, taxed at the rate prescribed by law upon the particular class of merchandise imported. In this case it was 15 per cent. upon the value either of the purchase price, where purchased by the importer, as shown by the invoice, if the invoice price is equal to or greater than the market or wholesale price; or if the invoice price is lower than the market value, then with such added sum as will raise the total up to the market value; or the market or wholesale value where he procures them otherwise than by purchase. At the time the goods in this case were delivered, neither the importer, his agent, nor the customs officers knew their value, and could not then ascertain what it was; hence, I think, the permit or first liquidation was merely tentative, and was so understood both by the importer and customs officers. This is entirely clear when we examine the entry, because it is there stated that the duty of \$30.75 is "estimated duty," and security was taken to furnish the consular invoice in order that the true value might be ascertained and a final liquidation made. It is immaterial whether the security was taken under section 2926 of the Revised Statutes, or under section 4 of the administrative act, for in both instances the condition of the bond is that the importer will pay the additional duty. In this case the bond was in form under

section 4, and provided for the production of the invoice within a specified time and the payment of the additional duty, if any. I do not deem it necessary to decide in this case whether the collector had the right to call for a reappraisement, for a reappraisement was had by the general appraiser, and, as already suggested, his report shows that the consular invoice represented the actual value or wholesale price of the goods at the time of exportation, upon which value the duty must be assessed and the importer must pay. But in this case there was no undervaluation by the importer which would authorize the taxation of the additional penalty, under section 7 of the customs administrative act, for he gave no statement of value, but, on the contrary, stated that he did not know the value. He had to accept the appraisement made by the local appraiser, and the mere fact that he made his entry in the form he did, upon the demand of the collector, in order to secure the goods, does not, in my opinion, affect his right to insist that he is liable only for the duty upon the valuation shown by the consular invoice. *Robertson v. Bradbury*, 132 U. S. 491, 10 Sup. Ct. 158, 33 L. Ed. 405. The case just cited arose under section 2926 of the Revised Statutes. There the importer sought to correct an entry made upon a certified invoice upon which certain nondutiable charges were included in the particulars of the merchandise instead of being stated separately. The customs officer, however, refused to permit him to make the entry upon the invoice with a supplemental invoice in which the nondutiable charges were separately stated, but insisted that the entry must be made on the value shown by the certified invoice, to which demand the importer yielded. In disposing of the case, the court, in the course of its opinion, said:

"As to the course which the plaintiff did pursue, we see no error in the position taken by the court, that although the statute prescribed a particular method to be followed under section 2926 of the Revised Statutes, in case of an incomplete entry of goods, or an entry without the specification of particulars, yet if, when the importer or consignee pointed out the imperfection, and desired to correct it, or have it corrected, he was met by a declaration of the officers that he must enter the goods at the value expressed in the invoice, and in no other way, and was given to understand that that was the only thing he could do, and he was compelled to do that in order to proceed at all, then he was not bound to ask for an appraisement under the statute. The case was prejudged against him."

The imposition of additional penalties under section 7 of the customs administrative act applies, I think, and were only intended to apply, to cases where a value is stated by the importer as of his own knowledge, or where he professes to have knowledge and information, and cannot be held to apply to a case where the importer states, under oath in an affidavit, as in this case, that he has no invoice and does not know the value, and where he is obligated to adopt the appraiser's value in order to get possession of the goods. Under this statute, these penalties accrue for an understatement of value by the importer, whether made innocently or fraudulently, because in such case an understatement of value may mislead the customs officers and thus deprive the government of the duties justly due; but that is not this case. Here the customs officers were advised of the fact

that the importer did not know the value, and that he simply adopted the value returned by the local appraiser, because he was compelled to do so in order to get possession of the goods; hence no one could be misled by his act. To give the statute any other construction would inflict the additional penalties upon an importer, acting in perfect good faith, simply because he lacked the information and knowledge requisite to enable him to correct the mistakes of the appraising officer.

The conclusion reached is that the importer in this case is liable for the duty upon the value shown by the consular invoice, but not for the additional duties sought to be imposed by the collector, and the judgment of the Circuit Court should be affirmed.

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THE BAYAMO.

(Circuit Court of Appeals, Fifth Circuit. June 8, 1909.)

No. 1,896.

**SALVAGE (§ 19\*)—UNSUCCESSFUL SERVICES—RIGHT TO COMPENSATION ON COMPLETION OF WORK BY ANOTHER.**

Libelants contracted to attempt the salvage of a stranded steamship and her cargo, and to save her if they could do so within a reasonable time. They were to receive no pay unless successful. After several days' work without success, the master of the steamship contracted with another and larger vessel, by which she was rescued. Libelants worked in good faith, and rendered valuable aid in preventing the ship from receiving further injuries from storms, lightering cargo, etc. Whether their efforts would have been successful, if continued, was doubtful under the evidence. *Held*, that an award of \$5,000, in view of all the facts, was sufficient, and would be affirmed.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. § 47; Dec. Dig. § 19.\*]

Pardee, Circuit Judge, dissenting, holds that libelants were entitled to an additional allowance as a salvage reward, in view of the ultimate salvage of the vessel to which they contributed.

Appeal from the District Court of the United States for the Southern District of Florida.

Bisbee & Bedell, for appellants and cross-appellees.

Cockrell & Cockrell and Clarence Bishop Smith, for appellees and cross-appellants.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges are of opinion that the decree of the District Court is without reversible error. It is therefore affirmed.

PARDEE, Circuit Judge (dissenting). My examination of the record in this case brings me to the following conclusions:

1. The contention of the original libelants to be allowed salvage on the Bayamo the same as if they had effected the full relief of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
171 F.—5

the ship, and on the ground that they were the first salvors in possession and were taking effective measures, which would have resulted in full relief had they not been discharged—in fact, ousted by the master of the Bayamo—should be denied, because, under the evidence, the court cannot say that the libelants could and would have saved the ship, if left to their own unaided efforts.

2. The services rendered by the libelants were salvage services in view of the ultimate result, because they were effective in aiding the ship to withstand the storm and in keeping afloat until still more effective salvage services could be rendered, and this in putting out anchors, lightening the ship, and aiding to keep her in best position to meet the storms; and they were salvage services particularly in respect to cargo of which the ship had to be lightened, in that they removed a considerable quantity to Miami, aided in loading the Colonial with cargo, and removed considerable cargo from the lower hold to a place of safety on the upper deck.

3. There is no doubt that the libelants acted in the best of faith and rendered meritorious services. They labored diligently, and their tugs and lighters and men were at times exposed to decided risk and peril. Their actual outlay for material was about \$1,250, and it would seem that with ordinary allowances for the use of the tugs Three Friends and Martha Helen, with the lighters used and men employed, the sum of \$5,000 allowed by Judge Locke is only ordinary compensation for services rendered and materials furnished.

As applicable to the facts of this case, Mr. Jones, author of a highly reputable English work on Salvage, says:

"If part of a salvage service is performed by one set of salvors, and the salvage is afterwards completed by others, the first set are entitled to reward pro tanto for the services which they actually render, and this even although the part they took, standing by itself, would not, in fact, have effected the salvage. Thus, where the crews of a lifeboat and lugger made great and meritorious exertions to save a ship and cargo, but were at length compelled to abandon her, and she was afterwards found and saved by a steamer, the first salvors were, under the circumstances, held to be entitled to salvage. And where a vessel got on the rocks off Folkestone, and received assistance from some small boats, which were unable to get her off, and a tug steamer also tried in vain, and a large passenger steamer towed her off for a few minutes, when the hawser broke, and she went ashore, and she became a wreck, but her cargo, valued at a large amount, was saved, it was held that the boats' crews, as well as the steamers, were entitled to participate in the salvage awarded."

In *The Tolomeo* (D. C.) 7 Fed. 499, Judge Locke says:

"The principle has been well established that, where benefits have been rendered to property by one set of salvors, nothing but a voluntary absolute abandonment of the enterprise and property will lose a right to save, or share with others who did save finally."

He cites *The Ionge Bastian*, 5 C. Rob. 323, where the first salvors, having rendered what was considered valuable service by floating a ship from the rocks, in spite of her subsequent sinking, although she subsequently sunk and they did not stay by her, were permitted to share with those who finally weighed her up and brought her into port. Also cites *The Island City*, 1 Black, 121, 17 L. Ed. 70, where, as he says—

"the schooner Kensington, although never perfecting a salvage service nor remaining by the vessel, and neither continuing her efforts nor retaining possession, shared in the award of salvage, because she had brought the ship into a place of greater comparative safety."

And I find that the same doctrine was recognized in *Muntz v. A Raft of Timber* (C. C.) 15 Fed. 555, the syllabus of which, supported by the decision, is:

"If part of a salvage service is performed by one set of salvors, and the salvage is afterwards completed by others, the first set are entitled to reward pro tanto for the services they actually rendered; and this, even though the part they took, standing by itself, would not in fact have effected the salvage."

As the services rendered to the *Bayamo* by the libelants were salvage services, and as such under the salvage laws the element of reward should enter into their compensation, and as the amount allowed in the lower court, as declared by the judge, was "only an amount for work and labor and expenses incurred," I think the libelants are entitled to relief in this court.<sup>1</sup>

NOTE. The following is the opinion of Locke, District Judge, filed in the court below:

LOCKE, District Judge. The libelants, having found this vessel in distress, agreed to assist her and save her if they could within a reasonable time, with the proviso that it should be 'no cure, no pay'; that is, if they did not save her, they should have no pay. There are always certain questionable matters which may arise in such contracts, when applied to salvage services. What, under the circumstances, is a reasonable time? When may a master, in his anxiety, consider that the salvor has had sufficient opportunity, and be authorized to procure new assistance without becoming liable to the original salvor? And what were the probabilities of ultimate success, if new aid had not been accepted? The principles of law are well established, but their application to this case leaves certain questions to be settled which can only be settled upon probabilities. The two questions of importance which are presented are to the reasonableness of the time occupied and the probabilities of ultimate success of the libelants.

Perils of the sea are always to be considered in contracts or agreements covering maritime services, and, considering the two storms, which all agree prevented actual beneficial assistance during a large portion of the time, it cannot be said that the time occupied was so unreasonable as to forfeit the rights of the libelants to continue their efforts. The rights or duties of salvors, and of masters in charge of property in distress in making or enforcing contracts, are not to be judged or measured by the strict rules of common law, but with a greater flexibility, which will protect the reasonable and equitable rights of all. In such a case as this, where, in spite of the honest efforts of the original salvors, either on account of their inefficient appliances, or bad weather, or other circumstances beyond their control, they were not making such progress as would justify the belief in a final success, it would be unreasonable and against public policy to compel the master, where superior aid could be secured, to wait until the last moment of the prior salvors' efforts and take all the chances of final failures; but in contracting for and accepting such superior aid the parties making such contract make it subject to all the existing rights of the original salvors, and in any such contract the property becomes responsible to them, regardless of any amount which may be promised the new-comers. Even if such later contract should be considered void, it could not affect the prior rights of others not parties to it.

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<sup>1</sup>See order at end of opinion of Locke, District Judge.

It is considered in this case, therefore, that the rights acquired by the libelants can in no way be affected by the amount promised the Merritt Company.

The other important questions are of probabilities and uncertainties, which it is impossible to determine beyond a doubt: First, what actual benefits had the libelants rendered the property? and, second, what were the probabilities of future success? The property was in a worse condition when the Relief arrived than upon the arrival of the Three Friends. Would it not have been still worse, had it not been for her presence? It is contended that it would. Whether she would have swung around broadside upon the reef is uncertain; but it is not considered that it is necessary to determine this question definitely, in order to decide that the libelants had a right to continue their efforts, or receive some compensation for what they had done. The more important question is: What were the probabilities of a successful saving of the ship by the original salvors, had not the services of the Relief been accepted? There are reasonable arguments on both sides, and it becomes a question of difficulty, and not one of certainty, as contended by the libelants. When we consider that unquestionably the libelants could have removed the remaining cargo, and could probably have removed the greater part of the water, and that the ship, with her 304 tons of coal and what water would be necessarily left in her, would draw less than 10 feet, it does not seem that with the pleasant weather it would have been so improbable; but when we consider the fact that the repeated and continued efforts of the four steamers, Three Friends, Martha Helen, Colonial, and Forward, to float the ship at a time when her tanks had been about emptied of water and when she was not nearly as far aground as on the 15th, had amounted to nothing, and also the time and efforts taken by the Relief, with her vastly more powerful appliances, and that two of the libelants' pumps had been tried and had not succeeded, the probabilities of success appear very slight. The fact that the ship had been driven further onto the ridge of the reef by the force of the sea does not necessarily show that she could have been pulled completely over it easily, and I am forced to believe that the prospects were not sufficient to justify the continuance of their unaided efforts. In the case of *The Eldorado Bryne v. Johnson*, 53 Fed. 840, 4 C. C. A. 47, the United States Circuit Court of Appeals considered that the libelants were entitled to a liberal compensation pro opere et labore for what they had done, although they had voluntarily left the stranded ship, taking cargo that had been taken out with them.

In this case, I consider the benefits which may have been rendered the property and the probabilities that the libelants might have saved it finally, had they been permitted to continue, will justify an award sufficient to pay the expense actually incurred, a reasonable amount for the actual work and labor, and for the risk and damage, although it cannot be considered that salvage had been earned more than upon the net value of the property taken ashore. If, as contended by claimants, any amount in addition to that contracted to the Merritt Company would be unreasonably burdensome, it would only be on account of their own contract. The amount awarded will be less than one-half what the parties in interest had agreed to pay to Merritt Company on the net value of the cargo, had it not been brought ashore by the libelants.

A decree for \$5,000 and costs will be made.

The following is the order from which the appeal and cross-appeal were taken:

"This cause coming on to be heard upon," etc., "it is hereby decreed that the libelants recover for the services as alleged and proven, as quantum meruit for the work done and labor performed, and for the expenses, risks, and damages incurred in rendering such services, the sum of \$5,000, together with their costs herein incurred; and it is further ordered that upon the payment into the registry of the court of said \$5,000 and costs taxed at \$475.34, the bonds and stipulations herein filed be canceled and annulled."



## UNITED STATES v. HILBERT.

(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

No. 242 (4,142).

**1. CUSTOMS DUTIES (§ 35\*)—CLASSIFICATION—ORNAMENTS IN THE PIECE—“TRIMMINGS OR GALLOONS.”**

Ornaments, loops, etc., which are manufactured separately but are temporarily stitched together in six-yard lengths for convenience and economy in handling and carding, and which are used singly in decorating garments, are not “trimmings or galloons,” within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187 (U. S. Comp. St. 1901, p. 1670).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 35.\*]

**2. CUSTOMS DUTIES (§ 17\*)—TEMPORARY CONDITION AS AFFECTING CLASSIFICATION.**

While it is elementary that generally duty must be assessed upon imported articles according to their condition on arrival, the temporary stitching together of ornaments on economical grounds does not require that the articles should be classified otherwise than if they had been imported individually.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 17.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The decision below reversed a decision by the Board of United States General Appraisers (G. A. 6180, T. D. 26,808), and reads as follows:

HAZEL, District Judge. The articles in controversy consist of ornaments, loops, medallions, etc. When imported they are sewn together with silk thread for the purpose of saving the expense of separately mounting or carding them. The question now arises whether such articles are dutiable as trimmings at 60 per centum ad valorem under paragraph 390 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]), or, as claimed by the importer, as manufactures of silk at 50 per centum ad valorem under paragraph 391.

The articles are ornaments or decorations for garments, and not trimmings, as that term is understood in commercial parlance. The figures, scrolls, or designs are manufactured separately, are not regular in size, and doubtless were stitched together for convenience in handling and to avoid expense of separate carding. The individual pieces were sewn together after their manufacture and after their importation such pieces were cut apart, and sewn upon cards, and sold to the trade by the dozen as ornaments. While such articles might be used as trimmings, they are usually used separately for the purpose of decorating portions of a dress or garment and to impart a distinctive effect. The importer testified that at first he purchased articles of this description abroad at a certain price per dozen, and later he purchased them by the yard. The stipulation in evidence shows the goods were imported in pieces six yards in length, and are invoiced and bought at a price per dozen yards.

The government contends that, as the goods are bought by measure, they are dutiable as trimmings, and not as manufactures of silk. It is pointed out that in the case of *Garrison, Wright & Co. v. United States* (C. C.) 121 Fed. 149, it was held by Judge Wheeler that where articles analogous to those in question are bought and sold by the piece they are not dutiable as trimmings, which are usually bought and sold by linear measure. The principle of the case indicates, I think, that when the imported article, design, or ornament is intended for separate decorative effect, as distinguished from

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a continuous extension of ornamentation on a garment, such as trimmings, the former retains its specific designation of ornaments for tariff purposes. In the Garrison Case the court, speaking of the known distinction between trimmings and ornaments, says: "The dropping of the word 'ornaments' from the act of 1897 (U. S. Comp. St. 1901, p. 1626), does not indicate that what would be ornaments are to be trimmings, rather than manufactures or anything else, for which apt words are retained, or otherwise seem to show that the well-established distinction between trimmings and other articles was intended to be removed."

The exhibits in this case are separate and distinct articles, are not uniform in appearance or size, and are entirely independent pieces, appropriate for individual use and effect. The fact that such articles are bought in six-yard lengths to lessen the expense of carding and not at a fixed price for each separate ornament is not thought to require their classification as trimmings. I think the articles have been incorrectly assessed, and that they are dutiable at 50 per centum ad valorem under paragraph 391.

The protest of the importer is sustained, and the decision of the Board of General Appraisers reversed.

Henry A. Wise, U. S. Atty. (J. Osgood Nichols, of counsel), for the United States.

Comstock & Washburn (Albert H. Washburn, of counsel, and George J. Puckhafer, on the brief), for importer.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The merchandise in controversy consists of ornaments, loops, and medallions made of silk and imported in pieces six yards in length. When imported they are sewed together, but on arrival they are cut apart, mounted on cards and are thus marketed, being sold by the dozen as ornaments or loops. The sewing together is done after the individual articles are manufactured, for convenience in packing for importation, the cost of putting up the goods being reduced thereby, as compared with carding the ornaments singly, about 12½ to 15 per cent. The collector classified the articles as trimmings or galloons under paragraph 390 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]); the importer insists that they should have been placed under paragraph 391 of the act as "manufactures of silk." The board affirmed the collector and the Circuit Court reversed the board.

That the importations are ornaments, loops, and medallions, used singly and not as trimming is used, for decorating the garments of women, is established by the proof. There is no testimony to dispute this statement; at least we have found none. The only reason the separate units are sewed together is for the convenience of packing for transportation. This proposition is criticised by the board and by counsel for the United States, but there is no proof on which to base the criticism.

It is suggested that the ornaments as sewed together might in that condition be "bound around the bottom of a woman's skirt, for which an entire roll might very well be used without being cut apart at all." As an abstract proposition this may be true. The difficulty is that there is no testimony in the record to support it. On the contrary, the testimony is uncontradicted that the ornaments are cut apart and

sold, not as trimming but as units. It is unsafe for courts to base their judgments on what might be done, especially when what actually is done has been proved without contradiction.

It is elementary that as a general rule duty must be assessed upon imported articles according to the condition they are in upon arrival at our ports, but we think the decision of the Circuit Court furnishes no departure from this rule. The temporary stitching of the ornaments together for the purpose of transportation did not change their character; it did not make trimmings of them. The well-known distinction in tariff nomenclature between ornaments and trimmings was in no way disturbed. If the samples in evidence had been placed one upon another in piles of 100 and then sewed together to keep the piles intact, it will probably be admitted that they would not be converted into trimmings by this process; and yet, so far as the proof goes, this is precisely what was done in the present case, the form of fastening being different. In other words, there is not a particle of proof that the ornaments were ever used as trimmings or in any other way in the form in which they reached the port of New York or could be so used.

The decision of the Circuit Court is affirmed.

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#### F. ROSENSTERN & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 25, 1909. On Rehearing, June 9, 1909.)

No. 249 (5,152).

#### 1. CUSTOMS DUTIES (§ 44\*)—CLASSIFICATION—CATTLE-HAIR GOODS.

Cattle-hair goods are dutiable by similitude as manufactures of "wool," under Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 366, 30 Stat. 184 (U. S. Comp. St. 1901, p. 1666), being similar in quality, use, and texture.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 148; Dec. Dig. § 44.\*]

#### 2. CUSTOMS DUTIES (§ 44\*)—SIMILITUDE—RESEMBLANCE IN USE.

Within the meaning of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), fabrics composed of calf hair and cotton and used in manufacturing cloaks resemble in "use" fabrics of calf hair, cotton, and wool and also used in manufacturing cloaks, notwithstanding that the latter fabrics are of a better grade and command a higher price.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 148; Dec. Dig. § 44.\*]

On Rehearing.

#### 3. APPEAL AND ERROR (§ 832\*)—REHEARING—GROUNDS.

Where a citation was mainly relied on at the oral argument and appeared prominently in the brief, rehearing should not be applied for on the ground that the court had inadvertently overlooked the citation, but it should be assumed that the court had given the point due consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3215; Dec. Dig. § 832.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The court below affirmed a decision by the Board of United States General Appraisers (G. A. 6,686 [T. D. 28,592]), which approved the action of the collector of the port of New York in assessing certain importations for duty under Tariff Act July 24, 1897, c. 11, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1626). The opinion of the Circuit Court reads as follows:

MARTIN, District Judge (orally). The merchandise in question, consisting of so-called cattle-hair goods, was assessed for duty at the rate of 33 cents per pound and 50 per cent. ad valorem under the provisions of paragraph 366 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1666]), for "manufactures \* \* \* made wholly or in part of wool, not specially provided for." The importers protested against said assessment, claiming the merchandise to be dutiable under section 6 of said act at 20 per cent. ad valorem as a nonenumerated manufactured article. The Board of General Appraisers sustained the assessment of duty as made by the collector.

It does not satisfactorily appear that wool, goat hair, or mohair enters into the manufacture of the article in controversy; but, upon the evidence in the case, it is apparent that its use is analogous to the articles covered by the paragraph under which the assessment is made. I am of the opinion that the case of *Arthur v. Fox*, 108 U. S. 125, 2 Sup. Ct. 371, 27 L. Ed. 675, pointedly applies to the case at bar. It was properly assessed by virtue of the similitude clause in section 7, under said paragraph 366.

The decision of the Board of General Appraisers is affirmed.

Brooks & Brooks (Frederick W. Brooks, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The tariff act defines the word "wool" as follows:

"Par. 383. Whenever in any schedule of this act, the word 'wool' is used in connection with a manufactured article of which it is a component material, it shall be held to include wool or hair of the sheep, camel, goat, alpaca or other animal, whether manufactured by the woolen, worsted, felt, or any other process." Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 185 (U. S. Comp. St. 1901, p. 1668).

The Board was convinced by the testimony before it that the fabric imported, besides a cotton warp and calf-hair filling, contained a substance used to hold the calf-hair fibers in place, either coarse East India wool, wool waste, or mohair noils. It was classified, therefore, under—

"Par. 366. On cloths, knit fabrics, and all manufactures of every description made wholly or in part of wool, not specially provided for in this act, valued at not more than forty cents per pound, the duty per pound shall be three times the duty imposed by this act on a pound of unwashed wool of the first class; valued at above forty cents per pound and not above seventy cents per pound, the duty per pound shall be four times the duty imposed by this act on one pound of unwashed wool of the first class and in addition thereto, upon all the foregoing, fifty per centum ad valorem."

Further testimony was taken in the Circuit Court, and upon the record as it now stands we fully concur with the conclusion of the

judge who heard the cause below that it does not satisfactorily appear that wool, goat hair, or mohair enters into the manufacture of the articles in controversy. The results of the chemical analyses and the report from the confidential agent of the Treasury Department in Berlin cannot be disregarded because manufacturers in this country testify that they cannot produce the fabric upon the machines they use without the use of some "wool" to hold the calf-hair fibers in place.

There being no special provision covering this fabric, the question is: How shall it be classified? It is not within that part of section 7 which deals with nonenumerated articles manufactured of two or more materials, because both of the materials of which the fabric is composed are on the free list; the cotton under paragraph 537 and the calf hair under paragraph 571. The importers contend that they are dutiable as a nonenumerated manufactured article under section 6. The government contends that they are dutiable by similitude to articles enumerated under paragraph 366, *supra*. The Board and the Circuit Court so held.

We concur with both tribunals in the conclusion that as to these goods this court is controlled by the decision of the Supreme Court in *Arthur v. Fox*, 108 U. S. 125, 2 Sup. Ct. 371, 27 L. Ed. 675. In that case the importations were composed of cow or calf hair, vegetable fiber, and cotton, an imitation of sealskin, and used for manufacturing hats and caps. Here the fabric is composed of calf hair and cotton, an imitation of pony fur, and used for manufacturing cloaks. In the *Fox Case* they were found to be substantially similar to manufactures of goats' hair and cotton, made to imitate sealskin, and used for the purposes for which sealskin is used. The goods in suit bear a like similarity to certain manufactures of calf hair and cotton, with a substantial percentage of wool or mohair noils, which are used for cloaks, but, being of a better grade and more durable, are also used for other purposes (such as car-seat coverings), which involve more wear and tear. In our opinion these additional uses of the standard with which these importations are compared do not disprove a similarity in use, and the weight of the testimony establishes a similarity in texture and quality as well. Nor does the circumstance that the goods with some wool in them are of a better grade and command a higher price prevent the application of the similitude paragraph.

The decision is affirmed.

#### On Rehearing.

PER CURIAM. This application is made upon the theory that the court "inadvertently overlooked" the decision in *Herrman v. Arthur*, 127 U. S. 363, 8 Sup. Ct. 1090, 32 L. Ed. 186, and is confined to a discussion of the bearing of that decision. Such decision was mainly relied upon on the oral argument and was the prominent authority cited in appellants' brief; copious excerpts from it being printed therein. The brief on this motion is a mere reproduction of the earlier brief. The authority referred to was not over-

looked—indeed, it could not have been overlooked, unless the court had wholly failed to listen to the oral argument and to read the briefs. If counsel would charitably assume that these are not left undone when a cause is heard on appeal, possibly there might not be so many petitions for rehearing to consider.

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CHESAPEAKE & O. RY. CO. v. DANDRIDGE.

(Circuit Court of Appeals, Fourth Circuit. June 9, 1909.)

No. 759.

1. RAILROADS (§ 344\*)—CROSSING ACCIDENTS—DECLARATION—NEGLIGENCE.

A declaration for injuries at a railroad crossing, charging that defendant negligently, by and through its agents and employés, operated and managed one of its locomotive engines, so that it ran into a vehicle driven by plaintiff at a crossing, etc., causing the injury complained of, was not demurrable under the West Virginia practice for failure to particularize in what the negligence consisted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1107; Dec. Dig. § 344.\*]

2. APPEAL AND ERROR (§ 1078\*)—ASSIGNMENTS OF ERROR—REVIEW—WAIVER.

An assignment of error, abandoned in argument, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

3. RAILROADS (§ 347\*)—CROSSING—ACCIDENT—ABSENCE OF SAFEGUARDS—EVIDENCE.

In an action for injuries at a railroad crossing, evidence of the absence of a gateman or electric bells at the crossing was not objectionable, because neither were required by statute, since ordinary prudence might have required them in the absence of statutory requirement.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1131; Dec. Dig. § 347.\*]

Duty to give warning signals at crossing, see note to Chesapeake & O. Ry. Co. v. Steele, 29 C. C. A. 90.]

4. APPEAL AND ERROR (§ 215\*)—OBJECTIONS NOT MADE AT TRIAL.

Objections to the court's charge cannot be first made on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1309; Dec. Dig. § 215;\* Trial, Cent. Dig. §§ 683-685.]

5. APPEAL AND ERROR (§ 977\*)—DISCRETION—NEW TRIAL—VACATION—VERDICT.

A refusal to set aside a jury's verdict and grant a new trial is discretionary, and not reviewable on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3864; Dec. Dig. § 977.\*]

In Error to the Circuit Court of the United States for the Southern District of West Virginia, at Huntington.

F. B. Enslow, for plaintiff in error.

Edmund R. French (James M. Ellis, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

PER CURIAM. This suit was instituted in the Circuit Court of Fayette county, W. Va., for the recovery of damages alleged to have been sustained by the plaintiff while passing with his team and loaded wagon upon the tracks of the defendant company at a crossing over a public highway. The case was, by proper proceedings, removed to the federal court and after the overruling of a demurrer to the declaration interposed by the defendant company, tried upon its merits, resulting in a verdict and judgment in favor of the plaintiff for \$500, from which judgment this writ of error was sued out.

The assignments of error relate to the rulings of the court passing upon the demurrer, the admission and rejection of testimony during the trial, the court's charge to the jury as to the law of the case, its failure to instruct a verdict for the defendant, and in not setting aside the verdict of the jury and granting a new trial as prayed for by the defendant company.

The objection to the declaration is that it failed to set forth the plaintiff's case with sufficient particularity to enable the defendant to meet the same, the averment being in effect that at a point about 300 yards from Thurmond station, where the tracks of the defendant company cross a public highway extensively traveled by the people of the county and the public generally, on the day and year aforesaid—

"the defendant so negligently and carelessly, by and through its agents and employes, operated and managed one of its locomotive engines, then and there being, that same, because thereof, ran into and against a vehicle owned and being at the time driven by the plaintiff upon and over said public road, at the point where the defendant's road crosses same as aforesaid, and thereby and because of said negligence of defendant as aforesaid, a collision occurred between said locomotive engine and said vehicle plaintiff was so driving as aforesaid, and the plaintiff was because thereof thrown from such vehicle to and upon the ground with such force and violence, and the team plaintiff was driving to said vehicle was knocked down by such collision and cut, bruised, and otherwise generally injured, and said vehicle he was riding upon was severely wrenched and broken, all in consequence of said careless and negligent act of the agents and employes of the defendant as aforesaid which culminated in said collision."

Perhaps it would have been better pleading, and at least fairer to the defendant, to have stated more specifically in what the negligence complained of consisted. Still it cannot be said that the declaration under the West Virginia practice, by which the same should be tested in a law case removed from a court of that state to the federal court, is not sufficient. *J. W. Bishop Co. v. Shelhorse*, 141 Fed. 643-646, 72 C. C. A. 337.

The declaration, charging that the defendant negligently and carelessly, by and through its agents and employes, operated and managed one of its locomotive engines that the same ran into a vehicle driven by the plaintiff on one of the state's highways at a place crossed by the defendant railway company, causing the injury complained of, was not, because of the failure to go more into detail in showing the particulars of the negligence in a removed case as aforesaid, subject to demurrer, and the same was properly overruled. *Snyder v. Wheeling Elec. Co.*, 43 W. Va., 661, 662, 28 S. E. 733,

39 L. R. A. 499, 64 Am. St. Rep. 922; Hogg's Pleading & Forms, §§ 139, 140, 141.

The second, third, and fourth assignments of error relate to the court's admission and rejection of testimony pending in the trial. The fourth assignment was abandoned in argument, and the third and second may be said to be without merit. In the ruling complained of by the second assignment, the trial court did not hold that the defendant, under the circumstances mentioned, might not have made the inquiry as to whether the plaintiff was not unconscious as the result of the injury sustained, but that the defendant's counsel could not ask the question, implying that he had admitted the existence of such condition, when he had not in fact done so.

The third assignment presents the question of error in the trial court's allowing plaintiff to testify to the absence of a gateman or electric bells at the crossing, because neither were required by statute. Manifestly the nonexistence of such a statute did not forbid the asking of the question and the answer to the same, as common prudence on the part of the company might have required such safeguards in the absence of statutory regulations. *Grand Trunk Ry. v. Ives*, 144 U. S. 419, 420, 421, 12 Sup. Ct. 679, 36 L. Ed. 485.

The remaining assignments of error should all be overruled—the one as to failure to take the case from the jury and instruct a verdict for the defendant, because no such motion was submitted to the court, and, if made, it should have been overruled and not granted upon the state of the testimony before the court; those pertaining to the court's charge to the jury, if for no other reason, because the same was not objected to during the trial, and exceptions thereto cannot, for the first time, be made in this court; and the assignments as to the failure to set aside the jury's verdict and grant a new trial, because the court's action was of a discretionary character and not a subject for review by this court on a writ of error. *Southwestern Virginia Imp. Co. v. Frari*, 58 Fed. 171, 7 C. C. A. 149, Goff, J.; *Edge Moor Bridge Works v. Fields*, 58 Fed. 173, 7 C. C. A. 152, Fuller, J.; *Graves v. Sanders*, 125 Fed. 690, 60 C. C. A. 422.

The decision of the lower court is in all respects free from error, and the same will be affirmed, with costs to the appellee.

Affirmed.

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ALLEN v. KNOTT.

(Circuit Court of Appeals, Eighth Circuit. May 15, 1909.)

No. 2,908.

1. TRIAL (§ 418\*)—DEMURRER TO EVIDENCE—WAIVER.

An exception to the ruling of the court denying defendant's motion for judgment at the close of plaintiff's case is waived by the introduction of evidence by defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 981; Dec. Dig. § 418.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**2. APPEAL AND ERROR (§ 849\*)—REVIEW—ACTION TRIED WITHOUT JURY.**

Where a jury is waived in an action at law in a federal court, and the cause submitted to the court, without any motion for judgment at the close of the evidence, and the court makes a general finding only, and no exceptions are taken to any rulings made during the progress of the trial, no question of law is presented by the record for the consideration of the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3363-3365; Dec. Dig. § 849.\*]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Jesse W. Barrett, Sp. Asst. U. S. Atty., for plaintiff in error.

Walter N. Davis, for defendant in error.

Before SANBORN, VAN DEVANTER, and ADAMS, Circuit Judges.

PER CURIAM. This action, to recover the amount of a tax and accrued penalty paid by a manufacturer of oleomargarine under protest, from the collector of internal revenue, was submitted for final judgment to the trial court, a jury having been duly waived, upon proof taken by both sides on the issues joined. At the close of plaintiff's case the collector moved for judgment in his favor and saved an exception to an adverse ruling on that motion. He then introduced evidence in his own favor. By doing so he waived the exception taken to the action of the court in denying his motion for a judgment. *Barnard v. Randle*, 49 C. C. A. 177, 110 Fed. 906. He closed his case without again moving for judgment in his favor, and submitted the same to the court for a general finding according to the preponderance of proof, and such finding only was made. No exceptions were preserved to any rulings of the court made during the progress of the trial. On such a record no question of law is presented for our consideration. *Keeley v. Ophir Hill Consolidated Mining Co.* (C. C. A.) 169 Fed. 601, and cases cited.

The judgment of the Circuit Court is accordingly affirmed.

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UNITED STATES v. ACKER, MERRALL & CONDIT CO. et al.

(Circuit Court of Appeals, Second Circuit. July 8, 1909.)

No. 244 (5,068).

**CUSTOMS DUTIES (§ 43\*)—CLASSIFICATION—PICKLED WALNUTS—SIMILITUDE—"PICKLES."**

The provision for "pickles" in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), covers only vegetables. Pickled walnuts are therefore excluded therefrom, and are classifiable as unenumerated manufactures under section 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 147; Dec. Dig. § 43.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Circuit Court reversed a decision by the Board of United States General Appraisers (G. A. 6,663; T. D. 28,423), which had affirmed the assessment of duty by the collector of customs at the port of New York. The opinion below reads as follows:

PLATT, District Judge (orally). The merchandise in question consists of pickled walnuts. It was assessed for duty at 40 per cent. ad valorem as "pickles," under paragraph 241 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649]). The importers claim in their protest that it is dutiable as unshelled walnuts at three cents per pound, under paragraph 270, or, alternatively, as an unenumerated manufactured article, under section 6 of said act. The Board of General Appraisers sustained the collector's classification, and from that decision the importers have appealed to this court.

Upon the argument importers' counsel abandoned his claim under paragraph 270, and now relies upon the provision in section 6. An examination of the record does not show that the statement or finding of the Board that this "commodity is the walnut, plucked green, before the shell of the nut has formed," etc., is supported by any testimony. In order to be dutiable under the provisions of paragraph 241, the article to be assessed must be a vegetable. In *re Johnson* (C. C.) 56 Fed. 822. In no sense can this walnut be regarded as a vegetable. The merchandise is therefore dutiable at 20 per cent. ad valorem under said section 6.

Decision of the Board reversed.

D. Frank Lloyd, Asst. U. S. Atty.

B. A. Levett, for importers.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decision affirmed, on the opinion of Platt, District Judge.

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#### KIMPTON v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

No. 256 (5,239).

CUSTOMS DUTIES (§ 47\*)—DUTIABLE VALUE—"COVERINGS"—STONE BOTTLES.

The value of stone bottles filled with ad valorem goods (ink) should not be added to the dutiable value of their contents, to make up the dutiable value of the imported merchandise, under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 (U. S. Comp. St. 1901, p. 1924); such bottles not being "coverings," within the meaning of the act.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 20; Dec. Dig. § 47.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal from a decision of the Circuit Court, which affirmed the Board of General Appraisers in sustaining the action of the collector. For decision below, see 165 Fed. 236.

Walden & Webster (W. Wickham Smith, of counsel), for importer.

Henry A. Wise, U. S. Atty. (J. Osgood Nichols, of counsel), for the United States.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. The appellant imported ink in stone bottles. The collector added the value of the bottles to the value of the ink, and assessed an ad valorem duty of 25 per cent. upon the aggregate value under paragraph 26 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 153 [U. S. Comp. St. 1901, p. 1628]); his action in this regard being founded upon section 19 of the customs administrative act (Act June 10, 1890, c. 407, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924]). This section provides in substance that, whenever imported merchandise is subjected to an ad valorem duty, the duty shall be assessed upon the actual market value or wholesale price of such merchandise at the time of exportation, "including the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind." The legality of the collector's action turns upon the question whether these stone bottles are "coverings" of the ink contained therein.

In *United States v. Nichols*, 186 U. S. 298, 22 Sup. Ct. 918, 46 L. Ed. 1173, this court certified the following question to the Supreme Court:

"Should the value of the bottles filled with ad valorem goods be added to the dutiable value of their contents, under section 19 of the customs administrative act of 1890, to make up the dutiable value of the imported merchandise?"

The question was answered in the negative, and as the facts are in all essential particulars identical we feel ourselves bound by the decision.

The decision of the Circuit Court is reversed.

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## AUSTIN, NICHOLS & CO. V. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

No. 259 (5,242).

**CUSTOMS DUTIES (§ 47\*)—DUTIABLE VALUE—COVERINGS—"CASES AND SIMILAR COVERINGS."**

Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 (U. S. Comp. St. 1901, p. 1924), providing that the value of "cases \* \* \* and similar coverings" shall be added to the dutiable value of their contents, includes tin cans and stoneware receptacles.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 47.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The decision of the Circuit Court affirmed the Board of General Appraisers in sustaining the action of the collector.

For decision below, see 165 Fed. 236.

Walden & Webster (W. Wickham Smith, of counsel), for importers.

J. Osgood Nichols (Henry A. Wise, U. S. Atty., on the brief), for the United States.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. This appeal was argued contemporaneously with the Kimpton Case, 171 Fed. 78. The only difference between the two cases is that in the Kimpton Case the imported merchandise was ink in stone bottles; here it consists of vegetables in tin cans and fish paste and pâté de foie gras in stoneware receptacles. In other words, the former controversy involved the consideration of liquid in bottles; the latter, of solids in tin cans and terrines. The facts differ sufficiently to warrant us in distinguishing the present controversy from that before the Supreme Court in *United States v. Nicholls*, 186 U. S. 298, 22 Sup. Ct. 918, 46 L. Ed. 1173.

The history of previous tariff legislation, and the difficulties, embarrassments, trickery, and fraud engendered by the chaotic condition of the law on the subject of coverings at the date of the passage of the customs administrative act, lead us to believe that it was the intention of Congress to set at rest the vexed questions by requiring the value of all coverings to be included in the value of ad valorem goods, as provided in section 19 (Act June 10, 1890, c. 407, 30 Stat. 139 [U. S. Comp. St. 1901, p. 1924]). It is unnecessary to add to the able presentation of this subject by General Appraiser Somerville in writing the opinion of the Board.

Even if the doctrine of *ejusdem generis* be applicable, so that the section reads "cartons, cases, crates, boxes, sacks, and similar coverings of any kind," we fail to understand why the coverings here involved may not be included. Webster defines "case" as "a covering, box or sheath; that which incloses or contains." It is not easy to perceive why a tin box containing vegetables, if not actually a case, is not similar to one. So, too, an earthenware receptacle containing meat paste is a case, or, if not, it is a covering similar to a case.

We think the decision of the Circuit Court should be affirmed.

In re MERCER et al.

In re WESTERN IMPLEMENT CO.

(Circuit Court of Appeals, Eighth Circuit. June 14, 1909.)

No. 98.

**BANKRUPTCY (§ 350\*)—DEBTS ENTITLED TO PRIORITY UNDER LAWS OF STATE—“DEBT”—“DEBT OWING TO STATE.”**

Money due to the state of Minnesota for binding twine manufactured by the state in its penitentiary and sold is a “debt,” and a “debt owing to the state,” within the meaning of Rev. Laws Minn. 1905, §§ 4618, 4633, which give priority in distributing the estates of insolvents to “debts owing to the United States and to the state,” and is also entitled to priority of payment from the estate of a bankrupt under Bankr. Act July 1, 1898, c. 541, § 64b (5), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3448), as one owing to a person “who by the laws of the state \* \* \* is entitled to priority.”

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. § 350.\*

For other definitions, see Words and Phrases, vol. 2, pp. 1864–1886, vol. 8, p. 7628.]

Petition to Review an Order of the District Court of the United States for the District of Minnesota.

For opinion below, see In re Western Implement Co., 166 Fed. 576.

M. H. Boutelle and N. H. Chase, for petitioners.

George T. Simpson, Atty. Gen., and George W. Peterson, Asst. Atty. Gen., for the State of Minnesota.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

**PER CURIAM.** The Western Implement Company, when it was adjudged a bankrupt, was indebted to the state of Minnesota for binder twine theretofore manufactured at the state prison and sold and delivered to the company conformably to the state laws, and in due course the state insisted that this debt should be accorded a priority in payment under clause 5 of section 64b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]). The District Court, in a well-considered opinion, reported in 166 Fed., at page 576, sustained the state's contention, and that ruling is now challenged by the trustees of the bankrupt's estate. After carefully considering the matter, we have arrived at the same conclusion as did the District Court, and for the same reasons.

The ruling of that court is accordingly approved and confirmed.

## LONDON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 13, 1909.)

No. 2,915.

**PUBLIC LANDS (§ 21\*)—MAKING FALSE AFFIDAVIT UNDER TIMBER AND STONE ACT—CRIMINAL LIABILITY.**

An indictment will not lie under Rev. St. § 4746, as amended by Act July 7, 1898, c. 578, 30 Stat. 718 (U. S. Comp. St. 1901, p. 3279), for the making of a false affidavit under the provisions of Timber and Stone Act June 3, 1878, c. 151, § 2, 20 Stat. 89, as amended by Act Aug. 4, 1892, c. 375, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1545); and an illegal conviction based on such an indictment cannot be sustained under the general perjury statute (Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653]).

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 21.\*]

In Error to the District Court of the United States for the Western District of Arkansas.

J. E. London, for plaintiff in error.

L. W. Gregg and Ira D. Oglesby, for the United States.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

PER CURIAM. Since the judgment of conviction was rendered in this action the Supreme Court of the United States in the case of United States v. F. W. Keitel et al., 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. —, has decided that an indictment will not lie under section 4746, Revised Statutes of the United States, as amended by Act July 7, 1898, c. 578, 30 Stat. 718 (U. S. Comp. St. 1901, p. 3279), for the false making of an affidavit under the provisions of section 2 of the act of Congress of June 3, 1878 (20 Stat. 89, c. 151), entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada and Washington Territory," and extended to all the public land states by Act Aug. 4, 1892, c. 375, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1545).

As the plaintiff in error was convicted under section 4746, Revised Statutes of the United States, for the false making of an affidavit under section 2 of the act of June 3, 1878, it necessarily follows that on the authority of the case above cited the judgment of the court below must be reversed, unless the conviction can be sustained under section 5392, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3653), being the general perjury statute. A careful consideration of the record leads us to the conclusion that neither the law nor a due regard for the orderly administration of justice will permit the illegal conviction of the plaintiff in error under section 4746 to be sustained by endeavoring to bring the indictment and proof under another section of the Revised Statutes which might have been applicable had the United States chosen to charge the plaintiff in error thereunder. False swearing under section 2 of the act of June 3, 1878,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

subjects the offender to all the pains and penalties of perjury, and it is quite probable that the plaintiff in error in a prosecution for perjury would be entitled to instructions by the trial court that he would not be entitled to under section 4746, above mentioned.

The judgment of the District Court is reversed, and the case remanded, with directions to quash the indictment.

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ELECTRIC CONTROLLER & SUPPLY CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. June 24, 1909.)

No. 1,876.

1. PATENTS (§ 35\*)—INVENTION—EVIDENCE—SUCCESS OF DEVICE.

The fact that a patented device overcame defects in prior structures which persons skilled in the art had for several years been trying unsuccessfully to remedy, and went into immediate and successful commercial use, is persuasive evidence of invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.\*]

2. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—ELECTRICAL CONTROLLER.

The Lange & Lamme patent No. 518,693, for an electrical controller, was not anticipated, and discloses invention. Also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Wm. L. Pierce, for appellant.

L. F. H. Betts, for appellee.

Before LURTON and WARRINGTON, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge. This is a suit for the alleged infringement of claims 13 and 14 of United States patent No. 518,693, dated April 24, 1894, issued to the appellee as assignee of Lange & Lamme, upon a "controlling switch for electric railways," usually called in the record a "controller." The defenses argued here are anticipation and lack of patentable invention.

By the decree of the Circuit Court the claims in question were held valid and infringed. The office of an electric railway controller, broadly speaking, is to govern the amount of current flowing through the motors, and thereby to regulate the speed of the latter, and thus the speed of the car. The amount of current supplied to the motors is governed by the number of the motors used from time to time and their relation to each other and the extent to which (if at all) artificial

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

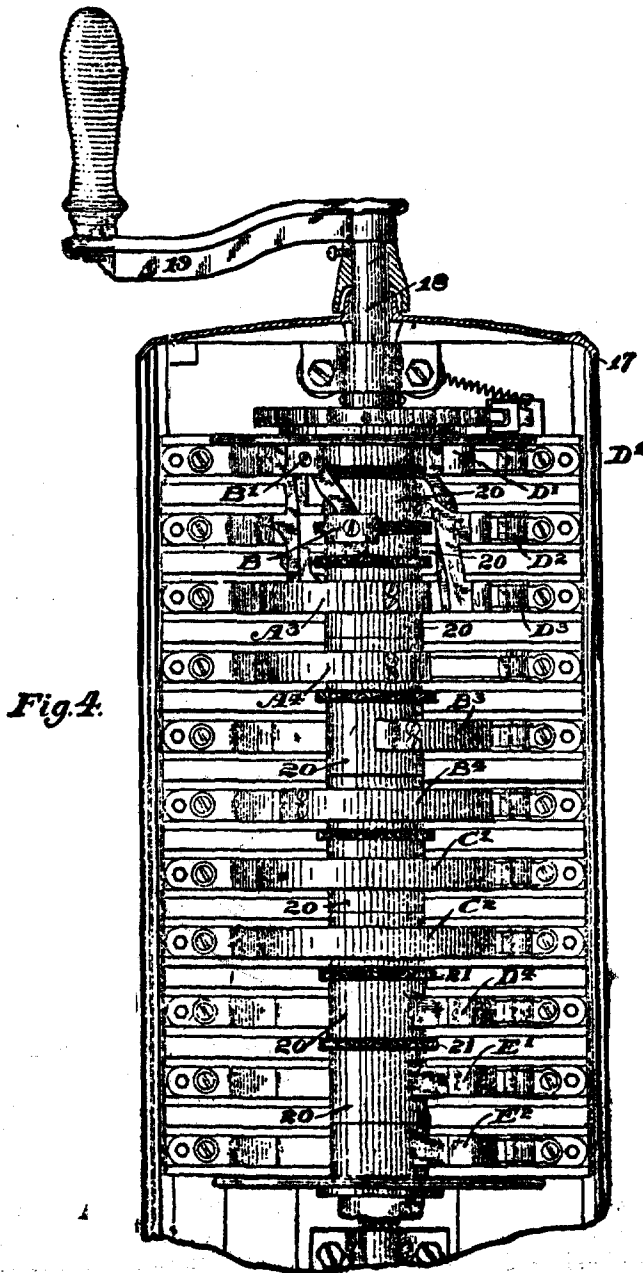
resistance is used; and these elements are specifically regulated by a series of switches composed of a number of contact strips upon the rotatable axis or drum of the controller, adapted to engage with a corresponding number of contact buttons, usually on the casing of the controller—the contact or noncontact between these strips and buttons, as the controller axle is rotated, opening or closing the switches. The patent in question embraces two inventions; the first relating to the method of controlling or regulating the motors, the second to the construction of the controller.

The contest here relates only to the construction of the controller. A consideration of the prior art, so far as it pertains to controller construction, is necessary to a determination of the validity of the claims in question. The commercial use of electric railway controllers in the United States dates from the year 1887, although experiments in that direction had been carried on for some time before. The controller drums first used were of solid wood. To this wooden drum were attached copper segments for contact with corresponding buttons in opening or closing the switch as the rotating handle of the drum was turned in one direction or the other, the copper segments being attached to the drum by screws and connected by wires imbedded in the wood and leading to the circuit of the motor. This construction was always attended with practical difficulties and was never satisfactory. The heavy arcking of the current, as the contact strips and buttons separated, resulted in burning the copper conducting segments, carbonizing the wood of the drum (thus making it an electrical conductor), causing short-circuiting and consequent injury to, and the eventual destruction of, the drum, and sometimes of the entire controller. These injuries necessitated frequent repairs and replacements. From 1887 until the time of the Lange & Lamme invention, various changes, devices, and experiments were resorted to by those concerned in electric railway invention and operation for correcting the arcking. Among such changes and devices were the substitution of fiber for wood in drum construction, and attempts to use a porcelain molded drum. Experiments were also made by way of inserting sections of mica or porcelain at the terminals of the contact segments. None of these changes and experiments overcame the evil referred to. The vulcanized fiber not only absorbed moisture to such an extent as to interfere with the maintaining of the contact segments in position, but also carbonized nearly, if not quite, as badly as wood. The porcelain cylinder, while giving less trouble than fiber or wood, still permitted heavy and injurious arcking at the contacts. The porcelain was, moreover, expensive; and serious difficulty was found in adequately securing the contact segments thereto. The mica segments were found to quickly wear out from friction, and were abandoned. The porcelain segments were unsatisfactory because of the difficulty in securing them in position. Until Lange & Lamme's invention, the wooden drum was standard construction.

The first named among the stated objects of the Lange & Lamme invention is "the production of a controller having provision for a



diminution of arcs when the same is operated." Fig. 4 of the patent, which is reproduced below, sufficiently shows the method of construction of the controller in suit.



In this construction, the shaft, 18, is journaled to the controller casing at its top and bottom. The drum is built up by mounting upon this shaft a series of metal sleeves, 20, which are conductors, each sleeve carrying integrally therewith and radiating therefrom a curved conducting strip concentric with the sleeve, the latter being insulated from the axle (in practice by an insulating composition by which the sleeve becomes rigidly attached to the axle), and the sleeves being insulated from each other by thin insulating strips, 21. The specifications, in commenting upon the drum construction, use this language:

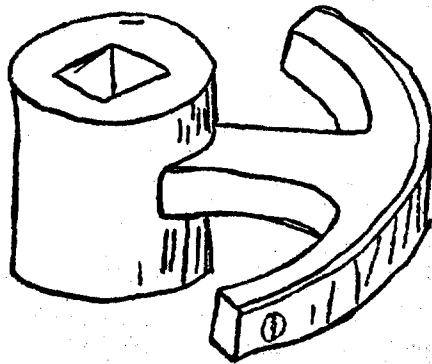
"Upon this axle (referring to shaft, 18) are mounted sleeves, 20, carrying offsets as shown, curved to a cylindrical surface as shown, and acting as strips, as indicated by lettering agreeing with Fig. 1. This construction is preferred to a solid drum, as it is lighter, but of course a drum carrying peripheral strips would be within our invention, and we will in our claims use the term 'drum' as including the construction shown in Fig. 4. The various strip systems are insulated from each other by insulating washers, 21."

The claims which are the subject of this suit are in this language:

(13) "In a controller for electric cars, a rotatable axle, a series of conducting sleeves carried thereby, said sleeves being insulated from each other and from the axle, and a curved conducting strip carried by each sleeve, in combination with a row of switch buttons, adapted to cooperate with said strips, substantially as described."

(14) "In a controller for electric cars, a rotatable axle, a series of sleeves carried thereon, and curved projecting strips carried thereby, in combination with a row of switch buttons, adapted to cooperate with said strips, substantially as described."

The following is a rough sketch of one of the sleeves, with its radiating conducting strip:



The strips at the contact points are insulated from the drum and from each other by air, and, the metal sleeve being conducted and insulated, the drum is not exposed to serious injury from arcking. This construction is not inaptly characterized by appellee as a "metal sleeve skeletonized drum." It came into immediate and successful use, and soon almost entirely superseded the prior construction referred to. Since 1896 appellee and its licensee, the General Electric Company, have constructed and sold about 150,000 controllers of the Lange & Lamme construction; applying them not only to electric railways, but to various

kinds of electrical devices. The Lange & Lamme controller is convenient in construction, being easily assembled and permitting ready replacement of parts if required, and is much lighter and is less expensive than the wooden and other forms of drum construction formerly used.

The history we have given of the development of the art of electric railway drum construction, the unsuccessful experiments made during several years before the Lange & Lamme invention to remedy the serious defects and difficulties connected with the then existing construction on the part of those not only skilled in the electric art, but under the sharp spur of commercial competition, the success and usefulness of the device in question and its speedy general adoption, furnish persuasive evidence that the discovery of the Lange & Lamme idea involved actual invention, and was not the result merely of mechanical skill. Among the many cases which have recognized and applied the principle involved in the proposition just stated, the following may be cited: *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 143, 14 Sup. Ct. 295, 38 L. Ed. 103; *Potts v. Creager*, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275; *Hobbs v. Beach*, 180 U. S. 383, 392, 21 Sup. Ct. 409, 45 L. Ed. 586; *Star Brass Works v. General Elec. Co.*, 111 Fed. 398, 49 C. C. A. 409; *Kalamazoo Ry. Supply Co. v. Duff Mfg. Co.*, 113 Fed. 264, 51 C. C. A. 231; *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 886, 53 C. C. A. 36.

It is clear that the Lange & Lamme device involved patentable invention, unless it shall be found to have been anticipated by one or more of the patented devices presented by defendant.

The patent first urged as anticipatory of the patent in suit is United States patent No. 503,279 to Davis, on a "controlling switch for electrically propelled vehicles." The application for this patent was filed January 7, 1893. The patent is dated August 15, 1893. The Lange & Lamme patent in suit was applied for February 25, 1893. The date of the filing of the Davis application (as well, in fact, as the date of the patent) thus antedate the corresponding dates of the Lange & Lamme patent. If, therefore, the two applications disclose substantially the same subject-matter, in the absence of any other evidence of the date of invention, the date of the first application would *prima facie* be taken as the date of the first invention. *Drewsen v. Hartje Paper Mfg. Co.*, 131 Fed. 734, 739, 65 C. C. A. 548. The prominent element of Davis' invention and patent is the reversing switch. Neither of the patent claims embraces conducting sleeves (whether insulated or not) carried by the axle, or curved conducting strips carried by the sleeves. The skeletonized metal sleeve construction is thus entirely lacking, so far as the patent claims are concerned. Nor is such construction shown by the specifications, except as Fig. 4, which is characterized as "a vertical section" of "my controlling switch," discloses what appears to be the skeletonized metal sleeve construction of the Lange & Lamme patent. The only other reference to Fig. 4 which can be thought at all relevant to the claimed anticipation is this: Speaking of the method of manipulating two electric motors, the inventor says:

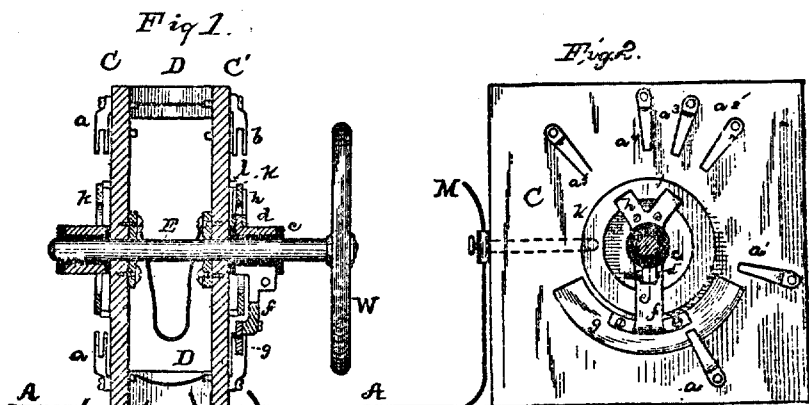
"These circuits have been hitherto employed in connection with a controlling cylinder similar to that shown in part in Fig. 4, and with a reversing

switch situated under the car and operated, by gears more or less complicated, from the point of control."

The testimony of the inventor Davis negatives whatever presumption is afforded by Fig. 4 and by the specifications of an anticipatory invention of the features of construction in question. He testifies unequivocally that he is not, and does not claim to be, the originator or designer of the form of construction shown in Fig. 4 of his patent. His explanation of the use of this Fig. 4 is that he was employed by the Westinghouse Company at the time of his invention and that of Lange & Lamme, and that the latter were at that time doing the designing of all of the Westinghouse Company's controllers. He identifies the working drawings of the Lange & Lamme drum construction as made July 21, 1892, and October 20, 1892, and thus several months before the Davis application was filed; and he testifies that he knows from contact with both Lange & Lamme that they were at that time working together on the controllers in question, and it was thus his "understanding" that the latter jointly invented it. He testifies that the reversing switch, "which is my invention, was applied to a controller previously designed having this drum type of construction embodied in it, and in making up the drawings for the patent specifications a part of this controller drum was shown, to show the combination of this reversing switch and the controller drum"; and that he merely intended to illustrate in Fig. 4 the form of drum construction for the speed switch, which was not his invention, but the invention of others, as an example of the form of speed drum controllers. He also testifies that the Lange & Lamme construction had been embodied by the Westinghouse Company in commercial forms of controllers prior to the invention of patent No. 503,279. The charge contained in the answer of a surreptitious patenting by Lange & Lamme of a patent invented by Davis is thus rebutted; and while Davis' "understanding" may not have been competent evidence, standing by itself, that Lange & Lamme were the first inventors of the skeletonized metal drum construction, his testimony, especially in view of the lack of description in the patent specifications, to the effect that he was not the inventor of the device in question, and that it had been invented by others previous to his application, is clearly competent evidence to rebut whatever presumption of anticipation might be afforded by the unexplained representation of the drum construction in question in a figure illustrating the inventor's switch. The Davis patent may thus be disregarded.

The patent next presented as anticipating the Lange & Lamme invention is United States patent No. 309,167, issued December 2, 1884, to Frank J. Sprague upon an "adjustable resistance for electrical circuits." The object of the invention is declared to be "to provide an adjustable resistance of compact and convenient form." This object is accomplished by the use of two parallel wooden switch boards separated a short distance from each other, and connected by a shaft passing through both boards, each board carrying a series of contact plates attached directly thereto, a series of resistance coils being connected between these plates and with the circuit to be resisted, so that, by a circuit-controlling contact arm (carried by the shaft) upon each switch board, variations of resistance may be produced through differ-

ent combinations of the resistance coils. Figs. 1 and 2 of the patent, which are reproduced below, represent a side and front elevation respectively of the switch board—the resistance coils below the boards being here omitted from the figures accompanying the patent.

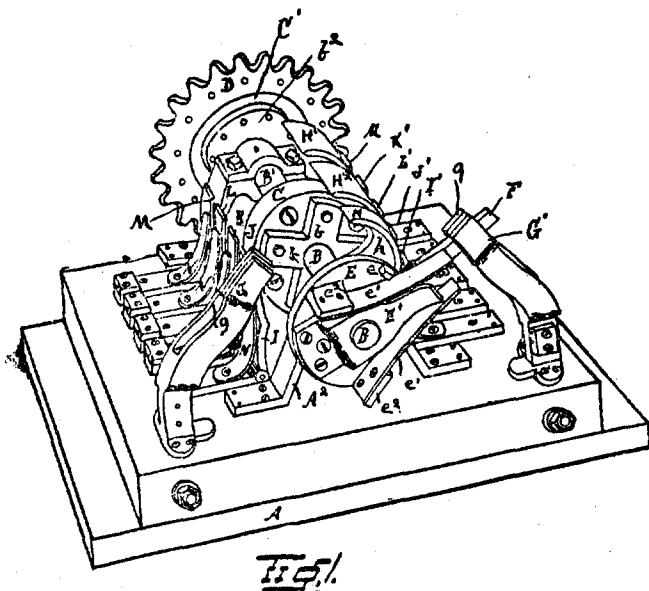


This Sprague device is set up as a “complete prototype of Lange & Lamme”; and it is urged that each element of the claims of the Lange & Lamme patent in suit can be read upon the Sprague invention. It is only in a narrow and limited way that this statement is even plausibly correct. There is no series of conducting sleeves carried by the axle, except that, as respects each of the two switch boards, there is one sleeve carried by the axle. There is no series of curved projecting strips, except as there is one strip which might be so characterized on each of the wooden switch boards. The invention, as described in the Sprague patent is neither in letter nor in spirit the device described in the Lange & Lamme patent. The former has in no sense the skeletonized metal sleeve construction of the latter. On the other hand, it has all the defects of the old wooden drum construction, including the exposure of a wooden switch board to electric arcking, a feature which the Lange & Lamme invention was expressly designed to overcome. The patent claims contain no suggestion of the Lange & Lamme claims in suit, nor do the specifications or the claims suggest the object of overcoming or diminishing electric arcs. The sole object of the invention is stated to be “to provide an adjustable resistance of compact and convenient form, in which there shall be very little metal not in use at any time, variations of resistance being produced by the different combinations into which a small number of coils are thrown by the movement of the adjusting device.”

There may be some remote analogy between the use to which Sprague put his resistance switch and the use to which Lange & Lamme put their current controller; but unless the uses are so analogous that the application of the old device to the use of the new would occur to a person of ordinary mechanical skill, inventive faculty may be involved in such new application. *Potts v. Creager, supra.* If

there were otherwise any doubt that the disclosure of the Sprague invention would not naturally suggest the Lange & Lamme invention, such doubt would seem to be removed by the fact that when Sprague himself, the electrical inventor and railway expert, three years after the obtaining of his patent (and six years before the Lange & Lamme patent), was confronted with the problem of a suitable and practical railway controller, he disregarded his own resistance device, and used the wooden drum construction before referred to.

United States patent No. 510,596 to Germann, dated December 12, 1893, is also relied upon as an anticipation. This patent is upon a reversing switch for electric motors. The application was filed April 19, 1893, which is subsequent to the application for the Lange & Lamme patent. An attempt is made to carry the invention and public use of the Germann device back of Lange & Lamme's application. The Circuit Court was not satisfied that this alleged priority of invention and use had been proven with the requisite certainty. The testimony on this subject is somewhat confused. In the view we take of the patent, we do not find it necessary to decide the question of fact referred to. A prospective view of the Germann switch is given below.



The so-called drum is constructed of two separate shafts, marked B and B', between which is an insulating disk marked C. Each of these shafts carries an arm supporting a contact plate; also an arm at the inner end of the shaft for connecting to the insulating disk. The outer end of the shaft on one side carries the main contact in the arm of a key, F, engaging clutches, G and G', respectively, as the reverser is set and the current made to flow in one direction or the other. In our opinion, the Germann reverser does not anticipate the Lange & Lamme

invention. It is obvious that the idea of a conducting metal sleeve drum is entirely absent. Germann's device employed a solid shaft (carrying but one strip), which shaft was itself a conductor. Had his switch contacts been carried by an insulated sleeve, his device as constructed would not have been operative. It is not, to our minds, an answer to this proposition to suggest that, had Germann been compelled to provide for a larger number of contact strips, he would or could have adopted a sleeve construction upon an insulated shaft; and that Lange & Lamme were forced to the sleeve construction because they had a large number of contact strips which it would be difficult to embody in one or two pieces. Laying speculation aside, the fact remains that Germann did not adopt the metal conducting sleeve device, and that Lange & Lamme did. While it is not necessarily invention to construct a shaft in one piece instead of two, or to use a sleeve construction instead of a solid shaft construction, where the function of the device is not changed (*Standard Caster & Wheel Co. v. Caster Socket Co.*, 113 Fed. 162, 51 C. C. A. 109), as between Germann's and Lange & Lamme's inventions the functional difference is plain. While both devices are in a broad sense switches, the function of Germann's reverser is merely to change the direction of the current flowing through the motor, so as to govern the direction of its revolution. The function of Lange & Lamme's controller, on the other hand, is to manipulate a number of contacts, each carrying a live current, so as to increase or retard the speed of the motors. It is, to our minds, clear that Germann's reverser would not have suggested to a skilled mechanic the idea of the Lange & Lamme controller.

The Warner patent, No. 505,686, September 28, 1893, is not, in our opinion, an anticipation; nor does it suggest the principle of the Lange & Lamme invention. The patent is upon controller rollers for electric cars. For the purpose of obviating electric arcking between adjacent conducting strips, the inventor employed a series of slate disks placed alternately, large and small, upon the shafts, the contact strips being attached to the peripheries of the large disks. The design was that the air space thus formed between the disks carrying the contact strips would operate to prevent destructive sparking. The disks are not only sleeveless, but are nonconducting. The fundamental principle of the Lange & Lamme invention is entirely lacking.

The Beardslee patent, No. 264,230, dated September 12, 1882, remains to be considered. This patent is upon a commutator for dynamo-electric machines. Beardslee's commutator wheel is built up by so assembling four segments, each attached to an annular disk provided with an insulated bushing, as that when the disks are fitted side by side on the sleeve on which the commutator wheels are mounted, with their intervening insulated washers, the disks will be within the segments, and the peripheries of the segments will be in line with each other so as to form a complete and compact wheel against which the commutator brushes bear. There is in this construction no anticipation of the Lange & Lamme invention. While it is true that each segment of Beardslee's commutator wheel before assembling bears a resemblance to the Lange & Lamme sleeve, yet not only is the latter's patent not for a sleeve (but for a series of sleeves), but the complete

structure of Lange & Lamme differs radically from that of Beardslee not only in form but in function. The former is open—with widely separated parts; the latter, when the parts are assembled, forms “a complete and compact wheel,” as it must be to fulfill its function. The former regulates the supply of current to the motor; the latter shifts the magnetic line of attraction. The object sought to be accomplished by the Lange & Lamme construction does not pertain to Beardslee’s device. Devices in nonanalogous arts have no direct bearing upon questions of anticipation. *Star Brass Works v. General Elec. Co.*, 111 Fed. 398, 49 C. C. A. 409. The fact that, for eleven years following Beardslee’s commutator wheel patent, it does not seem to have occurred to any of those actively engaged in experiments to prevent destructive arcking in electric railway controllers to apply to the solution of the problem the segmented and insulated commutator wheel construction, is convincing evidence that the commutator art and the controller art are not so analogous as to preclude invention in the adoption by Lange & Lamme of their sleeve construction for the purpose of preventing electric arcking in controller drums. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586.

The objection that the claims are void for lack of sufficient description and disclosure is not, in our opinion, well taken. The specifications disclose “mounted sleeves, 20, carrying offsets as shown, curved to a cylindrical surface as shown, and acting as strips, as indicated by lettering agreeing with Fig. 1.” They expressly state that “the various strip systems are insulated from each other by insulating washers, 21.” Claim 13 expressly states that the sleeves carried by the axle are “conducting,” and that they are insulated not only from each other but “from the axle.” It is true that claim 14 is less specific than claim 13, in that it omits the statement that the sleeves are conducting and that they are insulated from each other and from the axle. But not only is the feature of insulation of the sleeves from each other covered by the express language of the specifications, but we think that insulation, in some form, of the sleeves from the axle, and thus their conducting nature, is necessarily implied by the specification that the sleeves be insulated from each other, as such insulation would be useless if the sleeves were not insulated from the axle, and the latter remained a conductor. We therefore construe claim 14 as requiring that the sleeves be conducting, and that they be insulated from the axle as well as from each other. Whether, as suggested by appellee, an insulation of the sleeves from the axle by means of air alone would satisfy the requirements of claim 14, we need not consider, as such a case is not presented.

That the defendant’s structure does infringe complainant’s patent is clear. Indeed, we understand it to be conceded that the lower part of defendant’s structure, which its counsel styles “a reverse,” does infringe the Lange & Lamme patent if valid; it being contended, however, that the upper part, styled a “flying helix,” does not infringe. With this latter question we are not concerned. The structure in question is a unit, and contains an infringing device.

The decree of the Circuit Court will be affirmed.



## E. H. ANGLE REGULATING APPLIANCE CO. et al. v. ADERER.

(Circuit Court, S. D. New York. June 23, 1909.)

## 1. PATENTS (§ 165\*)—INFRINGEMENT—FEATURES DISCLOSED, BUT NOT CLAIMED.

A patentee is entitled to the benefit accruing from a characteristic of his device which is clearly disclosed, although not specifically claimed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.\*]

## 2. PATENTS (§ 328\*)—INFRINGEMENT—TOOTH-REGULATING DEVICE.

The Angle patent, No. 626,476 for a tooth-regulating device, was not anticipated, and is valid; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

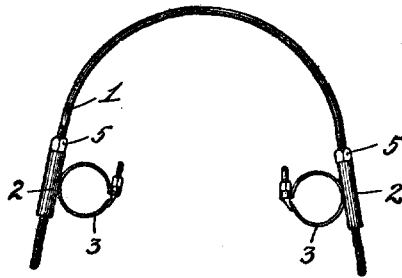
In Equity. On final hearing.

Joseph C. Fraley and Henry N. Paul, for complainants.

Emilius W. Scherr, Jr., for defendant.

HOUGH, District Judge. Complainants are respectively the owners of and the sole licensees under patent 626,476, issued to Dr. Angle for a "tooth-regulating device." The patentee is admittedly well known to be skilled in the art or science of dentistry, and particularly in that department thereof which seeks to correct by mechanical devices teeth badly placed in the human jaw. This branch of dental science has been termed in argument "orthodontia." When Dr. Angle applied for his patent there were known to the art devices sufficiently represented by Figures 1 and 2 below reproduced.

*Fig. 1.*



*Fig. 2.*

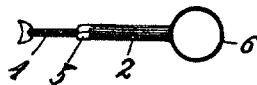
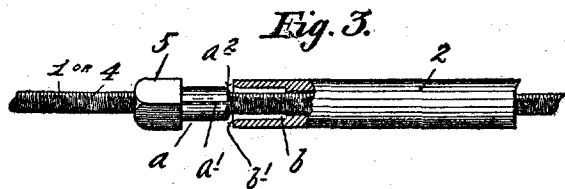


Fig. 1 represents an "artificial arch," fastened outside of the teeth of either jaw by applying rings, 3, to molar teeth on the right and left sides of the mouth, respectively, and adjusting the arch near to and outside the intervening teeth. Obviously this arch, being composed of metal possessing resilience, is under some tension, and this tension

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

may be increased or diminished, and generally regulated, by the nuts, 5, which, operating upon the screw thread on which they turn, may be used to advance or retract the metal arch as may be desired, and thereby to apply power to any tooth or teeth appropriately fastened to the arch itself by easily conceivable bands or "ligations." Fig. 2 represents a means of applying power to a single tooth, by fastening as before a ring, 6, to a molar, and adjusting the "fish-tail" end against the tooth intended to be moved, and then regulating that power as before by the operation of the nut, 5, upon the screw thread.

The patentee observed that, not only did the misplaced teeth move (as was desired), but the molars used as anchors were not themselves absolutely rigid in the jaw, with the result that the adjusting nuts, 5, would remain where set, as long as a tension or pressure was maintained upon them. Whenever that tension was relieved by tooth movement, the "adjusting nuts were liable to be accidentally moved under the engagement therewith of the tongue or lips of the wearer." It is the intention of the dental operator that the patient wearing one of these devices should return to him from time to time to have the nuts adjusted and to re-establish the proper tension upon the teeth. But it was very desirable not to facilitate a slackening of the entire contrivance by tongue or lip movement upon the nuts in question. Dr. Angle therefore obtained this patent for a device shown by the figure next reproduced.



This drawing exhibits the screw thread of the device first above pictured; a nut, 5, as before, and one of the anchor tubes, 2, whose positions on the screw thread are regulated by the nut, 5. But the two nuts, instead of being of the ordinary form, are provided with the "threadless extension," a, which fits into the recess or counter-bore, b. In operation the extension, a, by insertion into the recess or counter-bore, b, forms what the patentee calls a "friction sleeve" in telescopic and frictional engagement with the counter-bored anchor tube, 2. The application shows two forms of this friction sleeve, one as in the figure last above reproduced, with the sleeve split axially, a', and another form in which it is not split. He points out that when the sleeve is not split it must "be made of a size to afford a close fit with the anchor tube." This unsplit form is not preferred by the patentee, but it was admitted at the argument that it is the form which has passed into commercial use.

It is obvious that this device introduces a difficulty or retardation in the movement of the nut upon the screw thread, which is entirely independent of the screw action. The amount of that difficulty will depend upon the amount of friction existing at any given time in the friction sleeve. This friction will arise either from the spring action of

the friction sleeve when split and pressed into the counter-bore, or it will depend merely upon the close adjustment of parts, as when the sleeve is not split, but operates just as one portion of a telescope does upon the other. The usual form of this device is the arch first above represented. The straight jackscrew appears to be less common. In the arch form it is evident that friction in the friction sleeve is increased by the tension of the arch, so that, though the friction sleeve and the counter-bore may fit quite loosely when the apparatus is not in use, the desired result will be attained when it is in use by the tension of the arch when fitted to the jaw. This result is not set forth and is not claimed in the patent, but the form of apparatus which renders it possible is shown, and means by which the successful result is secured are disclosed; for which reasons it seems to me that the patentee is entitled to whatever benefit or advantage may accrue from this characteristic of his patented device, although not by him specifically set forth in his application. *Van Epps v. United Box Board & Paper Co.*, 143 Fed. 869, 75 C. C. A. 77.

The first claim of this patent is as follows:

"1. In a tooth-regulator having extensible parts, an adjusting-nut working on one and reacting against the other of said parts, which nut has an abrupt shoulder that resists the end thrusts or strains, and is provided with a friction sleeve or section that puts the said nut under a friction or tension against rotation, independently of the end strains on the said nut, substantially as described."

The second (and only other) claim specifically covers the axial split above referred to. It is admitted that the novelty of this invention rests only in the friction sleeve, securing the nut against accidental rotation under slight pressure. As applied to a tooth-regulating appliance, it is not denied that the invention is patentable unless anticipated.

It is matter of common knowledge that this branch of dentistry has recently made great advances, and it appears to me from the testimony herein that such advances are quite largely due to regulating devices such as this. The apparatus sold by defendant differs from that of the complainants solely in this: That whereas complainants' apparatus, as shown by the diagrams above reproduced, have a cylindrical friction sleeve, or one at all events cylindrical before a spring action is produced by compression of the split portions of the sleeve, the defendant's appliance possesses a friction extension of the nut, which is obviously slightly conical, and whose counter-bore is split. Whether the friction sleeve or the counter-bore be split is unimportant. The intent of either splitting is to produce a spring action, and defendant cannot escape infringement (nor has he sought to) by this change alone.

The defense, therefore, rests upon the proposition that defendant's conical sleeve is no more than a part of a "jam nut," that jam nuts were well known before this patent, and therefore the defendant has a right to do what he has done. By the testimony of defendant's expert, the best of his references is the Banovits British patent, No. 9,818, of 1891; and, if anticipation is not found there, defendant has not established it. The Banovits patent is for "improvements in and connected with lock nuts." It does not seem to me profitable to enter into

an elaborate discussion of the revelations of the Banovits specification. It is sufficient to say that what Banovits describes in a large variety of forms is a "lock nut," evidently intended for coarse machinery and operations widely differing from those of dental surgery, which lock nut is provided on one side with a conical projection entering into a conoidal boring, into which, by turning the nut, the aforesaid conical projection can be forced until a clamping action takes place. There is nowhere in Banovits' specification any statement that both projection and recess may be cylindrical, so as to permit of a telescoping action, and free insertion of the projection into the recess until the lug of the nut is reached, and even then permitting the revolution of the nut under frictional engagement only of the cylindrical parts; and this is the essence of Angle's invention.

It is not denied that if the defendant's apparatus really is a jam nut on the Banovits principle, it would not infringe; but it is just as true that it would not perform the function of Angle's apparatus. The nut must be readily turnable on the screw thread at the operator's will; but it must not be turnable within its cylindrical recess by the inadvertent tongue action of the wearer. If the nuts jam, it is quite true that the wearer's tongue cannot turn them; but neither can the operator turn them, without releasing the jam, to the disarrangement of the delicate apparatus and the probable great pain of the wearer of the same. An examination of defendant's device, therefore, convinces me that his is not a "jam nut," and that it is a colorable imitation of complainants' mechanism. His conoidal form is just a sufficient departure from a true cylinder to encourage a defense in a patent suit, but not a sufficient departure to produce Angle's result by any other method or in any other manner than that disclosed in Angle's application for his patent.

For these reasons the complainants are awarded a decree as prayed for.

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ELLIOTT-FISHER CO. v. DONNING et al.

(Circuit Court, S. D. New York. May 10, 1909.)

No. 8,932.

1. PATENTS (§ 328\*)—VALIDITY—INFRINGEMENT—BOOK TYPEWRITERS.

The Hatch & Hillard patent, No. 620,125, for improvements in book typewriters, was not anticipated, and discloses invention. While not of a pioneer character, it covers a meritorious improvement in the art, and is entitled to be given a corresponding scope and a reasonable range of equivalents. As so construed, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

2. PATENTS (§ 328\*)—INVENTION—BOOK TYPEWRITERS.

The Halle patent, No. 621,660, for mechanism relating to book typewriters, claims 1, 4, 5, 7, 9, 19, and 64 are void for lack of patentable invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## 3. PATENTS (§ 328\*)—INFRINGEMENT—BOOK TYPEWRITERS.

The Fisher & Laganke patent, No. 632,681, for means for supporting the platen of book typewriters, conceding its validity, must be given a narrow construction, and as so construed *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

## 4. PATENTS (§ 328\*)—INFRINGEMENT—BOOK TYPEWRITERS.

The Fisher patent, No. 632,680, for a book and machine support for book typewriters, construed, and *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

## 5. PATENTS (§ 112\*)—SUIT FOR INFRINGEMENT—DEFENSES—SCOPE OF DECISION OF PATENT OFFICE.

The defeated party in an interference proceeding in the Patent Office is not estopped to contest the validity of the patent granted to the successful party when sued for its infringement, although he took no appeal, and did not raise the question of patentability in such proceeding.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. § 112.\*]

## 6. PATENTS (§ 26\*)—INVENTION—"COMBINATION OF OLD ELEMENTS."

To constitute a patentable combination of old elements, they must co-operatively perform a different function from what they did before, unless it is shown that, in the combination as applied to a machine or device in its entirety, a new and useful result is produced.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.\*]

## 7. PATENTS (§ 328\*)—INVENTION—BOOK TYPEWRITERS.

The Elliott patent, No. 665,774, for a book support for book typewriters, is void as for a mere aggregation of old elements, each of which performs its old function and without producing any new result.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

## 8. PATENTS (§ 328\*)—ANTICIPATION—BOOK TYPEWRITERS.

The Smith patent, No. 669,355, for clamps for holding the typewriting work down on the platen in book typewriters, is void for anticipation.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

## 9. PATENTS (§ 328\*)—INFRINGEMENT—WORK GAGE FOR BOOK TYPEWRITERS.

The Halle patent, No. 705,527, for a work gage attachment for book typewriters, *held* valid and infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On final hearing.

Robert Fletcher Rogers, for complainant.

Griggs, Baldwin & Baldwin (Dyrenforth & Parry, of counsel), for defendants.

HAZEL, District Judge. This action is for the infringement of the following letters patent No. 620,125, dated February 28, 1899 (application filed June 16, 1898), to Hatch & Hillard for improvements in typewriters; No. 632,680, dated September 5, 1899, to Fisher, for book and machine support; No. 632,681, dated September 5, 1899, to Fisher & Laganke, for book supporting table with means for tracks; No. 621,660, dated March 21, 1899, to Halle, for machine rest; No. 665,774, dated January 8, 1901, to Elliott, for book support; No. 669,355, dated March 5, 1901, to Smith, for paper confining means; and No. 705,527, dated July 22, 1902, to Halle, for work gage attachment. The specifications and claims of the enumerated patents disclose that

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 171 F.—7

they relate to mounting typewriting mechanism used principally for writing on pages of bound books, a suitable supporting frame, a flat plate or platen, a base or track frame, and their manner of adjustment. The history of the art indicates that the inventions were not of a pioneer character, but consisted merely of additions and improvements in book typewriters.

In the Hatch & Hillard patent, No. 620,125, claims 11, 12, and 13 are involved. Claim 11 reads:

"The combination of a base-frame, a platen, and a supporting-frame to which one end of the base-frame and one end of the platen are each attached by a pivoting connection, substantially as described."

Claim 12 specifies a base-frame overlying the platen, and claim 13 states that the base-frame and the platen are each independently attached to the supporting-frame. According to the specification:

"The invention consists in an adjustable supporting-frame, called the 'adjusting-frame' or the 'supporting-frame,' which supports one end of the platen and base-frame of the machine, and in the manner in which the platen and base-frame are attached to the adjusting-frame."

The typewriter has a table upon which the book is placed. The printing mechanism moves laterally to enable suitable spacing between the letters, words, and lines. The plate or platen rests on the book which is supported by suitable contrivance between the table and printing mechanism; each element being so supported as to conveniently control the book during the printing operation. The specified means are for easily moving and replacing the platen and printing mechanism in order to adjust the book and facilitate writing upon its pages. The defenses are lack of novelty and that the claims are limited to an adjustable supporting-frame. It appears from the many prior patents in the record that it was old to use a flat platen for book typewriting, and it was also old to use for a machine support a base-frame resting upon an open book. Moreover, it was common to mount the machine on the base-frame adapted to lateral movement to provide letter and line spacing. In the prior art, however, it was necessary to move either the book support or writing mechanism to get the alignment of line and letter spacing, and the work of the operator was retarded and hindered since it was frequently necessary to readjust or move the flat platen and the book and supporting-frame as the writing progressed. The patentee was the first to conceive the idea of replacing the movable flat platen with one that was normally stationary and adapting it to a practical movable typewriting machine which could be successfully operated. Why, then, should not his invention receive a proper share of appreciation and the protection of the statutes? Reading the specification with the claims would seem to indicate that the patentee did not limit the claim to the feature of adjustability of the supporting-frame. Such a limitation was not essential to the accomplishment of his object. Indeed, the specification points out that the invention is not exclusively for the adjustable-frame, but also for the manner in which the platen and base-frame are pivoted or attached thereon. It seems to me that the patentee has complied with the provisions of section 4888 of the Revised Statutes (U. S. Comp. St. 1901, p. 3383), requiring him

to "particularly point out and distinctly claim, the part, improvement or combination which he claims, as his invention or discovery." That a stationary flat platen pivoted for vertical adjustment in connection with the movable writing machine was an improvement and made the book typewriter practicable is not seriously controverted. True, the elements of the claims are not new, but their correlation in a new way produces a new and useful result. They were not an aggregation, but a "true combination." *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 367, 3 C. C. A. 559. To provide means for holding the flat platen rigidly in position as the work progressed and lifting it from the printing area and enable the base-frame to guide the writing in its lateral movements, and to secure the required spacing between lines and letters by bringing the elements in accurate operative relation, undoubtedly required a fair degree of the inventive faculty notwithstanding the information and knowledge possessed by the skilled in the manufacture of the common typewriter. It may seem to have been a very small achievement, but it was of such consequence in the then state of the art that not a little of the success attained by the book typewriters is due to it. Defendants claim that the claims under consideration lack novelty because of the prior patents to Halle, No. 621,660, of March 21, 1899 (application filed June 13, 1898), and to Elliott & Hatch, British patent No. 19,002, of 1897, application dated August 17, 1897. Such inventions, however, assuming that they cover and include the claims in suit, are proven by the stipulation of the defendants found in the record to have been later than the patented invention in controversy. The proofs are that on July 2, 1897, the patentee manufactured a machine (No. 536 in evidence) complete in every particular, and embodying the supporting-frame and the platen and base-frame pivotally mounted thereon as described in the specification. This testimony is not controverted. Therefore the patents cited by the defendant as anticipatory were anticipated by the invention in suit. *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139; *Westinghouse Electric & Mfg. Co. v. Saranac Lake Elect. Co.* (C. C.) 108 Fed. 221. The said stipulation was enough to put upon the defendants the burden of establishing that the asserted prior inventions were made earlier than the invention in controversy. As no such proof was offered, it is unnecessary to enter upon a discussion of such prior publications. There is no material difference between defendants' typewriting machine and that of the complainant in so far as the involved claims are concerned. The defendants' base-frame does not overlie the platen, but such alteration or method of clamping the paper or sheet was not a departure from complainant's method of holding down the page of the book. In the Hatch & Hillard patent the paper is retained on the platen by the overlying base-frame, while in defendants' device the base-frame does not overlie the platen but lies without the plane of the platen; the paper being held down by lateral clamping devices and the platen being retained in position by a separate device. The Hatch & Hillard invention, as has been stated, is not of a pioneer character, but it has meritoriously improved the art. The claims should be given corresponding scope and a reasonable range of equivalents (*Cimiotti Unhairing Co. v. American Fur Co.*, 198 U. S. 399,

25 Sup. Ct. 697, 49 L. Ed. 1100), and, as thus construed, defendants' construction infringes the claims in suit.

The patent to Halle, No. 621,660. The object of the patentee was to devise a method of moving the writing mechanism positioned on the platen off and away from the operative area or printing field without raising or otherwise moving the machine "except parallel with the printing surface," and, after adjustment of the book or paper, to return the machine to its position for printing. In the prior art the writing mechanism was either lifted from the track rails to enable adjustment of the book or in cases where the tracks were pivotally mounted by raising the machine and rails to a vertical position. The involved claims are 1, 4, 5, 7, 9, 19, and 64. They are not believed to be essentially different from each other. The substance of claim 1 includes two so-called members (rails) within and without the printing area; the outside member being displaceable when the machine is moved on the rail within the printing field. Claim 19 covers a rest outside of the printing field to hold the machine and a platen susceptible of being moved independently of the rest. Claim 64 is for a rest member outside of the printing field to receive the machine when not in use and for the required means to move the machine from the writing field to the outside thereof. It was a contentious point as to whether the term "writing area," as used in the specification, means the space between the supporting strips wherein is located the tracks upon which the machine moves or only the space within which the actual printing occurs, but it will not be necessary to decide this point, for in my estimation the prior state of the art was such at the date of the Halle patent that to provide a position of rest for the machine outside the printing area was not a patentable discovery. To paraphrase the rule stated in *Johnson Co. v. Toledo Traction Co.*, 119 Fed. 885, 56 C. C. A. 415, it was an old device adapted to a new use without any change in the manner of application and without any result substantially distinct in its nature.

In the patent to Marks, No. 361,431, for transferring patterns, a rigid rest is provided at the rear of the table used for making impressions with a roller having guide wheels to enable traveling from the table to the position of rest at the end thereof. True, this was not in an analogous art, but, as the positions of rest practically performed the same function and for a similar purpose as the element in suit without substantial change to so adapt it, the said prior patent is not entirely inapt. The principle finds support in many cases. *Mann's Boudoir Co. v. Monarch Co.* (C. C.) 34 Fed. 130; *Jones v. Cyphers* (C. C.) 115 Fed. 325, and cases cited. Moving either the work or the machine away from the writing area is also present in the typewriting patents to Cash and Young. In these patents the work was moved outside the printing field and away from the writing mechanism, while in the patent in suit the machine travels to the rear of the table and away from the work. In the patent to Hopkins, No. 613,209, for book typewriting, the machine has rails extending back beyond the printing field. It is true, as contended by complainant, the extension of the rails will not permit moving the machine outside the printing area to permit adjustment of the work without raising the machine, but nevertheless the



position of rest for the machine is thought to be suggested. Halle extended his sectional rails further beyond the printing area than Hopkins to enable placing the entire machine thereon, and thus supply a position of rest outside the printing area. This accomplishment was an obvious improvement on the antecedent devices, but it suggested itself to the ordinary workman, and does not rise to the dignity of invention.

Claim 19, in view of what has been said in relation to the claims already discussed, is thought fairly anticipated by the British patent to Elliott & Hatch, No. 19,002, and to Crary, No. 477,353. In the Crary patent is shown a writing mechanism supported by a base-frame overlying the paper and platen, the writing machine being movable to the side to clear the book or writing, thus occupying a position of rest. It is true the platen does not swing vertically and the base-frame cannot be lifted, but raising or swinging the platen is not emphasized in claim 19. However, the British patent to Elliott & Hatch plainly indicates means for swinging the platen and clamping frame. The involved claims are invalid for want of patentable invention, and therefore are not infringed by the defendants.

Fisher and Laganke patent, No. 632,681. This patent relates to means for supporting the platen; the object of the patentee being to bring the writing mechanism and book or page in co-operative relation. The description of the invention shows that the table upon which the machine stands has separate supporting strips raised above the surface of the table for placing the book between them. The platen which spans the strips is pivoted at one end to enable proper adjustment of the page of the book. According to the drawings and specification, the supporting strips may be raised or lowered, by suitable worm shaft, the worms meshing with gears for "retarding said strips at the desired adjustment without the use of auxiliary locking devices." The evidence shows that this operation of the supporting strips enables instant and convenient adjustment to heights demanded by the size of the book used. As to whether the involved claims, 8, 9, and 13, are patentably novel in view of the Fisher patent, No. 632,680, which is for a vertically adjustable book support underneath the plane of the patent, is extremely doubtful, but, assuming invention, the claims must be given a strict construction, and, thus construed, the defendants are not thought to infringe. In their machine there are no supporting strips, both the platen and track frame being supported by front and rear castings. Moreover, in defendants' machine the book is necessarily raised to the platen, and by the vertically adjustable book support positioned between the front and rear sides of the table and the platen at all times remaining stationary. In the patent in suit the platen is supported by the strips, and, when the strips are raised or lowered, the platen and rails are moved with them. The difference in construction between the defendants' mode of operation and that of complainant is distinctly different, and accordingly the alleged infringement is not sustained.

Patent to Fisher, No. 632,680. This patent relates to means for raising or lowering the book toward a normally stationary platen so as to press or adjust the book thereto. In the preferred structure there are two platens positioned on the typewriting table each capable of separate movement to place upon them the pages of the book for writing; the

book itself being supported underneath the platens, the leaves passing upward through the edges of the adjacent platens and lying thereunder. Means are provided for adjusting the book support which enables moving the book in proper position and in corresponding relation to the platen.

Claims 1 and 3 are involved. Claim 1 reads:

"1. A typewriting machine having a normally stationary platen, a vertically adjustable book support disposed below the plane of the platen, and having a continuous book-receiving surface, whereby an open book may be elevated throughout its extent toward the plane of the platen, and means for securing the book support at the desired adjustment, substantially as specified."

Claim 3 is substantially similar save that reference is made to the adjusting feature. The defenses are that the claims are invalid for lack of novelty and noninfringement. The prior Fisher patent, No. 569,625, describes a book support consisting of two independently adjustable members for raising the book to the plane of the platen; the only perceivable difference being that in the patent in suit means are provided for raising the entire book to the lower surface of the platen. In the Crary patent cited by defendants as anticipatory is shown a support or frame which apparently does not act on the entire book, while in the Fisher patent in suit there is present the feature of a continuous book receiving surface, which is emphasized to achieve the elevation of the book in its entirety "throughout the plane of the platen." In view of the earlier Fisher and Crary patents, the claims must be limited to a continuous book receiving surface and to the construction for the adjusting mechanism, essential elements of the claims.

The defendants do not employ a continuous surface book support. Their book support has two platforms which serve as a rest or support for the covers of the book. This feature was old and is shown in the patents to Young, Fisher, Elliott, Crary, and Hopkins. Defendants' feature of raising the book to the under side of the platen is also found in the prior art. For example, in the patent to Remley, No. 385,008, there is a vertically adjustable platform which may be elevated and lowered by suitable device to enable closely holding the paper in position for writing. In the Leverich patent, No. 12,954, an open book is supported on separate platforms; both being capable of raising and lowering the entire book, and they may be moved separately. In the Hopkins patent there is a separate book support consisting of platforms which may be lifted together or separately. It seems to me clear that the defendants in lowering and raising their book support have adapted a book support and means for adjusting which were old and commonly understood in the art, and therefore do not infringe the claims in controversy.

The Elliott patent, No. 665,774, was in interference with an application filed by the inventor of defendants' machine, and was decided adversely to him, but such decision is not the equivalent of an adjudication as to patentability and infringement (*Hildreth v. Norton*, 159 Fed. 428, 86 C. C. A. 408), and the defendants are not precluded in this action to challenge the validity of the patent as a true combination, even though no appeal was taken from the decision of the Commissioner of Patents or the patentee failed to comply with the rules of the

Patent Office to file a demurrer which would have presented for decision the question of patentability of the claims. *Automatic Racking Mach. Co. v. White Racker Co.* (C. C.) 145 Fed. 643. The Elliott machine concededly embodies the general arrangement of the Hatch & Hillard patent, No. 620,125, hereinbefore considered and held to be infringed by the defendants' machine. The involved claims 1, 2, 3, 4, and 5 point out that the elements are in combination with a normally stationary plate or platen and normally stationary book support which is movable laterally underneath the platen and consisting of two vertically depressible elevations or boards. Such boards or supports are attached to the table in such manner as to hold both sides of the book in writing; the object being to bring one side of the book in correct alignment with the platen, and turning the page to allow it to rest on the platen during the printing operation. The feature by which the book support moves from one side of the table to the other and its separation into two vertically depressible book supports is admittedly the new element of the claims which are for a combination of elements well known in the art. Indeed, the main difference between the prior Hatch & Hillard patent and the patent in suit is that in the former the supporting frame is vertically adjustable and the base-frame is arranged for moving on the plate from one side to the other. I do not doubt that in defendants' machine are embodied the various elements of the claims in controversy, but it is a question whether such combination claims are not void as being for old elements without performing any new functions or carrying out any new method of operation. To escape being a mere aggregation, the elements of the combination must co-operatively perform a different function from what they did before, unless it is shown that in the combination as applied to a machine or device in its entirety a new and useful result is produced. *Bullock Elec. Mfg. Co. v. General Electric Co.*, 149 Fed. 409, 79 C. C. A. 229; *Goodyear Tire Co. v. Rubber Tire Co.*, 116 Fed. 363, 53 C. C. A. 583; *Spear Stove & Heating Co. v. Kelsey Co.*, 158 Fed. 622, 85 C. C. A. 444; *American Saddle Co. v. Sager Gear Co.* (C. C.) 122 Fed. 645; *Johnson v. Foos Mfg. Co.*, 141 Fed. 73, 72 C. C. A. 105.

As applied to claim 1, the proofs show that in the patent to Hatch & Hillard is found a platen and base-frame pivoted to the supporting-frame. That the base-frame is not movable laterally is not thought material. In the patent to Harriman, No. 242,309, are found divided platforms adapted to be raised and also for the purpose of adjusting the book. It has also a movable carriage, together with supporting members mounted and guided to conveniently write on different sides of the book. In the patent to Leverich is shown a longitudinal depression and a movable carriage which has provided rising and falling book supporting leaves for upholding the sides of the book. In the patent to Cray hereinbefore mentioned is shown a table having upon it a typewriting machine and a flat platen to suitably hold the leaf of the book during the writing process. Such patent also has a base-frame mounted to be tilted away from the platen and in relation thereto. As to claim 2, the platen and base frame is shown in the Halle patent hereinbefore considered. Leverich also illustrates a book sup-

port with leaves that are adapted to rise and fall; the support being adapted to shift laterally.

Enough has been said to indicate the functional operation of the different elements in the apparatuses of the prior art. The combination of the claims doubtless is new, but it is not apparent that any new result is attained thereby. The parts or elements here perform the same function as in the structures from which they were taken and without the accomplishment of any original result. A more convenient or salable structure probably is produced by the adaptation of the means described in the specification, but this was not sufficient, for it has been frequently held that:

"The adaptation of well-known devices and means to the accomplishment of the desired result which had been before accomplished in substantially the same manner by substantially the same means, although not in precisely the same combination, amounts to no more than mechanical skill." *Eastman Kodak Co. v. Anthony & Scovill Co.* (C. C.) 139 Fed. 36.

Hence the patent under consideration, being for mere aggregation, is void.

The Smith patent, No. 669,355, covers clamps or lips for holding the typewriting work down on the platen. The clamps or lips in the specific form of construction are fixed to the track rails which when raised release the paper. The sole feature of novelty is the use of the clamping device in connection with the rails or base-frame, so that upon lifting the latter the clamping device performs its function. The defendants' clamping device consists of a series of small plates attached lengthwise to the rails, and when in operative position, overlie the platen. Defendants' clamps or grippers are operated by spring arrangement located above the front end of the platen, and, when the spring is manipulated, the grippers or clamping devices drop down against the platen or paper. I think the prior art which is invoked by the defendants to invalidate the claims in controversy substantially discloses the combination in suit. The patentee claims that he achieves a beneficial result by releasing the clips on merely lifting the base-frame, and that by such operation it is unnecessary to raise the printing mechanism any appreciable distance in order to adjust the paper on the platen. But in my estimation no inventive skill was exercised in adapting a clamping device in the manner specified in the claims. Certainly the patent to Veith anticipates, for there is shown a yielding lip attached to the upper end of the base-frame which normally rests on each side of the platen, and does not overlie it as in complainant's patent. That it does not rest on the platen is an immaterial distinction, inasmuch as it substantially performs the precise function of the claims in issue. Other anticipatory patents are cited in defendants' brief; but it is unnecessary to discuss them.

The patent to Halle, No. 705,527, is for a work gage consisting of studs and ribs located outside of the base-frame and the platen. The proofs show that, when the base-frame is raised, the paper or page is placed on the platen and held by the work gage, and, when the base-frame resumes its ordinary position, it rests on the paper and clamps it. Claim 7 reads as follows:

"7. In a typewriting machine, the combination with the platen, and the rails or guides for the traveling printing mechanism, of a work-gage having a support distinct from the platen and arranged to lie outside of the vertical plane of a rail or guide."

The combination of a platen, base and frame, and work gage which performs its functions outside and irrespective of the platen, was new and novel. Although a very simple device its value and usefulness in machines of this description are thought to have advanced the art in a modest way. The arrangement of the pins alongside the edge of the platen and the bar with its projection or gage concededly help to keep in position the paper during the progress of printing. The defendants, in connection with their printing machine, use a work gage which is supported by a series of clamps connected to the rails or base-frame. The work gage consisting of aligning pins located on the under side of the clamps has a support inside of the rail and is interposed between the rail and the platen, extending parallel thereto. The contention that defendant does not infringe because its work gage is positioned inside of the track rails is immaterial, and, even construing the claims narrowly, its device is fairly covered and included by complainant's patent. The same results are achieved by defendants by the use of equivalent means. Their gage device aligns the work upon the platen, and holds it in proper position for printing. I have examined the patents to Cash and Cohn, but in my judgment they do not anticipate the claim.

It follows that claims 11, 12, and 13 of patent No. 620,125, to Hatch & Hillard, and claim 7 of patent No. 705,527, to Halle, are valid and infringed by the defendant; that the patents No. 632,681, to Fisher & Laganke, and No. 632,680 to Fisher, as construed by the court, are not infringed by the defendants; that patents No. 621,660, to Halle, No. 665,774, to Elliott, and to Smith, No. 669,355, are invalid. Appropriate decrees may be entered, but without costs to either party.

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BOYER v. CLEVELAND PNEUMATIC TOOL CO.

(Circuit Court, N. D. Ohio, E. D. May 21, 1909.)

No. 6,284.

PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—PNEUMATIC HAMMER.

The Boyer patent, No. 667,863, for a pneumatic hammer having a length of stroke greater than the length of the hammering piston, as to claims 1 to 9 and 32, is void for anticipation; also *held* not infringed, if conceded validity.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On final hearing.

Rector & Hibben, for complainant.

Cook, McGowan & Foote and E. Hayward Fairbanks, for defendant.

TAYLER, District Judge. This is a suit charging the infringement by the defendant of claims 1 to 9, inclusive, and claim 32, of patent

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

No. 667,863, dated February 12, 1901, for a pneumatic hammer, issued to Joseph Boyer. This invention relates, as described by the patentee, more particularly to that class of tools, commonly known as "pneumatic hammers," in which the reciprocating piston operates as a hammer or striker to deliver blows upon a chisel or other working tool inserted in or carried by the front end of the cylinder; and has for its principal object the provision of means whereby the piston may be permitted a longer stroke and thereby enabled to strike a harder blow than had theretofore been usual in devices of that kind.

The drawings show an ingenious and complicated device whereby the hammering piston is given a length of stroke greater than the length of the piston. By thus lengthening the stroke, as compared with the length of the piston itself, it is manifest that a much more powerful blow can be given than where the length of the stroke is limited by the length of the piston. In the hammers in which the length of the piston regulates the length of the stroke, the inlet and outlet of compressed air are controlled by the opening and closing of ports or valves, depending on whether the port is covered or uncovered by the moving piston. In the device where the length of the stroke is greater than the length of the piston, it is manifest that the control of the entry or exit of compressed air must be otherwise than by the mere length of the piston itself. The patent in suit accomplishes this result, and the question here involved is whether or not it had been anticipated by previous use or patents.

The device which defendant uses is made in accordance with patent No. 735,589, issued August 4, 1903, to C. B. Richards.

A large number of patents are cited as showing anticipation of the Boyer patent of 1901. Among them, and not intending to include all that may be important, are British patents to Gray, 1,095 of 1863, Johnson, 3,125 of 1872, and Floyd, 2,693 of 1877, as well as the American patents to Manson, No. 152,391, Harthan, No. 590,661, Wren, No. 303,344, Von Buhler, No. 510,155, Clement, No. 522,511, and Allen, No. 194,396.

I have come to the conclusion, upon an examination of the prior art:

1. That the idea of a pneumatic hammer which had a stroke longer than the length of the piston was old when Boyer took out his patent. Manson, No. 152,391, granted June 23, 1874; Harthan, No. 590,661, granted September 28, 1897. The pistons in these hammers were controlled by tappet or mechanically actuated valves, while in the Boyer hammer the piston was controlled by a fluid actuated valve.

2. That the valve arrangement which he described—that is to say, a piston-controlling valve, operated by fluid pressure only and controlling the reciprocations of the piston in the cylinder—was also old. Indeed, Boyer admits that this method of operation and control of pistons is old. On page 4 of the patent in suit, at line 43, he says:

"I am aware that it has heretofore been proposed in steam engines of certain types to operate the valve or valves by means of air compressed by the piston; but I am not aware of any adaptation of such idea to devices such as pneumatic hammers, nor of any embodiment of it in steam engines in a form suitable for use in pneumatic hammers."

Assuming that this admission is to be taken as stating exactly the state of the art at the time it was made, it cannot be seriously contended that there was any novelty in the introduction of the idea of a fluid-actuated valve in a pneumatic hammer.

3. That the difficulty of determining whether or not the Boyer patent is entitled to precedence or priority depends upon the differentiation between that patent and those which preceded it as a mere mechanical appliance and not involving any principle of operation. In this respect there is certainly no infringement by the defendant of the patent in suit.

4. Defendant offered in evidence the file wrapper, contents, and drawings in the matter of the application of Charles K. Pickles, filed June 16, 1902, for improvement in pneumatic impact tools. This is not to be considered evidential, but argumentative; and argumentatively it is convincing, and may be summarily stated as follows: The Boyer patent was issued February 12, 1901. June 16, 1902, Charles K. Pickles filed his application for a patent for an improvement in pneumatic impact tools. His claims, nine in number, were identical with claims 1 to 8 and claim 32 of the Boyer patent. Manifestly, this was an application filed in conformity to rule 94 of the Patent Office, where a new applicant claimed to be the real inventor of a device for which a patent had previously been granted to another person, and he therefore sought an interference, whereby the question of priority of invention would be heard in the Patent Office. There was an incidental controversy, not important here, growing out of a claim of want of consistency between Pickles' claims and the drawings which he showed of his device.

The examiner rejected claims 1 to 8 on the British patents to Gray, Johnson, and Floyd, and also on the Boyer patent in suit. Claim 9 was held to be objectionable for a mechanical reason, and also because it was anticipated by the British patent to Floyd.

On an application to reconsider, and also on an allowance of the claims and declaration of the interference with the Boyer patent, the claims were again considered and again rejected for the reasons set out in the first rejection, with this additional observation: That the English patents on account of which the Pickles application was rejected were not a part of the record in the Boyer application.

The case was again heard on application of Pickles by another examiner, and he adhered to the former conclusion, that claims 1 to 8 were objectionable for the reasons stated in the first rejection, claim 9 for the reason that had been theretofore given, and that all the claims were held anticipated by the references of record.

On a petition from the action of the examiner, an appeal was allowed to the examiners in chief, who held claims 1 to 8, inclusive, were anticipated by the British patents to Gray and Johnson, and the grasping handle feature by the patent to Gray.

Finally, it was heard by the examiners in chief on appeal, who held that claims 1, 2, 3, and 4 were fully anticipated by the British patent to Gray, that 5 and 6 were in their several parts anticipated by the Gray and Floyd patents, 7 and 8 by the Johnson patent, and 9 for a reason unimportant in this connection.

Then the case was heard on appeal from the examiners in chief to the Commissioner of Patents, who held that all the claims are rejected on the following references: Boyer, and British patents to Gray, Johnson, and Floyd. The Commissioner sets out in his opinion the details, in which it appears that the British patents anticipated the claims of the Pickles application. Of course, if they anticipated the claims of the Pickles application, they must have anticipated the claims of the Boyer patent.

As was observed in the early part of the discussion of this opinion, the argument presented by the Patent Office against the novelty and invention of the Pickles application, and, therefore, of the Boyer patent, in so far as these claims are concerned, is convincing.

This subject was most carefully and exhaustively inquired into by the several examiners and by the Commissioners of Patents, at least six independent investigations having been made. In the course of the decisions we discover that the anticipatory patents cited against Pickles' application were not before the Patent Office when the Boyer application was considered. If they had been, it would make no difference in the persuasiveness of the argument, because whatever might be said to be an anticipation of claims 1 to 9 of the Pickles application was an anticipation of claims 1 to 8 and claim 32 of the Boyer patent. So that we have not only the moral persuasiveness of many and exhaustive investigations by the experts of the Patent Office respecting the history of the art and the question of anticipation, but also the detailed argument presented by the several officials of the Patent Office on the several occasions when this important question was before it. The argument made by these examiners and the Commissioner are absolutely convincing to me, apart from the persuasiveness of the Harthan and other patents cited in the proof and argument in this case, that the Boyer patent is, in so far as claims 1 to 8 and claim 32 are concerned, invalid because of anticipation. Certainly these claims, as well as claim 9, are invalid, if given sufficient scope to cover the alleged infringing device.

The bill is, therefore, dismissed, at complainant's costs.

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C. E. TAYNTOR GRANITE CO. v. GOETCHIUS et al.

(Circuit Court, S. D. New York. June 23, 1909.)

1. PATENTS (§ 328\*)—NOVELTY—ROOF FOR MAUSOLEUMS.

The Tayntor patent, No. 722,392, for a roof for mausoleums, construed, and held void for lack of novelty in view of the prior art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 430\*)—ACTION—PERSONAL OR REPRESENTATIVE CAPACITY.

A suit cannot be maintained against the executors of a decedent for infringement of a patent in the construction of a mausoleum in which the body of their decedent was placed, where it was contracted and paid for by them and others individually, and not as executors, and the estate is not the owner of the same.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 430.\*]



In Equity. On final hearing.

D. Frank Lloyd (E. Hayward Fairbanks, of counsel), for complainant.

George C. Dean, for defendants.

HOUGH, District Judge. Shortly before the filing of this bill the children of John M. Goetchius, deceased, late of this city, contributed in unequal shares a sum of money sufficient to erect a family mausoleum or burial vault in a cemetery situated in Westchester county, N. Y. The mausoleum was completed before this litigation began, and the remains of Mr. Goetchius are there entombed. There is room in the vault, however, for other caskets, and it is in evidence that any member of the family may be placed there after death. Although the money to pay for this mausoleum was contributed by a number of the members of the family, the contractual responsibility for erecting the same was assumed by Henry K. Goetchius, who alone signed the building contract. This action is brought against certain of the contributors who are the executors of Goetchius, Sr. It is against them as executors, and there are no other parties defendant. The bill alleges, in substance, that the roof of the mausoleum in question is constructed in violation of the complainant's right under patent No. 722,392, granted March 10, 1903, and relating—

"to an improvement in roofs for mausoleums, vaults, and the like, with the object in view of providing an improved roof construction, in which the seams formed by the junction of the several parts of the roof will be well protected, so as to prevent the rain from driving through the said seams."

The second claim of this patent reads thus:

"A roof for mausoleums, vaults, and the like, comprising pediments, side roof stones having ribs along their inner top edges, and a central roof stone having lips along its opposite side edges, fitted to overlap the ribs upon the side roof stones, substantially as set forth."

The construction here claimed is confessedly exemplified in the Goetchius mausoleum, and consists of a roof whereof the portion exposed to the sky and to the vertical downpour of rain consists of three parts, to wit, two stones, one on each side of the edifice, the lower edge of each of which forms the side eaves of the building (so to speak), and the upper edge of which reaches nearly to the roof ridge. These stones are supported at the building's front and rear by the (so-called) triangular pediments there placed; the slope or pitch of the roof being determined by the apex angle of said pediments. These side roof stones are secured in place by a mortise and tenon arrangement, joining them to the pediments aforesaid at the building's front and rear, respectively.

It will be seen that the roof as thus far described presents the skyline of a simple house roof, with an open space where the ridge pole would ordinarily be. This open space is then filled in with a capstone (the "central roof stone" of the patent), extending solidly from front to rear, with its lower edges fitting against the upper edges of the roof stones aforesaid, resting at front and rear upon the pediments aforesaid, and also overlapping the said side roof stones to the extent of

the lips described in the claim above quoted, just as one shingle overlaps another. In the testimony this capstone is sometimes spoken of as a keystone. This is wholly inaccurate, for it is admitted that the capstone takes up no thrust, and it obviously performs none of the functions of a true keystone.

In my opinion the invention asserted to reside in this patent (in so far as this suit is concerned) consists solely in so cutting away the major portion of the exposed surface of the two side roof stones as to leave a rib or ridge along its upper outer edge and then resting the capstone lips upon said ridges or ribs, instead of upon the plane surface of the roof stones. This construction elevates the exposed line of joinder between capstone and roof stones above the general level of the sloping roof by just so much as the roof stones are cut away to form said ribs or ridges—in practice from  $\frac{3}{4}$  of an inch to  $1\frac{1}{4}$  inches. The construction of these lipped and ribbed roof stones is expensive, because it involves additional stone cutting. The advantage thereof rests solely in its preventing, or at all events retarding, the entrance of wind-driven rain into the edifice through the joints between capstone and roof stones by means of the raising of said joint or (what is the same thing) the depression of the roof plane by the aforesaid cutting away of the roof stones' surface.

If this patent be valid and not anticipated, it is not only admitted that the Goetchius mausoleum infringes it, but it is proven that said mausoleum was erected by one Harrison with full knowledge of Tayntor's patent, who agreed with Mr. H. K. Goetchius to defend any suit which might be brought thereon; and this suit is being defended by Harrison. To me there appear two reasons why this bill should be dismissed: First, because the patent, in view of the prior art, discloses no patentable novelty (assuming that invention resides therein); and, second, because these defendants are not liable for whatever infringement took place (if infringement there was).

Two burial vaults or mausoleums, whose erection and disclosure to public view antedate Tayntor's application, have been shown, wherein three-stone roofs were used, with the upper surfaces of the side roof stones cut away, so as to leave lips or ridges on their inner edges in conjunction with a capstone formed with lips resting on the ribs or ridges aforesaid (Black and Feigenspan). In each of these examples of the prior art the exposed jointure of side stones and capstones is removed from the direct action of the rain in the same way, and obviously for the same purpose, as in Tayntor's construction. But a slope or pitch is given to the roof, not by placing the side stones on the sides of triangular pediments, but by sloping the upper surfaces of the side stones themselves by progressively removing more material from the upper surface of the side stones as the stonemason progressed from rib to eave. It is thus possible for the roof of the Black and Feigenspan mausoleums to rest flatly upon the frieze of the edifice, and no pediments (in the sense in which the word is used by Tayntor) are required.

Complainant, therefore, claims that his patent is for a five-stone construction—i. e., two pediments, two side stones, and one capstone—and that any one may erect a mausoleum with rib-raised and rib-pro-

tected jointures, provided he does not slope his roof by the use of triangular pediments. In an art as old as is the one under consideration, where great antiquity is indicated by the very name "mausoleum," a patent such as this cannot be given in my opinion a wide interpretation. If pitched roofs for edifices of this construction were new, or if the existence and degree of that pitch had not long been determined by the shape of the front and rear walls of buildings (above the eave line), there might be something in complainant's contention; but it is not true that that portion of the front or rear wall of any building which lies between the eave line as a base and the ridge pole as its apex is either necessarily a pediment, or even a part of the roof. It is a part of the wall, and is entitled to the name "pediment" only under circumstances succinctly set forth in the Century Dictionary (tit. "Pediment"). There were peaked roofs for mausoleums before Tayntor. Phelps' vault, French patent; French v. Carter (C. C.) 25 Fed. 41; Id., 137 U. S. 239, 11 Sup. Ct. 90, 34 L. Ed. 664. And, as above shown, there were ribbed joints before Tayntor, and in an ancient art I do not think that he can successfully assert patentable novelty in putting together these ancient constructions and incidentally calling the "pediment" a part of his roof.

On the second point mentioned I am of opinion that the proofs show that the executors of Goetchius did not build this mausoleum. They do not own it, nor does the estate of Mr. Goetchius own it. Neither the defendants, nor any of them, made any contract or did any act in respect of the mausoleum in question in his capacity as executor. This would be true, even if the edifice had been reared on private land; but it is alleged and proven to have been erected in a cemetery in the state of New York, and by the laws of this state a lot in such cemetery, when once used for purposes of interment, ceases to be property in the ordinary sense of the word. It can only be used for the further interment of persons of the kin of the original purchaser, in accordance with the rules of the cemetery and the provision of the deed of conveyance. Without the consent of the cemetery authorities, nothing can be erected thereon or removed therefrom. Since, therefore, the defendants did not put up this building, do not own it, cannot remove it, and have very obviously made no profit therefrom, and never will make any profit therefrom, I do not think that a bill in equity will lie.

The bill is dismissed, with costs.

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## THOMSON-HOUSTON ELECTRIC CO. v. STERLING-MEAKER CO.

(Circuit Court, D. New Jersey. June 29, 1909.)

PATENTS (§ 328\*)—INVENTION—CONTACT DEVICE FOR ELECTRIC RAILWAYS.

The Van Depoele patent, No. 495,383, for an overhead contact device for electric railways, claims 1, 2, 3, 8, 9, 11, 12, and 13 are void for lack of invention, in view of patent No. 424,695, to the same patentee.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. On final hearing.

L. F. H. Betts and Ramsay Hoguet, for complainant.  
Stephen J. Cox, for defendant.

LANNING, Circuit Judge. One of the questions presented in this cause is whether claims 1, 2, 3, 8, 9, 11, 12, and 13 of patent No. 495,383 are valid. Claims 11, 12, and 13 were held invalid in 1895 by the Circuit Court for the District of Connecticut, and in 1898 by the Circuit Court for the Southern District of New York, on the ground that no patentable invention was disclosed by them. See *Thomson-Houston Electric Co. v. Winchester Avenue Railway Co.*, 71 Fed. 192, and *Thomson-Houston Electric Co. v. Union Railway Co.*, 87 Fed. 879. Notwithstanding these two cases were in the same circuit, Judge Shipman, in the latter of them, made an independent examination of the question concerning the patentability of these three claims and sustained the conclusion of Judge Townsend in the former case. Satisfied that the patent sets forth a decided improvement in the art of electric car propulsion, and desirous of sustaining it if I could find reasonable support in the law for so doing, I have followed the example of Judge Shipman and independently examined the claims and their history.

The patent in suit is for new and useful improvements in overhead contact devices and switches for electric railways, invented by Charles J. Van Depoele. That Van Depoele made most important improvements in the art of electric car propulsion is not disputed. The application for what is called his basic patent for improvements in contact devices and switches was filed on March 12, 1887; but he received no patent on that application until April 11, 1893, when patent No. 495,443 was granted. While the application was pending in the patent office, and because it had become involved with certain interferences as to a part of its claims, the claims not so involved or some of them were "divided out" and embodied in separate applications. These separate applications were filed on October 22, 1888, and March 21, 1889, and resulted in the grant of patents Nos. 424,695 and 424,910, on April 1, 1890, a little more than three years before the so-called basic patent, No. 495,443, on the original application, was granted. In the specification of patent No. 424,695, and in certain of its claims, there is described a combination of an overhead conductor (trolley wire), a vehicle (trolley car), and a trailing contact arm (trolley pole), hinged on a support and provided with a spring or weight at its shorter end, which serves to press the grooved wheel at the longer end upwardly against the conductor, and also, after the car has turned a curve, to bring the arm back into a plane coincident with the longitudinal center of the car. The feature of this patent to which attention is now directed is the tension device which subserves the double purpose of exerting a centralizing tendency upon the arm and maintaining contact between the grooved wheel and the conductor. This feature of the patent was sustained by the Circuit Court for the Southern District of New York in *Thomson-Houston Electric Co. v. Elmira Railway Co.*, 69 Fed. 257, and by the Circuit Court of Appeals of the Second Circuit in the same case on appeal, 71 Fed. 396, 18 C. C. A. 145.

The effort to sustain patent No. 495,443—the so-called basic patent—resulted in failure; the Circuit Court of Appeals of the Second Circuit holding that the tension device therein described was none other than the one described in patent No. 424,695. *Thomson-Houston Electric Co. v. Hoosick Railway Co.*, 82 Fed. 461, 27 C. C. A. 419. Later an application for a reissue of this patent was made. The reissue, No. 11,872, was granted on November 13, 1900; but it, too, has been adjudged to be void. *Thomson-Houston Electric Co. v. Sterling-Meaker Co.* (C. C.) 150 Fed. 589, and 158 Fed. 813, 86 C. C. A. 73.

Between March 12, 1887, when the application for the so-called basic patent, No. 495,443, was filed, and October 22, 1888, when the divisional application for patent No. 424,695 was filed, namely, on November 15, 1887, Van Depoele verified by his affidavit another application for a patent, which application he filed on June 18, 1888. That application is the one on which patent No. 495,383—the one now in suit—was granted, and its date is April 11, 1893, being the same as the date of the so-called basic patent. It does not purport to be a division of the application filed on March 12, 1887, but it does purport to set forth improvements upon the invention described in that application. It clearly contains a feature not expressly described in the so-called basic patent, No. 495,443, or in its divisional patent, No. 424,695. In the other Van Depoele patents there was a centralizing tension device which restricted the lateral movement of the trolley pole. In the patent in suit there is free rotatability of the trolley pole about its support, so that when a car reaches the end of its route, instead of turning it on a turntable or a circular track, or unhooking or disconnecting the trolley pole, swinging it around, and again rehooking or reconnecting it, as must be done when the devices described in the other Van Depoele patents above mentioned are used, all that need be done is to swing the trolley pole around 180 degrees. It is claimed, too, that by this free rotatability electrical contact at sharp curves on high speed is more certainly preserved. This new feature, it is urged, is a marked improvement, and an able argument has been made to establish its patentability. But, after careful consideration of the proofs and the arguments, I find myself forced, as to claims 11, 12, and 13, to the same conclusion expressed by Judges Townsend and Shipman. In patent No. 424,695, granted three years prior to the granting of the patent in suit, the combination of the patent in suit, except as to free rotatability of the trolley pole, was shown. The only important change necessary to secure that rotatability was to attach the tension spring at the short end of the trolley pole to a rotatable support for the trolley pole, rather than to some fixed part of the car. Such a change did not involve invention. As was said by Judge Shipman (87 Fed. 882):

“When Van Depoele had advanced to the point of his improvement where he said, ‘I must advance another step and make the contact arm freely rotate,’ the universality of mechanism of this sort made the mechanical task an easy one.”

Claims 1, 2, 3, 8, and 9 may be briefly disposed of. They are as completely devoid of patentable novelty as are claims 11, 12, and 13. Their principal distinguishing feature is a free lateral swing of the

trolley arm. That may be secured, as above shown, simply by attaching the tension spring of patent No. 424,695 to the rotatable support.

It is unnecessary to consider any of the other defenses presented.

The bill must be dismissed, with costs.

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HESS-BRIGHT MFG. CO. et al. v. STANDARD ROLLER BEARING CO.

(Circuit Court, E. D. Pennsylvania. June 26, 1909.)

No. 233.

TIME (§ 9\*)—COMPUTATION —DAYS—CONSTRUCTION OF STATUTE.

In computing time under Rev. St. § 4887, as amended by Act March 3, 1903, c. 1019, 32 Stat. 1225 (U. S. Comp. St. Supp. 1907, p. 1003), permitting the filing of an application for a patent in this country within 12 months after the filing of an application for a patent for the same invention in a foreign country, the day of the application in the foreign country is excluded, and where the foreign application was filed on February 23d, an application filed in this country on February 23d of the following year was in time.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.\*]

In Equity. On bill and plea.

Dwight M. Lowrey and Robert Fletcher Rogers, for complainants.  
Augustus B. Stoughton, for defendant.

LANNING, Circuit Judge. The single question raised by the plea in this case has to do with the method of computing time under the provisions of section 4887 of the Revised Statutes, as amended by Act March 3, 1903, c. 1019, 32 Stat. 1225 (U. S. Comp. St. Supp. 1907, p. 1003). That section provides that no person otherwise entitled thereto shall be debarred from receiving a patent for his invention, nor shall any patent be declared invalid by reason of its having been first patented in a foreign country, "unless the application for said foreign patent was filed more than twelve months \* \* \* prior to the filing of the application in this country." A further provision of the section is to the effect that an application for a patent for an invention by any person who has previously regularly filed an application for a patent for the same invention in a foreign country which by treaty, convention, or law affords similar privileges to citizens of the United States shall have the same force and effect as the same application would have if filed in this country on the date on which the application for patent for the same invention was filed in such foreign country, "provided the application in this country is filed within twelve months \* \* \* from the earliest date on which any such foreign application was filed."

By the plea it appears that the inventions covered by the two patents in suit were patented in Germany on an application filed in that country February 23, 1903. The earlier of the applications on which the two patents in suit were allowed was filed in this country on February 23,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1904. The contention of the defendant is that the period of 12 months referred to in section 4887 of the Revised Statutes had expired before the earlier application was filed in this country. Is this contention sound?

The defendant relies in part upon *Russell v. Ledsam*, 14 M. & W. 574, where the plaintiff averred that original letters patent had been granted to him on February 26, 1825, for a term of 14 years, and that these letters patent were renewed on February 26, 1839. The defendant there contended that the renewal letters were granted after the expiration of the term of 14 years for which the original letters were granted. Baron Parke said:

"The next question arises on a point reserved at the trial on the evidence in support of the seventh plea. That plea was that the second or renewed letters patent were granted after the expiration of the term of 14 years granted by the first letters patent. \* \* \* The proof was that the original letters patent were dated on the 26th February, 1825, the second on the 26th February, 1839, and the question is whether the day of the date of the first letters patent was inclusive or exclusive. The usual course in recent times has been to construe the day exclusively, whenever anything was to be done in a certain time after a given event or date; and consequently the time for enrolling a specification within six months given by the proviso is reckoned exclusively of the day of the date. \* \* \* But in this case the question is when the term given by a patent commences; and the same rule would apply as to the commencement of a term, which, if it is to run from the date of the lease, includes the day of the date. It was asked by Mr. Kelly whether, if there had been an imitation of the invention on the day the patent was dated, it would have been an infringement of it, and we have no doubt that the answer ought to be that it would; and, if so, the day of the date would be included, and the patent would expire at midnight on the 25th day of February, 1839, for the law never takes notice of the fraction of a day, except where there are conflicting rights between subjects."

This case was referred to in the later case of *Williams v. Nash*, 28 Beav. 93. In this latter case it appeared that by act of Parliament it was provided that:

"Letters patent should be void at the expiration of three years \* \* \* from the date thereof unless there be paid before the expiration of the said three years \* \* \* the stamp duties in the schedule to this act annexed."

It was held that the payment of the stamp duty on February 26, 1858, upon letters dated February 26, 1855, was in time to save the patent, and the language of Baron Parke from the *Ledsam* Case as to the usual course in recent times of excluding the day from which the computation is to be made was commented on as establishing the general rule of computation. To the same effect are the cases of *Hicks v. National Life Ins. Co.*, 60 Fed. 690, 9 C. C. A. 215, *Supreme Council v. Gootee*, 89 Fed. 941, 32 C. C. A. 436, and *Sheets v. Selden's Lessee*, 2 Wall. 190, 17 L. Ed. 822. Following these cases, as I understand them, I conclude that in the computation of time February 23, 1903, should be excluded, and that February 23, 1904, was available for the purpose of filing the original application for the patents now in suit. It is admitted that the latter of the two patents in suit was issued as a division of the application of the first patent.

The plea will therefore be overruled, and the defendant allowed 20 days after the service of a copy of the order overruling the plea within which to file its answer.

## UNDERWOOD TYPEWRITER CO. v. ELLIOTT-FISHER CO.

(Circuit Court, S. D. New York. July 12, 1909.)

**PATENTS (§ 322\*)—SUIT FOR INFRINGEMENT—DAMAGES AND PROFITS—PROOF OF MARKING OR NOTICE.**

Where, in a suit for infringement of a patent, the bill alleges the marking of the patented article as required by Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), or notice to defendant of infringement, the court may permit proof of such allegations at any time before final decree, even on an accounting before the master after an interlocutory decree, in order to carry the accounting back of the filing of the bill, where equity requires it, as where, although the issue was tendered by the bill, the point was not raised on the hearing and no proof was introduced thereon.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 322.\*]

In Equity. This, in effect, is an application for a rule or order limiting the master, on the accounting directed by the interlocutory decree, to proof of damages, etc., since the filing of the bill.

See, also, 165 Fed. 927.

Briesen & Knauth, for complainant.

Robert Fletcher Rogers, for defendant.

RAY, District Judge. I cannot assent to the claim that the interlocutory decree entered limits the complainant to proof of damages or damages and profits subsequent to the filing of the bill. At the time of signing the interlocutory decree I was requested so to limit the accounting, but declined, and inserted the following:

"To which it [complainant] may be entitled under the proofs and pleadings herein."

Prior to the final hearing the complainant did not prove, and in the record there was not proof, that the complainant had marked or given notice as required by section 4900, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3888). The bill of complaint duly alleged marking and notice. The issue was thus duly tendered. The point was not raised at the final hearing. If it had been, and complainant had claimed ability to show marking or notice at a date prior to bringing suit, the court in fairness would have done one of two things—sent the case back for proof on that question, or expressly referred the question to the master, allowing the case to go on the question of validity of the patent and infringement. This is not a case where the complainant has failed to allege marking or notice, and is not, therefore, entitled to show it under his pleadings. The question is: Can and should the court permit the complainant to show before the master marking or notice prior to the bringing of the suit, and thus carry the accounting back to a date prior thereto, or should it hold that no evidence on that subject can be given before the master?

It is a question of procedure, rather than of jurisdiction. The court has ordered an accounting, and has not confined it, as to the time it shall cover, otherwise than as mentioned. If the court has power, and justice demands, the master should be permitted to take the evidence of marking or of notice, as the case may be, and make

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



his findings and report according to the justice of the case. Bringing suit was notice, and hence an accounting was proper. The accounting is now proceeding. The decree entered is purely interlocutory. The Circuit Court has jurisdiction of the whole matter. It may open the whole case. Of course, there must be proof of marking or of notice before the complainant can charge the defendant in damages. *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426. That it is now seeking to do. I am of the opinion, while I do not approve the practice, that the complainant is entitled to give proof of marking or of notice prior to the commencement of the suit before the master. How far back the accounting shall reach is a matter for the master to determine under the evidence adduced before him. To fix that date he must, in the absence of a limitation in the interlocutory decree, ascertain whether or not there was the requisite marking, or notice, or both; if notice, the date thereof. "The proofs in the case" are those which legitimately may be given under the pleadings and practice of the court. I do not think this holding is in violation of *Dunlap v. Schofield*, supra, or of *Westinghouse v. Condit* (C. C.) 159 Fed. 154. In this last case this court limited the accounting to the time after suit brought, on the ground there was no allegation in the bill of marking or of notice, not on the ground that complainant had failed to make proof of marking or of notice prior to the final hearing. Marking and notice are issuable facts; but so long as the Circuit Court has the case, and prior to final decree, it may permit the proof to be given, even before the master. I think this is the result of the cases. This court has recently held, as did Judge Holt, that after interlocutory and before final decree proof by order of the court may be given of infringement by a defendant against whom there was no proof of infringement at the final hearing.

I think the accounting should proceed and the evidence be taken. On application for final decree, the rights of the parties can be fully protected.

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FRANK et al. v. BERNARD.

(Circuit Court, S. D. New York. May 1, 1909.)

PATENTS (§ 326\*)—SUIT FOR INFRINGEMENT—FINE FOR VIOLATION OF INJUNCTION.

A motion to set aside an order, entered three years previously, imposing a fine for contempt for violation of an injunction against infringement of a patent, denied.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 326.\*]

In Equity. On motion to vacate order imposing fine for contempt. For former opinion, see 146 Fed. 137.

O. Ellery Edwards, Jr., for complainants.

Henry D. Williams, for defendant.

LACOMBE, Circuit Judge. I do not understand that any question of the validity and meritoriousness of the patent is presented. On

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

June 5, 1906, an order was made by myself punishing the defendant with a trifling fine for contempt, viz., disobedience of an injunction against selling infringing articles. That order was made upon six affidavits and certain exhibits, which, with the injunction, constituted the record then before the court. A motion is now made to vacate such order and direct restitution of such fine. That motion is based upon various other documents referred to in the notice. At this late day the court sees no reason for reopening the proceeding which terminated in the order of June 5th and for introducing new testimony touching the act of infringement then complained of. Upon the record presented at that time I was convinced that the particular exhibit marked "E. H. L.," with its undercut wall, was an equivalent of the top-tilted wall of the patent, and such is still my opinion. Both secure the leather ring in place by pinching it between one wall and the projecting top of the other wall. Whether, upon some different record produced in support of an application to punish the defendant for some other alleged contempt, a like conclusion should be reached, is a question not now before me.

The motion to vacate order of June 6th is denied.

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UNITED STATES ex rel. HUIDEKOPER v. HADLEY et al.

(Circuit Court, E. D. Missouri, N. D. June 22, 1909.)

No. 493.

COURTS (§ 303\*)—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE.

The state board of equalization, created by Const. Mo. art. 10, § 18 (Ann. St. 1906, p. 293), and required to "adjust and equalize the valuation of real and personal property among the several counties in the state," is a tribunal charged, with duties as an agency of the state, in the performance of which judgment must be exercised by its members, and a suit against them to compel them to raise the valuation of the property in a county is one against the state, within the meaning of the eleventh constitutional amendment, of which a federal court is without jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 844½; Dec. Dig. § 303.\*]

Federal jurisdiction of suits against state, see note to *Tindall v. Wesley*, 13 C. C. A. 165.]

On Plea to Jurisdiction.

Tatlow & Mitchell, for relator.

Elliott W. Major, Atty. Gen. of Missouri, John M. Atkinson, Asst. Atty. Gen., for respondents.

DYER, District Judge. On the 14th of April last there was filed in this court by the relator herein a petition for a writ of mandamus to be directed to and against the state board of equalization and the county board of equalization for the county of Macon to have the valuation of the real and personal property of Macon county increased above the present assessment as made by the county assessor, equalized by the state board of equalization, and finally passed upon and equalized

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the county board. The state board of equalization is composed of the Governor, State Auditor, State Treasurer, Secretary of State, and the Attorney General. The county board is composed of the judges of the county court, county surveyor, county assessor, county collector, and the clerk of the county court. The relator is a judgment creditor of the county of Macon for a large sum, and in his petition for the writ of mandamus claims, among other things, that he has heretofore been and still is prevented from realizing on his judgments against the county, for the reason that respondents have wrongfully failed, neglected, and refused to assess the property of Macon county at its true value in money, in violation of the laws of the state, and that this refusal, neglect, and failure was the result of a conspiracy entered into by the respondents to assess the property far below its true value in money, so that the relator could not realize upon his judgments against the county, etc. The petition makes various other allegations of misconduct upon the part of the respondents, not necessary in the opinion of the court to be here particularly stated.

To the petition here under consideration the respondents, on the 27th of May last, at and during the regular term of this court, filed a plea in words and figures following:

"Plea to Jurisdiction.

"Now come Herbert S. Hadley, James Cowgill, Elliott W. Major, John P. Gordon, and Corneliss P. Roach, constituting the state board of equalization, and appearing for the purpose of this plea, and for no other purpose whatever, and reserving to themselves all rights and privileges to defend as they may be hereafter advised, say that the relator cannot and ought not to have and maintain this action, for it appears that this honorable Court has not and cannot have jurisdiction of the subject-matter of this action, and of the person of these respondents as herein sued; and so these respondents say that they ought not to be required to further appear and defend this action, but the same ought abate and cease."

This plea raises the only question for present consideration. The plea necessarily admits all of the allegations of the bill, and, this being true, the sole question is: Has this court jurisdiction to issue the writ and compel compliance therewith? This requires a brief consideration of the laws of the state touching the assessment of property for the purpose of taxation and the collection and disbursement of the revenues derived therefrom.

Article 10, § 18, of the state Constitution (Ann. St. 1906, p. 293), is as follows:

Article 10, § 18: "There shall be a state board of equalization consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the state, and it shall perform such other duties as are or may be prescribed by law."

This provision of the Constitution imposes upon the state board of equalization the duty "to adjust and equalize the valuation of real and personal property among the several counties in the state."

Sections 9126, 9127, 9129, and 9130, of the Revised Statutes of Missouri of 1899 (Ann. St. 1906, pp. 4204, 4205), are as follows:

"Sec. 9126. The board shall meet at the Capitol in the city of Jefferson on the last Wednesday in February, 1894, and every year thereafter, a majority

of whom shall constitute a quorum, and the members thereof shall each take an oath or affirmation that he will, to the best of his knowledge and ability, equalize the valuation of real and personal property among the several counties in this state, according to the rules prescribed by this chapter for equalizing and valuing real property; and the secretary of the board shall keep an accurate account of all their proceedings and orders, and file the same, together with all of their papers, in the office of the State Auditor.

"Sec. 9127. The State Auditor shall lay before the board of equalization the abstracts of all taxable property in the state and the abstracts of the sales of real estate in such counties as returned to him by the respective county clerks and the president of the board of assessors of the city of St. Louis, and the board shall classify all real estate situate in cities, towns and villages as town lots, and all other real estate as farming lands, and shall classify all personal property as follows: First, banking corporations; second, railroad corporations; third, street railway corporations; fourth, all other corporations; fifth, bonds, notes, and evidences of indebtedness; sixth, horses, mares and geldings; seventh, mules; eighth, asses and jennets; ninth, neat cattle; tenth, sheep; eleventh, swine; twelfth, farm implements and all other personal property. And the board shall proceed to equalize the value of each class thereof among the respective counties of the state in the following manner:

"First. It shall add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money such per centum as will increase the same in each case to its true value.

Second. It shall deduct from the valuation of each class of property, real or personal, of each county which it believes to be valued above its real value in money such per centum as will reduce the same in each case to its true value."

"Sec. 9129. When the state board of equalization shall have completed its labors, the State Auditor shall immediately transmit to each county clerk the per centum added to or deducted from the valuation of the property of his county, specifying the percentage added or deducted from the real property and the personal property respectively, and also the value of the real and personal property of his county as equalized by said board; and said clerk shall furnish one copy thereof to the assessor, and one copy to be laid before the annual county board of equalization. And it shall be the duty of the State Auditor to require of clerks of the several county courts of this state to keep up the aggregate valuation of real and personal property in their respective counties, for those years in which no state board of equalization is held, to the aggregate amount fixed by the last state board of equalization.

"Sec. 9130. There shall be in each county in this state, except the city of St. Louis, a county board of equalization, which board shall consist of the county clerk, who shall be secretary of the same, but have no vote, the county surveyor, the judges of the county court, and the county assessor, which board shall meet at the office of the county clerk on the first Monday in April of each year. \* \* \*

Full, able, and exhaustive briefs (indicating great research) have been presented by counsel for relator and counsel for respondents. It is claimed by relator's counsel that this is not a suit against the state, within the meaning of the eleventh amendment to the federal Constitution, and that the officers against whom the petition is leveled are mere creatures of the law, and the duties imposed upon them merely ministerial. Herein lies the real question to be determined by the court. If the proceeding is one against the state, then counsel for relator concedes that the action will not lie. It is also conceded by counsel for relator (if I understand them correctly) that, if the state board of equalization has discretion to increase or diminish the rate of taxation, then the board acts as (at least) a quasi judicial body, and

its action cannot in the present proceeding be reviewed for the purpose of determining whether or not the assessment is too low.

Various authorities are cited by counsel in support of and against the proposition as they respectively contend. It is hardly necessary for this court to review at length these several authorities, and I shall only refer to one or two decisions of the Supreme Court of the United States which seem to support the views entertained by this court:

"The state board of equalization is one of the instrumentalities provided by the state for the purpose of raising the public revenue by way of taxation. \* \* \* Acting under the Constitution and laws of the state, the board therefore represents the state, and its action is the action of the state." *Raymond v. Chicago Traction Co.*, 207 U. S. 35, 36, 28 Sup. Ct. 7, 52 L. Ed. 78.

In the case of *Pennoyer v. McConaughy*, 140 U. S. 9, 10, 11, 11 Sup. Ct. 699, 701, 35 L. Ed. 363, the court says:

"The question, then, of jurisdiction, is first presented for determination. Is this suit, in legal effect, one against a state, within the meaning of the eleventh amendment to the Constitution? A very large number of cases involving a variety of questions arising under this amendment have been before this court for adjudication; and, as might naturally be expected, in view of the important interests and the wide-reaching political relations involved, the dissenting opinions have been numerous. Still the general principles enunciated by these adjudications will, upon a review of the whole, be found to be such as the majority of the court and the dissentients are substantially agreed upon. It is well settled that no action can be maintained in any federal court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that 'no state shall pass any law impairing the obligation of contracts.' This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself."

The provision of the state Constitution before quoted creates the board of equalization, and it is charged to "adjust and equalize the valuation of real and personal property among the several counties in the state." The word "adjust" is defined as follows:

"To settle or bring to a satisfactory state, so that parties are agreed in the result; as to adjust accounts; the differences are adjusted."

To "equalize" means:

"To make equal, to cause to correspond, or be like, in amount or degree as compared; as to equalize accounts, burdens, or taxes."

The state board of equalization is in the opinion of the court a tribunal created by the Constitution and charged with certain duties, in the performance of which judgment must be exercised by its members. The board to all intents and purposes acts for the state in fixing the values upon property subject to taxation and is in every sense of the word, so far as this proceeding is concerned, the state itself. If the present board has valued the property of Macon county below its real value, this court is without authority to correct the error or to compel a true valuation.

It follows that the plea to the jurisdiction of the court must be sustained, and the relator's petition dismissed. It is so ordered.

## FLORENCE MFG. CO. v. DOWD et al.

(Circuit Court, S. D. New York. June 23, 1909.)

**1. TRADE-MARKS AND TRADE-NAMES (§ 3\*)—MARKS SUBJECT TO APPROPRIATION—DESCRIPTIVE NAMES.**

The word "Keepclean" as a name for toilet brushes is descriptive, and cannot be appropriated as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 6; Dec. Dig. § 3.\*]

**2. TRADE-MARKS AND TRADE-NAMES (§§ 69, 75\*)—UNFAIR COMPETITION.**

To entitle a manufacturer to an injunction to prevent a competitor from imitating a name used by him to designate his goods which is descriptive, and therefore not a valid trade-mark, the imitation must be with fraudulent intent or such as is calculated to deceive the public.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 80, 86; Dec. Dig. §§ 69, 75.\*]

In Equity. On final hearing.

William A. Macleod and George P. Dike, for complainant.

A. Bell Malcomson, for defendants.

HOUGH, District Judge. The bill avers that complainant for a long time (viz., since about 1895) has appropriated as a distinguishing name or mark for brushes made and sold by it the word "Keepclean," and in 1897 registered the same as a trade-mark under Act March 3, 1881, c. 138, 21 Stat. 502 (U. S. Comp. St. 1901, p. 3401). It is further averred that this trade-mark "Keepclean" is stamped or printed, not only upon complainant's brushes or upon tags attached thereto, but upon the "individual boxes or packages containing the said brushes." Defendants are charged in the bill with violating complainant's rights by selling within the jurisdiction of this court "brushes of inferior quality, \* \* \* which are marked with the word 'Sta-kleen,' and, further, that defendants' inferior brushes are contained in 'individual boxes, \* \* \* said boxes being made in imitation of the \* \* \* boxes employed by' complainant. The bill prays that defendants be enjoined from selling 'brushes \* \* \* marked or stamped with the word "Sta-kleen," or with any imitation of the word "Keepclean" which is intended or calculated to deceive,' and that an account be taken in the usual way.

The case made by the evidence is hardly foreshadowed by the bill. It is, I think, proven that for many years the complainant has been engaged in the manufacture and sale of brushes for toilet purposes. Its product is large, widely advertised, well known, and extensively used. Some 14 years ago it introduced to the trade what is called a "new line of brushes"; i. e., first ordinary hair brushes, then clothes brushes, military brushes, etc. All these brushes were called "Keepclean." Whether designed for one toilet purpose or another, they possessed and possess certain common characteristics; i. e., they have black wooden backs and white metal faces, to which the bristles are attached and from which they project. These "Keepclean" brushes have been offered for sale in separate boxes, if not from the beginning.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at least for a considerable number of years. The "Keepclean" box has well-defined characteristics, and, whether the box contains one kind of brush or another, it resembles its fellows in general appearance, being oblong, rectangular, of a greenish basic color, with representations thereon of black-backed and white-faced brushes, and prominently exhibiting the word "Keepclean" in red letters on the greenish ground. The complainant's "Keepclean" line of brushes, however, did not include a tooth brush until 1904 or 1905. The evidence on this point is not satisfactory; but upon the whole I am convinced that it was intended to put out a "Keepclean" tooth brush as early as 1903, but the article was not put on the market until the early part of 1905. When offered to the public, the tooth brush was put into, and has since been sold in, boxes uniform in design and general appearance (though of smaller size) to the hair and clothes brush boxes above described, and the tooth brush itself has a black wooden back and a white metal face like the others.

The defendants seem to have at one time contemplated the manufacture and sale of the larger toilet brushes under the "Sta-kleen" mark; but as matter of fact they have (so far as the evidence indicates) manufactured and sold nothing but a tooth brush. This tooth brush is made under a mechanical patent (601,405), and was put on the market and actually sold in 1902 or 1903, and certainly before complainant's "Keepclean" tooth brush was offered to the public. From the beginning defendants have called their tooth brush the "Sta-kleen," and in 1904 they registered "Sta-kleen" as a trade-mark for "toilet brushes." For at least four years the two tooth brushes have been on the market together, and during that time both the parties to this action have endeavored to register "Keepclean" and "Sta-kleen," respectively, as trade-marks under the present act of Congress, and both have been refused on the ground that the words are descriptive.

In my opinion, not only are these words descriptive upon mere consideration of the words themselves, but an examination of the tooth brushes and their history confirms the finding. It is the complainant's object to furnish a metallic face from which the bristles may project, because the metal (apparently aluminum) does not afford easy adherence for particles of dirt; while the patent under which defendants manufacture specifically rests its claim to invention upon an open or reticulated back, which reduces the space for lodgment of dirt to a minimum. The tooth brushes themselves manufactured by the parties to this litigation bear as little resemblance to each other as any two implements designed for the same function can bear, and it has not been asserted in argument that even the most casual purchaser could be deceived into mistaking one for the other if he looked at them.

Complainant's case, therefore, rests on the following propositions: (1) That "Keepclean" is a trade-mark applicable and applied to toilet brushes generally (and inter alia tooth brushes), which trade-mark is infringed by defendants' use of "Sta-kleen." (2) If trade-mark validity be denied to "Keepclean," it must equally be denied to "Sta-kleen"; but complainant has for so many years made the public familiar with "Keepclean" as descriptive of a whole line of brushes that

the use of "Sta-kleen" as applied to a tooth brush only is an unfair endeavor to find a market for defendants' single brush under cover of complainant's reputation for an entire line of toilet brushes. (3) The defendants' brush box is a colorable imitation of the "Keepclean" line of boxes, and this not only constitutes unfair competition in respect of the sale of tooth brushes, but is also conclusive in favor of complainant's second proposition above stated.

As to the first contention, while I am of opinion that, if "Keepclean" were a valid trade-mark, "Sta-kleen" would be an infringement, it seems too plain for argument that under the evidence above set forth neither of the trade-names under consideration is a good trade-mark as applied to toilet brushes of any variety.

The second and third propositions are so closely allied that they may be considered together. There is some (contradicted) testimony showing that when defendants prepared to sell their "Sta-kleen" brush, and to that end gave to a box maker their first order for tooth brush boxes, they did intend to poach on complainant's business, but not, I think, in respect of the "Keepclean" articles. Long prior to the introduction of either tooth brush directly involved in this case, complainant had manufactured, advertised, and sold the "Prophylactic" tooth brush. This is a brush with an open back, and quite closely resembles the "Sta-kleen" brush. Complainant had sold this brush in a peculiar box, which box had been manufactured by the same maker to whom defendants gave their first order for "Sta-kleen" boxes. It may be true that defendants requested the box maker to provide them with a box which in general appearance would imitate the Prophylactic box. But this action is not for unfair competition with the Prophylactic brush, nor was any such imitation box actually made, and we are concerned here only with defendants' "Sta-kleen" box.

This box is (and has been for a period longer than the business life of the "Keepclean" tooth brush) of a slaty bluish color, bearing very distinctive ornamentation which does not in the least resemble that of complainant's brush receptacle. The sole similarity between the two boxes (other than size and shape) is that the words "Keepclean" and "Sta-kleen" are both printed in red, though in wholly different styles of type. In my judgment no person of ordinary intelligence could be deceived into taking one of these boxes for the other, and complainant has adduced no evidence that any one has been deceived as matter of fact. It is shown by one witness that he went into a drug store, asked for a Keepclean brush, was handed a box, did not look at it, and when he returned to his office discovered that he had the "Sta-kleen" article. This might furnish a cause of action against the druggist, under *Enoch Morgan's Sons Co. v. Wendover* (C. C.) 43 Fed. 420, 10 L. R. A. 283; but there is absolutely no proof that the druggist's misrepresentation was either directly caused by any act of the defendants, was the result of his own confusion with respect to the articles in question, or was due to any motive other than his own dishonest desire to palm off what is perhaps a cheaper article, or at any rate one that he happened to have in stock, on a peculiarly careless and inattentive member of the public. It is therefore to me plain



that defendants' use of the "Sta-kleen" box does not constitute unfair competition.

As to the balance of complainant's case, it is admitted that the mere fact that when the "Sta-kleen" box was introduced there was no such thing as a "Keepclean" tooth brush is not conclusive in favor of the defendants. *Collins & Co. v. Oliver Ames & Son Corporation* (C. C.) 18 Fed. 561. It is therefore urged that "Keepclean," although descriptive, has been so long used by complainant, and so great a reputation has been built thereon, that an injunction should issue against "Sta-kleen" under *Fuller v. Huff*, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332, *Meyer v. Medicine Co.*, 58 Fed. 884, 7 C. C. A. 558, *Revere Rubber Co. v. Consolidated Hoof Pad Co.* (C. C.) 139 Fed. 151, and *Von Mumm v. Frash* (C. C.) 56 Fed. 830. But, in order to bring this case within either the authority or the reasoning of the above decisions, the use sought to be enjoined must be fraudulent. Where the name upon which the complaining party has built up his business, or by which he has unfortunately chosen to designate it, is descriptive, or geographical, or otherwise invalid under trade-mark law, he cannot prevent another from using the same name, or one nearly the same, if that other uses it "with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact." *Williams v. Mitchell*, 106 Fed. 168, 45 C. C. A. 265.

Complainant's evidence, measured by this standard, fails, in my judgment, to make out a case. There is evidence (above referred to) of a fruitless intention on defendants' part to illegitimately profit by complainant's advertisement and introduction of the word "Prophylactic"; but that is certainly insufficient to warrant a finding even of intent to deceive in respect of "Keepclean." It is admittedly impossible to discover a "Sta-kleen" brush corresponding to the "Keepclean" hair, military, clothes, and nail brushes, and, as above set forth, no one is shown to have been deceived as to the "Keepclean" tooth brush, and I am unable to comprehend how any one can be deceived by defendants' product. In the absence of plain evidence of fraudulent intent or of actual deception, to permit this complainant to enjoin the defendants in respect of a descriptive word is going beyond even the wide limits of the law of unfair competition, and is practically an extension of the law of trade-marks, not only illegal, in view of controlling decisions, but obviously injurious to the public.

Let the bill be dismissed.

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THOMAS G. CARROLL & SON CO. v. M'ILVAINE & BALDWIN, Inc.

(Circuit Court, S. D. New York. June 23, 1909.)

**1. TRADE-MARKS AND TRADE-NAMES (§ 45\*)—TITLE—EFFECT OF REGISTRATION.**

Registration of a trade-mark cannot confer title, if some other individual by prior adoption and use has acquired a common-law title.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 53; Dec. Dig. § 45.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. TRADE-MARKS AND TRADE-NAMES (§ 21\*)—TITLE—CONTEMPORANEOUS USE.

Where the same trade-mark is used by different persons in the same line of business, and operating partly at least in the same territory, the exclusive use is awarded to him who first devised and used the same, provided he asserts his rights without laches.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. § 21.\*]

3. TRADE-MARKS AND TRADE-NAMES (§ 21\*)—TITLE—"BALTIMORE CLUB" WHISKY.

The right to the use of the name "Baltimore Club" as a trade-mark for rye whisky *held* to be in defendant on the ground of prior use, although both parties had used it continuously for many years, but in different localities.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. § 21.\*]

4. TRADE-MARKS AND TRADE-NAMES (§ 1\*)—NATURE.

A trade-mark merely distinguishes and designates the business in which it is used, and it is the business which is to be protected, and not the trade-mark as a mere collocation of words or symbols.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 1; Dec. Dig. § 1.\*]

5. TRADE-MARKS AND TRADE-NAMES (§ 84\*)—INFRINGEMENT—RIGHT TO INJUNCTION.

Complainant and its predecessors in Baltimore, and defendant and its predecessors in New York City, each for more than 30 years produced and sold a rye whisky under the name of "Baltimore Club." Complainant's business was chiefly local, and did not extend to New York City until shortly before the commencement of this suit, when it placed its goods in the market there. Defendant's business was larger, and whatever reputation or value attached to the name in New York was due to its efforts and its goods. *Held*, that complainant, even if conceded priority of use in the limited area of its business, had no standing to enjoin defendant's use in New York, since that would be to further the deception of the public there, which it is the primary object of equity in such cases to prevent.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 9C; Dec. Dig. § 84.\*]

In Equity. On final hearing.

Goepel & Goepel (Mr. Cozzens, of counsel), for complainant.

Parsons, Closson & McIlvaine (Mr. McIlvaine, of counsel), for defendant.

HOUGH, District Judge. The complainant is a corporation which has succeeded to and now owns a business founded in Baltimore by one Carroll in 1870. The defendant is a corporation which has succeeded to and now owns a business founded by one McIlvaine in New York in 1865. Both businesses have been continuous, and that of the defendant has for many years been well and favorably known in New York City. The complainant's business appears from the evidence to have been of smaller volume, but to have been well known in Baltimore.

The parties to this litigation and their predecessors have both, during all the periods above alluded to, been engaged in the business (inter alia) of selling whisky. In 1874 the original Carroll registered

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as a trade-mark under Act July 8, 1870, c. 230, § 77, 16 Stat. 210, the words "Baltimore Club" in connection with the words "Warranted Pure Rye Whisky," declaring in his affidavit that he had used this trade-mark in connection with "a high-class article of pure rye whisky" for more than 4 years. In 1881 the same Carroll registered the same trade-mark under Act March 3, 1881, c. 138, 21 Stat. 502 (U. S. Comp. St. 1901, p. 3401), declaring that "he had continuously used the same in his business for 11 years," and that the particular description of goods to which this trade-mark was appropriated was "rye whisky." In 1907 the present complainant registered as a trade-mark the words "Baltimore Club," declaring that the same had been continuously used in its business and that of its predecessors since 1870, and that the goods to which it was appropriated were "rye whisky." This course of registration is in my opinion sufficient to show that the complainant and its predecessors have persistently asserted right to the words "Baltimore Club" as a trade-mark for certain rye whisky sold by them in Baltimore. The testimony convinces me that their volume of trade was never large, and that until in very recent years they never obtained (if, indeed, they sought) any market for their liquor of this brand in or near New York City.

The view of the testimony most favorable to the complainant is that at least as early as 1875 the defendant's predecessors had a large local trade in New York in a brand of whisky known as "Baltimore Club," and also well known to be sold only by McIlvaine & Baldwin (a partnership at that time). Such trade has continued (if not enlarged) down to the time of the beginning of this suit. It is likewise a view of the testimony as favorable as the complainant could ask that down to about 1882 or 1883 the Carroll firm sold Baltimore Club whisky in Baltimore, and the McIlvaine & Baldwin firm sold whisky under the same trade-mark in New York, and neither knew of the other's existence nor interfered with each other's customers. There is some testimony that at the date last mentioned the original Carroll, accompanied by his sons, came to New York, and, having then or earlier learned of the existence of McIlvaine & Baldwin's Baltimore Club, called at the latter's place of business and laid claim to the trade-mark as the property of the Carroll firm. This is testified to by the only survivor of the parties to the conference.

Whatever threats or demands were made by the Carrolls at this time, they certainly bore no fruit; for each party continued to transact his business as before until shortly prior to the beginning of this action in 1907. By this time the founders of both businesses were dead. The complainant then made efforts to sell its Baltimore Club whisky in New York, and did sell some of it under a bottle label of which it is sufficient to say that it is an imitation of the label used for many years by the defendant and its predecessors, an imitation evidently calculated to deceive any but the most discriminating purchasers, and bearing no other resemblance to the trade-mark registered by defendant and its predecessors than the words "Baltimore Club" in different type and different color, and also bearing no resemblance at all to the bottle label used for a considerable period (though exactly how long is not shown) by the complainant in its established Baltimore

trade. These New York sales under an imitated label gave rise to some correspondence between the parties hereto, in which complainant declared that the alleged imitation of label would "not be discussed" further than to say that complainant regarded the words "Baltimore Club" as (its) exclusive property, conferring upon it the "right and liberty \* \* \* of printing [said words] in any style or color" it preferred; and to substantiate this assertion of right the present suit was brought.

The complainant gives undue weight to the series of registrations above set forth. Property right in a trade-mark exists at common law and is independent of the statutes regulating registration. Under the present trade-mark act a certificate of registration is *prima facie* evidence of ownership; but this evidence may be contradicted in court, and the apparent right of the registering party shown not to exist. Registration cannot confer a title to a trade-mark, if some other individual has acquired a prior right by adoption and use; nor can it vest a title in the registrant as against another's common-law title. *Glen Cove Mfg. Co. v. Ludeling* (C. C.) 22 Fed. 823; *La Croix v. May* (C. C.) 15 Fed. 236; *Ohio Baking Co. v. National Biscuit Co.*, 127 Fed. 116, 62 C. C. A. 116. The fundamental inquiry, therefore, in this case (as in most others relating to property in trade-marks), is: To which of the contending parties should judicial protection be granted upon the ground that he first produced or brought into the market an article of consumption that has found favor with the public, and first affixed thereto some name or symbol which serves to distinguish it as his?

To him who first did bring the article into the market and did first affix a distinguishing name or symbol should be granted protection, to the end that no other shall deceive or mislead the public and injure the first introducer by appropriating said distinguishing mark or any colorable imitation thereof. *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993. The owner of a trade-mark has no estate in the trade-mark as such, nor does registration confer upon him any monopoly. His position bears no resemblance to that of a patentee. He is entitled to legal protection for his trade-mark only because by granting the same the courts protect the business designated or indicated to the public mind by the trade-mark. It is for this reason alone that, where the same trade-mark is used by different persons in the same line of business and operating (partly at least) in the same territory, the exclusive use thereof is awarded to him that first devised and used the same. Upon the assumption, therefore, that the parties to this litigation are vending or trying to vend the same article in the same place under the same name, the question must be settled whether the founder of complainant's business or the founder of defendant's business first adopted and used the trade-mark "Baltimore Club" as applied to rye whisky.

It is established by his own declaration that the original Carroll began to sell Baltimore Club whisky not earlier than 1870, and it is in my opinion established by the oral evidence herein that the original McIlvaine sold Baltimore Club rye whisky and obtained a considerable market for the same as early as 1868. This finding of fact is enough

to dispose of this case; but there are, in my judgment, other reasons for dismissing the complaint, which may be stated.

Upon any view of the evidence herein the defendant and its predecessors for more than 30 years before the beginning of this suit had widely sold and extensively advertised in New York their Baltimore Club rye. They made a market for it. They made the trade-mark known in a densely populated community and among a portion of that community whose trade was and is very desirable. Whatever value attaches to the trade-mark in New York at all events is due to no business effort of the complainant, or its acts in putting certain words on record in the United States Patent Office. The defendant's trade under the trade-mark in dispute is and long has been confessedly much larger than the complainant's trade under the same trade-mark.

This case, therefore, presents an unusual inversion of the rule that a limited use in a small area does not give a party trade-mark rights as against other interests in other sections of the country, where no deception would be likely to result. The unusual condition rests in this: That this complainant, who has brought about a comparatively small use of Baltimore Club rye, now asserts a right to extinguish or appropriate a much larger business, which with or without its knowledge is the result of upwards of 30 years of effort on defendant's part. To grant an injunction under such circumstances would be to disregard the most important branch of the equitable rule invoked. The injunction in trade-mark cases is primarily designed to prevent the public from being misled and deceived, and to enjoin these defendants from using the words "Baltimore Club" in favor of this complainant would be to further the deception (in this jurisdiction at all events) which it is the object of equity to prevent.

In *Corwin v. Daly*, 7 Bosw. (N. Y.) 222, the defendant had introduced "Club House Gin" into California, shipping it from New York. The complainant, who had previously vendd gin under the same name in this city, endeavored to prevent it; and the court remarked:

"Defendant's wares are intended for, shipped to, and circulate in the California market alone, where only recently the complainants have followed them. The latter cannot claim their trade-mark to be prior in time there. They have not monopolized all the markets in the world, and cannot exclude the defendant's wares."

The same doctrine (in more modern form) is well illustrated in *Tetlow v. Tappan* (C. C.) 85 Fed. 774. In that case a large manufacturer, after he had established a trade-mark, discovered that the same mark had long been used for the same purpose by a small dealer with a small trade in a distant city, and he thereupon paid that small dealer (in effect) not to enlarge his use of said trade-mark. But this recognition of an apparently prior right was held not to invalidate the large manufacturer's title as against a proven invader of the manufacturer's business. The facts of this case (of which the writer had personal knowledge) are a good illustration of the rule that the trade-mark merely distinguishes and designates the business, and it is the business which is to be protected, not the trade-mark as a mere col-

location of words or symbols. There is nothing sacred about such words or symbols.

And, finally, in any view of the testimony, the decision in *Macmahon Pharmacal Co. v. Denver Chemical Co.*, 113 Fed. 468, 51 C. C. A. 302, is decisive against this bill. It is possible that here, as in the case cited, the defendant's predecessor, in ignorance of Carroll's acts or Carroll's business, adopted Carroll's words, and with those words as a signboard built up a large trade and acquired public reputation; but in this case, as in that, it must be held that, regardless of priority of adoption of words which are worthless without a business, the complainant never acquired the exclusive right to use the words in question, "Baltimore Club," as a trade-mark, and the bill must therefore be dismissed.

It is not thought necessary to discuss the imputations cast upon complainant, and based on its obvious imitation of defendant's bottle label. This case has been presented and tried on the theory that the alleged prior adoption and undoubted registration of trade-mark necessarily gave a universally exclusive right of use to the complainant, in the United States at all events. This contention I believe unfounded, because, first, complainant's predecessor did not first adopt the trade-mark, and, second, even if he did, such adoption in 1870 conferred (under the facts of this case) no exclusive rights as against this defendant when suit was begun in 1907.

The bill is dismissed, with costs.

UNITED STATES TELEPHONE CO. v. CENTRAL UNION TELEPHONE CO. et al.

(Circuit Court, N. D. Ohio, W. D. May 20, 1909.)

No. 2,127.

1. INJUNCTION (§ 114\*)—INDISPENSABLE PARTIES—SUITS INVOLVING VALIDITY OF CONTRACTS.

To a suit by a long-distance telephone company having exclusive contracts with local companies binding the latter not to make or permit connections with their lines by any other long-distance company for a term of years, to enjoin other companies doing a long-distance business from making connections and interchanging business with such local companies in violation of their contracts with complainant, the local companies are indispensable parties, the validity of the alleged contracts between them and complainant and their rights thereunder being necessarily involved.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 211-218; Dec. Dig. § 114.\*]

2. MONOPOLIES (§ 20\*)—COMBINATIONS PROHIBITED—CONTRACTS FOR EXCLUSIVE CONNECTIONS BETWEEN TELEPHONE COMPANIES.

Under the public policy of the state of Ohio, as evidenced by the decisions of its courts and its general statutes relating to monopolies and contracts in restraint of trade, a contract between a local telephone company and a long-distance telephone company for a connection between their lines and the use of the local lines for the sending and receiving of long-distance messages, which binds the local company not to permit any similar connection by any other long-distance company for a term of 99 years, thus disabling it from giving its subscribers the benefit of competition in long-distance service and from extending the field of such service beyond

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the lines of the other party, is void both as tending to create a monopoly and as denying to persons similarly situated the same privileges accorded to others. Conceding that a local company is not bound to permit any long-distance connection with its exchange, yet when it extends that right to one company it is under legal duty as a public service corporation to extend the same right to others.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.\*

Monopolistic contracts—Validity as affected by public policy, see note to *Cravens v. Carter-Crume Co.*, 34 C. C. A. 486.]

In Equity. On motion for preliminary injunction.

W. L. Cary, Jr., Cable & Parmenter, and Brown, Geddes, Schmettau & Williams, for complainant.

Doyle & Lewis and Paxton & Warrington, for defendants.

TAYLER, District Judge. A temporary restraining order was issued on the filing of the bill, and later the case was heard on the question as to whether the order should continue in force. This raised the question whether on the bill and the affidavits the complainant was entitled to an injunction.

The bill is very long, and, for the purposes of this opinion, is sufficiently summarized as follows:

Complainant alleges that it is a telephone company engaged in long-distance service. That the Central Union Telephone Company and the American Telephone & Telegraph Company are what are known as Bell Companies, the former being local to Ohio, Indiana, and Illinois, while the American Telephone & Telegraph Company is the parent Bell Company.

The bill alleges that the Bell Company seeks to monopolize the telephone business of the country. That for many years it succeeded in doing so. That it refused, during the period of its monopoly, to give long-distance and local service to communities that needed it, and altogether conducted itself in a very arbitrary and high-handed manner. That about 10 years ago, in consequence of these conditions and the necessities of the several communities which were denied the telephone service which they required, the complainant company was organized, and at an expense of more than \$5,000,000 constructed and acquired numerous telephones, telephone lines, and exchanges in the several states. That it has largely, and, indeed, enormously, developed the telephone facilities of the country, and in this and adjoining states has a larger number of exchanges and telephones than the Bell Companies have.

The bill alleges that prior to the organization of the complainant company, as well as since, a large number of communities in Ohio, Indiana, and Illinois which had been denied the privilege of local telephone service by the Bell Companies established their own independent systems, and to most of these independent systems the Bell Company refused long-distance service.

Complainant, in order to obtain some assurance of success in carrying on the business of a long-distance telephone company, commenced shortly after its organization, and has continued since that time up to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a recent date, to make contracts with the various local independent companies. The purpose of these contracts was to bind the local companies to permit no connection to be made with any other long-distance telephone company than the complainant for a period of 99 years. A typical contract is attached to the bill, and the provisions important to this inquiry are the last paragraph of the second section, as follows:

"And said parties agree not to enter into any contract with any other person, firm or corporation, whereby any of the rights, privileges or advantages herein acquired by either party may be impaired, except as provided in paragraph 4 hereof."

And paragraph 14:

"This contract shall be and remain in force for and during the period of ninety-nine years from date hereof and thereafter until one year's written notice shall have been given by either party to the other of its intention to terminate the same."

The bill alleges that, by reason of a conspiracy between the two defendants, 16 local independent telephone companies in Ohio, all of which had theretofore entered into contracts with the complainant, similar to that just quoted, have been induced to violate these contracts and to permit the defendant Central Union Telephone Company to connect its lines with the several local independent exchanges, thereby enabling the defendants to receive and transmit, and that they were receiving and transmitting, long-distance messages originating at or destined to the exchanges of the several independent companies above mentioned which otherwise would have been sent over complainant's lines, thereby depriving complainant of the benefit of the exclusive contracts which they had entered into, to its great damage.

The bill further alleges that the defendants are endeavoring to induce other independent telephone companies having similar contracts to violate them in the same manner.

It is alleged that this proposed action, as well as the consummated action, with the independent telephone companies, is an attempt to effect a combination and consolidation of competing telephone properties, in violation of the statutes of Ohio, and that it is also an attempt to monopolize part of the trade or commerce among the several states, and is in violation of the act of Congress known as the "Sherman Anti-Trust Act" (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and that the purpose of the defendants is to destroy all competition by destroying the value of complainant's property.

Allegations are made of the multiplicity of suits which would be necessary if actions were brought in respect to each company which has already entered into a contract with the complainant, and it therefore seeks to settle the rights of the parties with respect to all of them in one suit.

There are many other averments which do not bear upon the vital questions in the case, and need not further be referred to.

The prayer of the bill is that the defendants, their agents, servants, employes, etc., be restrained from in any manner violating any of the contracts between the United States Telephone Company and any of the companies forming a part of the independent telephone system for



the full terms of the contracts, and from connecting the lines of the defendants, or either of them, with the exchanges, switch boards, or systems of any of the independent companies with which the United States Telephone Company has contracts for exclusive interchange of telephone business; that the defendants be enjoined during the term of the exclusive contracts from delivering telephone messages to or receiving telephone messages from any of the independent telephone companies with which exclusive contracts existed; that the defendants be enjoined from continuing the connections already existing between them and the systems, lines, switch boards, or telephones of the 16 companies with which they have already made connections; and, generally, that they be restrained from doing any acts which will result in the diversion from the United States Telephone Company of the business to which it is entitled by virtue of the exclusive contracts referred to.

The bill also prays that the defendants be enjoined from entering into or carrying out any contract or conspiracy with any competing telephone company in restraint of trade or commerce among the several states, and from selling its or their property, plants, or exchanges, or any part thereof, to any person, firm, or corporation competing with the defendants or either of them in the telephone business in the states of Ohio, Indiana, Michigan, New York, Pennsylvania, or West Virginia, and from purchasing the property, plants, or exchanges, or any part thereof, of persons, firms, or corporations engaged in the telephone business in competition with the defendants, or either of them, in such manner as to prevent competition, and from consolidating, merging with, or dividing territory with any such competing companies in such manner as to prevent competition.

There is also a prayer to enjoin the defendants from circulating false and defamatory publications, circulars, pamphlets, etc., to which reference is made in the body of the bill.

It will thus be seen that the prayer of the bill is fourfold: (1) To enjoin the defendants from inducing any of the independent telephone companies having exclusive contracts with the complainants from breaking their contracts, or from making any connections with defendants' lines, which, it is claimed, would be a breach of such contracts. (2) To enjoin the defendants from continuing the connections which have already been made with 16 local independent telephone companies in Ohio, which have permitted such connections to be made, and which are giving long-distance telephone business to the defendants. (3) To restrain the defendants from violating the Ohio statute and the Sherman anti-trust act. (4) To enjoin them from distributing false and defamatory publications.

The relative insignificance of the subject of the last of these prayers is such that it was not to any considerable extent discussed in the argument.

Three important questions are presented in the discussion of the rights to which the complainant is entitled under the allegations of the bill: (1) Whether all of the necessary parties have been brought into the case. (2) Whether, under the allegations of the bill, the complainant is entitled to relief under the Sherman anti-trust act. (3)

Whether, if the court has jurisdiction, an injunction will lie to prevent the defendants from making connections with the lines of local independent telephone companies which have entered into with the complainant the exclusive contracts described.

1. In view of the conclusion to which I have arrived as to the third of these questions, it becomes unnecessary to discuss the first as fully as I otherwise would. I have rather extensively examined the authorities bearing on the question of the jurisdiction of this court to determine the issues here presented, as against the local independent companies, which are severally parties to the exclusive contracts, without their presence in this case. While the question is not free from doubt, I am of the opinion that no such relief as the complainant seeks to obtain by this bill can be granted without the presence of these local independent telephone companies.

I think I have examined all of the cases cited, and have analyzed many of them, for the purpose of arriving at a conception of the principle involved. If the case turned wholly upon that question, I would take pains to more amply elaborate the references to these authorities and my construction of them. It is enough to say that in my opinion, while it may be said that a court of equity has authority to restrain an individual from pursuing an immoral or unrighteous course of conduct, it will not do so where the effect of such action by the court is to definitely determine contract rights belonging to or inhering in persons who are not parties to the litigation. The effect, for instance, of a decree enjoining one of the defendants from continuing physical connections with a local independent company with which it now has telephone connections by virtue of some contract which they have seen fit to enter into, would be to determine as a finality against the local independent company, not a party, that it had no right to make a contract with the defendants or either of them, and to put an end to the operation of a contract which it has made, or has sought to make, with the defendant companies, without giving the local company an opportunity to come in and assert that the contract which it made with the complainant is void or invalid or was without consideration, or from presenting any other defense or claim against the validity or existence of its so-called exclusive contract with the complainant, or from showing that its contract with the defendants is valid and valuable.

The general rule is so clearly stated and so amply sustained on reason and authority by Mr. Chief Justice Fuller in the case of *State of California v. Southern Pacific Company*, 157 U. S. 229-249, 15 Sup. Ct. 591, 599, 39 L. Ed. 683, that I am content to quote from it the general rule of law:

"It was held in *Mallow v. Hinde*, 12 Wheat. 193, 198, 6 L. Ed. 599, that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court if its process cannot reach them or if they are citizens of another state; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties. And the court remarked: 'We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts

of equity, whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court.'

"In *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158, the subject is fully considered by Mr. Justice Curtis, speaking for the court. The case of *Russell v. Clarke's Executors*, 7 Cranch, 98, 3 L. Ed. 271, is there referred to as pointing out three classes of parties to a bill in equity: '(1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.' \* \* \*

"And Mr. Justice Curtis added: 'It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a Circuit Court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court, in *Elmendorf v. Taylor*, 10 Wheat. 167, 6 L. Ed. 289: "If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the court cannot reach, as if such party be a resident of another state, ought not to prevent a decree upon its merits." But if the case cannot be thus completely decided, the court should make no decree.'

"Mr. Daniell thus lays down the general rule: 'It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought by service upon them of a copy of the bill, or notice of the decree, to have an opportunity afforded of making themselves active parties in the cause, if they should think fit.' 1 Dan. Ch. Pl. & Pr. (4th Am. Ed.) 190.

"The rule, under some circumstances, not important to be considered here, may be dispensed with when its application becomes extremely difficult or inconvenient. Equity Rule 48.

"Sitting as a court of equity we cannot, in the light of these well-settled principles, escape the consideration of the question whether other persons who have an immediate interest in resisting the demand of complainant are not indispensable parties, or, at least, so far necessary that the case should not go on in their absence. Can the court proceed to a decree as between the state and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?"

There is a wealth of authority to the same effect.

The English cases, upon which such great emphasis was laid by counsel for complainant—*Lumley v. Gye*, 75 English Common Law Reports, 216 (2 Ellis & Blackburn), decided 1853, *Temperton v. Russell*, vol. 4, Reports, Decisions of the Court of Appeals on appeal from the Queen's Bench, p. 376, decided 1893, and *Quinn v. Leathen*, Law Rep. App. Cas. 1901, House of Lords, p. 495—on being analyzed, do not at all warrant the claim that they furnish precedents for the grant-

ing of the kind of relief which is sought here. Nor do the Ticket Scalper Cases justify the contention. (*Bitterman v. Louisville & Nashville Railroad Co.*, 207 U. S. 205) 28 Sup. Ct. 91, 52 L. Ed. 171.

Counsel for complainant cite and emphasize the case of *People's Telephone & Telegraph Co. v. East Tennessee Tel. Co.*, 103 Fed. 212, 43 C. C. A. 185, which went to the Circuit Court of Appeals of this circuit from the Eastern district of Tennessee. As to this case, it is claimed that the Circuit Court of Appeals held that jurisdiction would lie in the absence of one of the interested parties. In a measure that is true, but that was a case where there was an interference in the nature of a trespass with the physical property of the complainant. Jurisdiction might well attach in such a case as that for reasons which are not present here.

The effect of sustaining the bill and the manifest purpose is to order a specific performance of the exclusive contract with the complainant. For, if we decree that the defendant may not make a contract with one of the local companies, then we have decreed a specific performance of the contract between complainant and the local companies to the effect that the local companies may not make any connection with any other long-distance company for 99 years. This is sought without asking the other party to the contract whether it consents to have an effective decree against it which shall settle its contract rights with the complainant and the defendants.

2. In view of the conclusion to which I have come on the third proposition discussed, it would be purely academic to discuss the second question as to whether the complainant can invoke against the defendants the provisions of the Sherman anti-trust act. Indeed, so far as the allegations of the bill are concerned, it is the complainant which is proceeding in violation of the Sherman anti-trust act. This will appear from the discussion of the next proposition.

3. Interesting, however, as the question of parties is, I prefer to rest my conclusion on the ground that the contract between the complainant and the local independent telephone companies is (1) contrary to public policy and void, and (2) in violation of the common law and of the statute of Ohio requiring equality and impartiality of service to all persons similarly situated.

The substance of that contract, stated in its strongest form, is this: That, in consideration of the building of the United States Telephone Company's lines to a connection with the local independent company's line, the local company will permit the United States Company to use the top cross arm of its poles upon which to string its long-distance wires to a connection with the switch board of the local company. The local company is to receive a certain portion, not exceeding a certain maximum amount, of the toll charge on long-distance messages, and agrees that it will not permit any other telephone company to make any connection with its line or exchange for a period of 99 years. That is to say, the United States Company, the complainant, acquires by this contract a monopoly of the long-distance service which the patrons of the local company may obtain or possess through the local exchange.

Can a long-distance company in the state of Ohio acquire the exclusive right to furnish long-distance service to the patrons of a local telephone company? Can a local telephone company, existing and exercising its rights and powers under the law of Ohio, disable itself from giving to its patrons competition in long-distance service? Can it connect its exchange with a long-distance company's line and refuse to give the same connection to the line of another long-distance company, or can it, by contract, disable itself from permitting another long-distance connection?

In order to answer these questions, we must first examine the statutes and decisions of Ohio to discover what the public policy of the state is, and, as enlightening us in this inquiry, the common law touching the question.

Section 3471 of the Revised Statutes of Ohio provides that telephone companies shall have the same powers and be subject to the same restrictions as are provided by law for telegraph companies.

Section 3470 provides:

"Where two or more telegraph companies whose several lines are not parallel or in competition with each other, and when so united will form a continuous line for receiving and transmitting dispatches, desire to consolidate into a single corporation, they may do so in the manner and subject to the rules provided in chapter 2 for the consolidation of railroad companies."

Section 3455 provides:

"Any such company may construct, own, use and maintain any line or lines of magnetic telegraph, whether described in its original articles of incorporation or not, and whether such line or lines are wholly within or partly beyond the limits of this state, and may join with any other company or association in conducting, leasing, owning, using or maintaining such line or lines, upon such terms as may be agreed upon between the directors or managers of the respective companies, and such companies may own and hold any interest in any such line or lines or may become lessees of any such line or lines upon such terms as may be agreed upon; but it shall be unlawful for any such company or companies and the owner or owners of rights of way to contract for the exclusive use thereof for telegraphic purposes."

Section 3462 provides:

"Every company, incorporated or unincorporated, operating a telegraph line in this state, shall receive dispatches from and for other telegraph lines; and from or for any individual; and on payment of its usual charges for transmitting dispatches as established by the rules and regulations of the company, shall transmit the same with impartiality and good faith, under a penalty of one hundred dollars for each case of neglect or refusal so to do, to be recovered with cost of suit, by civil action in the name and for the benefit of the person or company sending or forwarding or desiring to send or forward the dispatch."

Section 4427-1 (the so-called "Valentine Anti-Trust Law," § 1) provides:

"A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either, any or all of the following purposes:

"(1) To create or carry out restrictions in trade or commerce.

"(2) To limit or reduce the production, or increase, or reduce the price of merchandise, or any commodity.

"(3) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"(4) To fix at any standard or figure, whereby its price to the public or

consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

"(5) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void."

Whether or not a telephone company is subject to the provisions of the Valentine law is immaterial. It is quoted here for the purpose of throwing light upon the question as to what is the settled policy of the state.

In the case of *State of Ohio ex rel. v. Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583, the action was for a writ of mandamus to require the Columbus Telephone Company to put up and maintain a telephone for the relator, the American Union Telegraph Company, which it had refused to do for the reason that it had a contract requiring it to give to the Western Union Telegraph Company, and no other telegraph company, the use of its telephone exchange. The complaint alleged that such exclusive use of said telephone wires was an unjust discrimination against relator, and a violation of the duty of the defendants and of their obligation to serve the public indiscriminately. The court, in its opinion, said:

"Whether any such duty, upon the principles of the common law, is owing from respondents or either of them to the relators as members of the general public, as is claimed by them, growing out of the nature of the business in which the respondents are engaged and their relations to the public generally, we need not stop to inquire, as, in our opinion, the whole question between the parties may be determined by the provisions of the statute in such case made and provided."

The court then held that the action of the respondents was in violation of the Revised Statutes of Ohio prescribing the powers and duties of magnetic telegraph companies (sections 3454-3471), and further says:

"We do not mean to say that, as between the Columbus Telephone Company and the American Bell Telephone Company, the right to control the receipt and delivery of telegraph messages might not have been reserved to the latter company; but we do hold that no such right could be reserved whereby the relators could be deprived of the use of the system of telephones organized and managed by these telephone companies, either jointly or severally.

"And in regard to the American Bell Telephone Company it is enough to say, after what has already been said in relation to the Columbus Telephone Company, that it cannot be permitted to operate a line or a system of telephones in this state, and in the face of the statute, either directly or through the agency of licensees, without impartiality, or, in other words, with discrimina-

tions against any member of the general public who is willing and ready to comply with the conditions imposed upon all other patrons or customers who are in like circumstances. And all contracts in contravention of the public policy of this state, as declared in chapter 4 of the Revised Statutes, above referred to, must be declared void and of no effect."

The last paragraph quoted is decisive, it seems to me, of the rights of the complainant here. It will be more fully discussed hereafter.

In the case of Central Ohio Salt Company v. Guthrie, 35 Ohio St. 666, the syllabus reads:

"A voluntary association of salt manufacturers was formed for the purpose of selling and transporting that commodity. By the articles of association, all salt manufactured or sold by the members, when packed in barrels, became the property of the company, whose committee was authorized and required to regulate the price and grade thereof, and also to control the manner and time of receiving salt from the members; and each member was prohibited from selling any salt during the continuance of the association, except by retail at the factory, and at prices fixed by the company. *Held*, that such agreement was in restraint of trade, and void as against public policy."

The court, at page 672, says:

"The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

In *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 608, 49 N. E. 1030, 1034, 41 L. R. A. 185, 63 Am. St. Rep. 736, it is said:

"But beyond this there is still another consideration connected with such monopolies and combinations that is not to be overlooked from the standpoint of sound political wisdom and economy. It is to the interest of the republic that there should be, measurably, an equality in the fortunes of its citizens, and one of the best modes of accomplishing this, without the use of arbitrary means, is by encouraging separate and independent employments, and by discouraging by law and its administration in the courts all tendencies to the concentration of property in the hands of the few—a condition in which there will be a constant unrest and dissatisfaction among the masses that can bode no good to the nation. It may be safely affirmed that free institutions cannot long be maintained among a people where a few, possessed of great wealth, are the employers and the many are mere laborers, wholly dependent on wages as a means of supporting themselves and families. These considerations, and others of a like character, constitute in great measure that sound public policy which looks with distrust upon all agreements in restraint of trade, and particularly such as may be used in the formation of monopolies, and the control by a few of all individual pursuits. \* \* \*

"The reasoning of the cases in which a departure from the common law had been adopted fails to persuade us that we should disregard the rule that has been so long settled in this state by the decisions of this court; on the contrary, the changed conditions, on which the argument proceeds, tend the more strongly to convince us that, in the interest of a wise public policy, it should be more firmly adhered to."

Having thus enlightened ourselves as to the public policy of the state of Ohio, as declared by its statutes and its courts, let us examine the claims of the parties touching the validity of the contract.

The chief contention of the defendant is (1) that the contract is invalid because it disables the local telephone company from the

performance of the duties which the law lays upon it; (2) that it is void as against public policy in that it tends to create a monopoly.

When we come to reason out the effect of the contract, it will be quite as convenient to deal with both of the grounds of objection above referred to at the same time; they are inextricably related to each other. The contention of the complainant, against the proposition that the contract is invalid because exclusive, is that under the charter powers of the local telephone company it is not required to furnish a connection with a long-distance company or to give its patrons long-distance service; that it is a common carrier within the limits of its own exchange and over its own line, among its own patrons; but that, since it is not required by law to extend its service beyond its local use, it violates no provision of the statute and no rule of law when it gives to a long-distance company the exclusive right to make long-distance connections with its exchange; so that, if it disables itself from giving its patrons competition in long-distance service, it only disables itself from doing that which by law it was not required to do at all. It is also contended, in this connection, that since the local company has the power to consolidate itself with another company or to lease its property to another corporation—in effect, the right to abandon its power to act as a corporation—this is a larger power and involves a greater annihilation of its own power than to give by contract the exclusive right to a long-distance company to furnish long-distance service, and that, since it may do the greater and larger thing, it may do the lesser. The fallacy of this particular contention is to be found in the fact that the lessee or consolidated company is not, by the act of lease or consolidation, disabled to perform any of the duties which by law may have rested on the lessor or constituent company. There still remains in either case—lease or consolidation—a company operating the local telephone system, and upon it rests, as formerly rested on the original constituent local company, the duty which the law laid upon it. Whatever may be the temper or the policy of the successor company respecting the matter of continuing to monopolize the local and long-distance business of the community, it will not by such lease or consolidation have parted with its power to give competitive service. Thus it will continue to have power to satisfy the legal necessities springing out of the fact that it is a corporation.

But let us now proceed to the question of the effect to be given to this contract, as to being void or valid, by reason of the fact that in making it the local company disabled itself for 99 years from making any other contract for long-distance connection.

First. Is it true that the local company is not bound by any public duty to give long-distance service to its patrons?

Second. If it is not so bound, may it nevertheless bind itself to give such connection to only one long-distance company, and thus to have the right to deny a similar connection to another long-distance company or disable itself from the power of permitting such other connection?

First. While this case, according to my view, is to be decided by the answer which I give to the second question, it seems to me not improper to submit a few observations on the first question. Counsel for



the complainant, as illustrative of their position, cite the case of Chicago, St. Louis & New Orleans Railroad Co. v. Pullman Company, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97. This was a suit on a contract between the railroad company and the Pullman Company, and it was objected that no recovery could be had under the contract for incidental liability growing out of it because the contract was void in that it provided that exclusive rights were given to the Pullman Company for the term of 15 years to furnish sleeping cars to the railroad company. The proposition of the syllabus in respect to this point is as follows:

"The contract was not void as being in general restraint of trade or against public policy. The contract is to be interpreted in view of the condition implied by law that the sleeping car company should furnish cars not only adequate and safe, but sufficient in number for the use of the public traveling over the lines of the railroad company. Such condition was not, and could not have been, dispensed with."

If the contract between the United States Company and the local telephone companies provided, or if by law it could be implied from the contract, that adequate and sufficient long-distance service should be furnished to the patrons of the local telephone company, we would have a case before us to some extent analogous to the Pullman Case. It is not contended that the United States Telephone Company can connect the subscribers of the local telephone company with all of the telephone subscribers over the country with whom the local subscribers may wish to communicate. One effect of the connection between the defendants and the local telephone subscribers is to give to the local subscribers direct communication with telephone subscribers elsewhere with whom the complainant cannot give connection.

There are other reasons growing out of the different character of the telephone service why the case just quoted is not applicable to the situation here; that is to say, the telephone subscriber must, in order to have efficient and satisfactory long-distance service, be able to talk to the individual with whom he desires to have conversation. He cannot relay his conversation as passengers can change cars, or freight can be transferred from one station or road to another. The act of speaking over a telephone is single and instantaneous, and is to be radically distinguished in its character from an act of transportation. When the contract that the Pullman Company makes with the railroad company provides that it will furnish adequate, safe, and sufficient cars for service on a railroad, and a certain regulation can be had through the Legislature of the rate of charge, it does not matter very much to the user of the railroad whether the Pullman Company has, for a period of 15 years or any other time, an exclusive contract or not. When he travels on a railroad in a Pullman, he is accommodated, and it would be folly to undertake to satisfy the varied tastes of travelers upon a railroad to the extent of giving him his pick of parlor or sleeping cars.

Adequate Pullman car service does not require that Pullman cars should run from every little or big town to every other town which is on a railroad. But "adequate" telephone service may be, and before many years have passed will be, such service as will permit the sub-

scriber at one exchange to immediately talk with any person anywhere in this country.

The opinion of the Supreme Court of the United States in the Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, is cited as supporting the proposition that an exclusive contract of the character involved in this case is not against public policy. It is sufficient, in this connection, to quote from the opinion of Chief Justice Waite to show how radically different that case is from this, and to illustrate by his cogent language the reason why an exclusive contract might be made with an express company:

"The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employé of the express company, it is important that a certain amount of car space should be especially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is express, it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is extremely inconsistent with the idea with an express business on passenger trains free to all express carriers. \* \* \* The car space that can be given to the express business on a passenger train is, to a certain extent, limited; and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. \* \* \* On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided."

The telephone business, as I have already indicated, is an entirely different thing from Pullman car or express business. The use of the telephone is familiar, but it is perhaps well to formulate it here, in order to satisfy the logical necessities of this opinion. A telephone subscriber in one of the smaller towns in Ohio, served by a local independent telephone company, may desire to talk to some person in Cleveland, Columbus, Chicago, Kalamazoo, or any small town where there is a telephone exchange in any state which the telephone reaches. One long-distance telephone company may reach the subscriber and the other may not. If he cannot have a wire connection with the person with whom he desires to talk, that is the end of the transaction; he cannot talk with him at all. If two long-distance telephone companies have connections with the local central exchange, and one of these long-distance companies reaches the person to whom he desires to talk and the other does not, the subscriber can carry on his conversation; or there may be an intermediate connection between two different lines whereby the conversation is carried on. There is no embarrassment of physical bodies which have to be moved. There is no confusion or difficulty arising out of the character of the thing that is transported. There is no interchange of cars or of freight; there are no complicated car mileage or car trackage accounts. Simplicity instead of complexity is the ever-present feature of the transaction. Nothing is transported except an electric undulation, which reproduces at the farther end of the line the pulsations which are set into motion by the voice of the first speaker. There is no such condition as raises

a rule of necessity growing out of the kind of materials handled, which operate, as they might in the case of express companies, transfer companies, or sleeping car companies, to modify or qualify the entire freedom of use of these instrumentalities, by whomsoever presented to any railroad company. Conceivably, 20 long-distance telephone companies might be connected with a local exchange with the same simplicity and with the same absence of confusion which we find in relation to the local subscribers' lines, and there is no more physical difficulty, no more physical or other confusion, even in such a case as that, in connecting a subscriber with one of 20 long-distance telephone lines than in connecting the subscriber with another local subscriber served by the same exchange.

All of these observations are intended to illustrate the truth that the telephone business, in its practical operations, is to be distinguished from railroads, and even from telegraph companies, because the telegraphic message may be relayed and repeated before reaching its destination; while a conversation may be repeated, yet everybody knows that in common practice that is not telephoning at all, and such a method of communication between persons far distant from each other is practically unknown. One may, it is true, send a message to another to be repeated, but that is like a conversation that one tells another to repeat to a third person. That is rather telegraphing than telephoning. That is not the way in which conversation can be carried on, and the telephone is, above all things, a vehicle of conversation, of exchange of intelligible vocal expressions.

When it is said that a long-distance telephone company has no right to compel a connection with a local telephone exchange belonging to another company (which, of course, must be done, if at all, on reasonable and fair terms to the local company), for the same reason that one railroad company cannot be permitted to run its engines and cars loaded with its freight on the lines of another railroad company, no account is taken of the fact that the law as applied to railroad companies is a law arising out of convenience and necessity; for it would be physically impossible and unsafe for one railroad company to be permitted to run its cars and engines, except with the consent of the other company, over another company's lines. This is an obvious fact.

But in the reasoning whereby an analogy is sought to be shown between connecting telephone lines and connecting railroad lines in the respects referred to, no account is taken of the fact that originally, when railroads were first instituted, the theory upon which they were given the right of eminent domain was that the line of railroad was in truth and in fact in every respect a legal highway, and that in the primary conception of railroads it was intended that they should be used as highways—that any person might go upon them with his own locomotive and cars and operate them under reasonable restrictions. In the stupendous development of the physical facts of railroading, this theoretical and basic idea, that the railroad was a public highway in the large sense which I have described, disappeared.

If we could assume that the telephone business came into existence before the railroads, and the right of eminent domain was given to the telephone companies, as it is now given, and we had argued from that

point on the question as to the kind of a common carrier and the kind of a highway for vocal intelligible sounds, which were thus created, we would have found no occasion to say, and there would have been no suggestion, that it was impossible to conduct a telephone business on any such theory or plan as that on which we now know it is impossible to conduct the railroad business, and, if the telephone business had preceded the railroad business, instead of having an appeal made to keep the telephone business within the restricted limitations of correlation which we find between railroad companies, we would have found the law endeavoring to make the relations between connecting railroads as physically complete as they would have been and could easily have been between connecting telephone companies.

So that it seems to me not unlikely, in view of the manner in which the telephone is used, that, when the question squarely arises, it may be declared to be the law that when one long-distance telephone company presents itself to a community in which there is a local telephone exchange and proffers to that local company, by the simple mechanical arrangement necessary, connection with the rest of the world which is reached by the proffering long-distance company, public policy will say that the long-distance company is to be treated no differently than an individual in the community who requests the local company to give him a local telephone and the use of the local exchange upon terms which entitle him to it.

Second. But we have a very different situation where, as in this case, a local company, assuming that it cannot be compelled to make or permit a connection with a long-distance company, does in fact permit it. If the local company extends the use of its lines to long-distance service, does it make the long-distance service any the less of a public character than its local service? Assuming that it had a right to remain independent of and isolated from long-distance business, does it not give up that right of local independence and isolation when it takes on long-distance business? And if, in respect to long-distance business, it has granted the right of connection to one long-distance company, can it, either under the common law or the statutes of Ohio, deny to one long-distance company the right and privilege which it has granted to another? It seems to me that to put this question is to answer it. To this effect is *Ohio ex rel. v. Telephone Company*, 36 Ohio St. 296, 38 Am. Rep. 583.

The courts have had great difficulty in getting away from the proposition which I have suggested in the discussion under the head immediately preceding this. They have had difficulty in escaping the conclusion that a local company must permit connection to be made with other exchanges, whether it desires to do so or not. But they have found themselves compelled to come to the conclusion that where two companies have permitted a connection to be made between their exchanges, without having fixed by contract any period of termination, no disconnection of the systems can be permitted except such as arises out of the total retirement from business by one or the other company. *State v. Cadwallader (Ind.)* 87 N. E. 644.

And, coming now to the question of impartiality in the exercise of the rights and powers of a common carrier telephone company, the

situation which arises when a telephone company has permitted connections to be made with other exchanges, and thus has waived its primary right of independence, is discussed in the *Cadwallader Case*, supra. The court quotes from *Allnutt v. Inglis*, 12 East, 527, the following fundamental rule:

"Where private property is, by the consent of the owners, invested with a public interest, or privilege, for the benefit of the public, the owner can no longer deal with it as his private property only, but must hold it subject to the rights of the public, in the exercise of that public interest conferred for their benefit."

And also, from *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77:

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

After discussing the situation in the light of the general principles just quoted, the court lays down the rule, as shown by the eleventh syllabus, as follows:

"Where a physical connection between telephone systems owned by different persons is voluntarily made, and the public thereby acquires an interest in the continuance thereof, the act of the persons in making such connection is equivalent to a declaration of a purpose to waive the primary right of independence, and it imposes on the property such a public status that it may not be disregarded."

Following this, the court discusses a question directly involved here, and comes to the inevitable conclusion which the situation there and here demands. On page 652 of 87 N. E. is the following:

"Having elected to furnish direct physical connection between, and immediate communication to and for, other exchanges and their patrons through his exchange in West Lebanon, he cannot exclude a like service to an exchange in the same town, for the reason that he is compelled to treat all of the same class alike, and there can, it seems to us, be no rational ground for excluding one exchange when others are admitted. The act of admitting the connection alleged is equivalent to a declaration that all will be admitted to the connection on the terms and conditions imposed as to one or more. Appellee has admitted to his exchange the exchanges of Ambia, Boswell, Williamsport, and Danville. Not only the patrons of appellant's plant, but those of appellee, the public at large, have an interest in the matter. Appellee could have refused to connect his plant and to furnish direct or immediate service to appellant's patrons and to other exchanges and their patrons, but did not so refuse; but he and they opened their exchanges to all applicants. Could it be insisted, other things being equal, that appellee could refuse connections from Ambia and accept those from Boswell? We take notice as a matter of science that the connection with the other towns and with appellee's patrons is made through a device known as a 'switch' in West Lebanon, so that the conditions of connection are the same and in numerous cases it has been held, with reference to telegraph lines, that, if service is furnished to one, another in the same town or city is entitled to the same service, not upon the ground of a primary right, but because, having elected to furnish the service to one, the same obligation arises in favor of all others like situated." (Citing authorities.)

The proposition involved in this last quotation is laid down in syllabus No. 16, as follows:

"Where an operator of a telephone system furnished connected immediate service to separate exchanges and their patrons, but denied such service to another exchange and its patrons of the same class, the operator discriminated against the latter in violation of the common law and of the statute of Indiana, requiring telephone companies to supply applicants impartially."

I find myself profoundly impressed with the soundness of the conclusion just quoted, and, indeed, I can conceive of no plausible argument against it. The telephone company is a public servant and is a common carrier of news, as the Indiana Supreme Court puts it. It cannot enter into a contract which tends to create a monopoly; and it cannot deny to one person the rights and privileges which it grants to other persons similarly situated.

This contract in question does tend to create a monopoly, in that it refuses to the subscribers to the local company any opportunity through the local exchange for competitive service; and the local company ceases to be a common carrier, devoted to a public use, offering the same terms, opportunities, and privileges to all persons similarly situated, in that it undertakes to give to the complainant what it denies to the defendant.

The position which counsel for complainant take comes to this when we analyze it: The Bell Telephone Company is a wicked monopoly. Some years ago the United States Company concluded to fight it. The only way to fight the Devil was with fire. The only way to fight the monopoly was to monopolize all unoccupied territory. The way to monopolize this unoccupied territory was to go to a local telephone company which had no long-distance connection and offer to give it such long-distance connection, provided a perpetual monopoly of it was given in return.

This purpose to destroy the Bell monopoly may be admitted to be virtuous. The method resorted to was vicious. It was a mere repetition and imitation of the methods which, when followed by the Bell Company, are so bitterly denounced. The philosophy that the end justifies the means, when the end is virtuous and the means vicious, has long since been discarded, if it ever had any avowed supporter. But even that philosophy cannot apply to a mere business undertaking. The purpose to destroy the telephone monopoly was not a virtuous purpose; it was a business proposition, which incidentally led, we may assume, to a righteous result. What becomes of the righteous result when the means to accomplish it are the means of unrighteousness? The ultimate result of which may be that we discover we have exchanged one master for another, or, if not, that we have emphasized the strength of the former master. Counsel, of course, will not deny that, if the Bell Company should acquire control of the complainant, these contracts would be just as valid, and the shield of our defense would be turned into a weapon with which to destroy us.

Are the court to turn themselves into inquisitors of the minds of men and say:

"Here is a man who wants to do the world some good. The ultimate result promises to be beneficial, but, in order to accomplish it, he must monopolize the business of some community and must violate the law. May he do so?"

These questions were long ago answered, yet they come up again and again.

The sum of it all is that it does no good to destroy one monopoly by creating another. Monopolies all look alike to the law. When they use their power unlawfully, it is for the law to take suitable steps to punish the offender and prevent recurrence of the offense. Take the concrete case before us. A small community has established a local telephone service; it wants a long-distance service; it contracts with a long-distance company that, if it will connect with the local company's line, it will not for 99 years permit any other long-distance company to make any such connection. There is no physical difficulty which interferes with more than one connection. The community, unless it starts a new exchange, for which it has no local use, is denied the right both to have competition and to have telephone connection with places and persons not connected with the lines of the long-distance company. This is, as I view it, against public policy, because it both tends to create a monopoly and denies to persons similarly situated the same privileges accorded to others. The situation would, I suspect, appear less complicated if the conditions were reversed and the attack was being made on a similar contract made by the Bell Company.

It follows that the complainant is not entitled to an injunction, and an order may be made accordingly.

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LUCKETT-WAKE TOBACCO CO. v. GLOBE & RUTGERS FIRE INS. CO.

(Circuit Court, W. D. Kentucky. December 22, 1908.)

1. INSURANCE (§ 421\*)—CONSTRUCTION OF POLICY—EXCEPTIONS.

In a policy insuring property against loss by fire except as otherwise provided, a clause excepting "loss caused directly or indirectly by invasion, insurrection, riot," etc., must be construed as an exemption of the insurer from liability for a loss from fire caused by a riot; a loss otherwise than by fire being entirely outside the terms of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1133; Dec. Dig. § 421.\*]

2. INSURANCE (§ 146\*)—CONSTRUCTION OF CONTRACT.

Insurance policies are contracts by the terms of which both parties are bound, when clear and unambiguous.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 292; Dec. Dig. § 146.\*]

3. INSURANCE (§ 141\*)—EXCEPTIONS IN POLICY—WAIVER.

The fact that an insurance agent, who issued policies to plaintiff, urged as an inducement to procure such insurance the very danger which afterward caused a loss, but which was within the exception contained in the policies, does not constitute a waiver by the insurer of such exception, where there was no agreement to that effect, and the policies were delivered and accepted with such clause retained.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 255; Dec. Dig. § 141.\*]

At Law. On demurrer to reply.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Wilbur F. Browder and J. C. Browder, for plaintiff.  
Chas. H. Sheild and Flexner & Campbell, for defendant.

EVANS, District Judge. The plaintiff sued to recover upon two policies of insurance, one for \$4,000 and the other for \$1,000. Each policy was signed by the defendant, and the plaintiff, acceding to their terms, paid the premiums, and the policies were accepted by and delivered to it. When thus accepted and delivered, the written policies constituted the contracts deliberately entered into by the parties, and evidenced their agreements. Being contracts, we know of no reason why each party thereto is not entitled to the benefits and subject to the burdens thereby imposed. Each policy provides that the defendant company "does insure" the plaintiff in the amounts stipulated for the specified term "against all direct loss or damage by fire except as hereinafter provided," and each policy thereafter contained a provision which, for brevity's sake, will be called the "excepting clause," and which is in this language:

"This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon."

A fire having occurred by which the insured property was destroyed, this action was brought upon the written contracts, and a recovery was claimed under their stipulations. The defendant answered, asserting that the insured property was consumed by a fire which was caused by acts which are specifically and in detail set forth, and which, in the judgment of the court, show that the fire and consequent loss was caused by a riot within the meaning of that word as used in the policy. In the judgment of the court the conduct, described in the answer, of persons commonly called "Night Riders," constituted a "riot," and those persons, when assembled and acting together, constituted a "mob," within the meaning of those almost synonymous words as given by Bouvier in his Law Dictionary. The court has no doubt that the facts stated in the answer bring the loss within the express stipulations of the parties as set out in their contracts.

When the demurrer was argued, it was urged on behalf of the plaintiff that inasmuch as the excepting clause stipulated that "the company shall not be liable for loss caused directly or indirectly by invasion, riot," etc., and did not provide that "the company shall not be liable for loss by fire caused directly or indirectly by invasion, riot," etc., the policy covered the loss independently of the excepting clause, and that the answer did not show a state of fact which brought the case within that clause, because the words "by fire" were not included therein. This view appears to be supported by the case of *Commercial Insurance Co. v. Robinson*, 64 Ill. 265, 16 Am. Rep. 557; but we cannot yield to the argument nor to that case. The view seems to be wholly unsound and unmaintainable. The only loss insured against or which is covered by the policies is "loss by fire," and we



do not doubt that the exception in the policies of loss caused directly or indirectly by "riot" must include those from fires which are the work of rioters. The excepting clause necessarily relates back to a "loss by fire," as that phrase is previously used in the policy; otherwise, the excepting clause is meaningless as referring to a loss not covered by the insurance. When we lay out of view all the intervening and inapplicable clauses in the policy, and endeavor to bring into juxtaposition those clauses which bear upon the question now involved, we think the only fair and sensible construction of the contracts is that the policies insured the plaintiff against direct loss by fire except as further therein provided, to the effect that the defendant shall not be liable for any loss caused directly or indirectly by riot. If the loss was not by fire, it was not insured against at all, and the excepting clause was useless. If the loss was by fire, it was insured against, unless the fire bringing about the loss was caused directly or indirectly by riot. If the latter, the loss comes within the excepting clause; but in the former the loss was not insured against at all, so that in either event the defense is good. That this is the fair and natural interpretation of the language of the parties in the contract sued on we do not doubt, and we think these conclusions are supported by the decisions in *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395, *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65, and *Montgomery v. Firemen's Insurance Co.*, 16 B. Mon. (Ky.) 442.

We state now and in this way the grounds upon which the demurrer to the answer was heretofore overruled, and, as the tobacco was consumed by a fire which the rioters kindled, we cannot doubt that its loss was directly or indirectly caused by riot, within the meaning of the policies. If this be so, the answer states facts which constitute a defense to the action, and for that reason the court overruled the demurrer thereto.

When the demurrer to the answer was overruled, the plaintiff filed a reply in four separate paragraphs, seeking to break or avoid the force of the answer, and to each of those paragraphs the defendant has demurred. In determining the questions thus raised, it is important to bear in mind that the plaintiff had in its petition sued upon, and had thus avowed the integrity of, the contracts evidenced by the policies. Now it seeks to disavow certain elements of those contracts; but we think there is nothing in the reply which appears to entitle the plaintiff either to get away from the contracts or to alter or to amend their provisions. The contracts sued upon by the plaintiff in their stipulations must be treated in this common-law action as binding upon both parties; the only questions being as to the proper construction of their stipulations. We know of no reason, or principle of justice, or rule of law which puts insurance contracts, plainly and unambiguously expressed, outside of the rules of proper construction, or exempts either party to them from the obligatory force of their stipulations. *Northern Assurance Co. v. Grandview Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. True, insurance companies prepare the contracts, and where their terms are ambiguously expressed, and in certain other well-established instances, the courts lean against them in efforts to ascertain their meaning;

but such rules have no application here, where there does not appear to be the slightest trouble in ascertaining the meaning of the terms and stipulations of the policies.

Bearing in mind these general propositions, we come to the consideration of the separate paragraphs of the reply. The first of them does not, as we view it, undertake to deny any statement of fact made in the answer, but confines itself to controverting conclusions of law. Legal questions being determinable by the court, it is unnecessary to raise any issue in the pleadings upon them, and a pleading which does nothing else is for that reason insufficient.

The second paragraph undertakes to state certain inducements offered for taking out the insurance, such as representations of the existence of a dangerous and unusual situation in plaintiff's locality and the surrounding parts of the state, and insists that the excepting clause in the policies was waived before the policies were accepted or delivered. Assuming that in soliciting business defendant's agent urged upon plaintiff the facts stated in reply as a reason for insuring its property, there is no averment nor pretense that there was any agreement in advance of issuing the policies that the excepting clause should be omitted therefrom. On the contrary, after the inducements, if such they can be considered, were offered, or after the arguments, as we might more properly call them, were urged—in short, after the preliminary talks and treaty between the parties—the policies were executed, paid for, delivered, and accepted with the excepting clause plainly printed in each and expressly included in the stipulations of each of the contracts which the plaintiff has sued upon. If the exclusion of the excepting clause had been agreed upon in advance, but had nevertheless been included by mistake or fraud, there might have been a basis for equitable relief in a suit for a reformation of the contracts so as to make the policies read as had been agreed upon. In the absence of such previous agreement for the exclusion or noninsertion of the excepting clause, if there had been any misrepresentations as to the state of affairs in the locality mentioned in the reply, and if thereby, or if by any fraudulent means, the plaintiff had been induced by its agent to enter into the contracts, there might be a basis for a suit in equity for the rescission of the contracts and the return of the premiums paid; that being the exact measure of the damages which the plaintiff in that event would have sustained by entering into the contracts, as distinguished from rights arising under them. Neither of those things, however, appears to have been attempted by the plaintiff; and its counsel, in insisting upon the proposition that there was a waiver in advance of the making of the contracts, seem to confound or confuse a possible mistake in omitting agreed clauses or a misrepresentation in the preliminary treaty, with a waiver of some stipulation of a contract by a course of conduct after the contract had been entered into. A waiver in the accurate sense in cases like this must be by conduct subsequent, and not prior, to the completion of the agreement. Things occurring before the contract is made are merged into it, and become immaterial afterwards, while subsequent conduct, which it is claimed amounts to a waiver of some stipulation therein, is important, though we think all such latter considerations are inapplicable to this

case; the alleged waiver having occurred, if at all, before the contracts were made. We conclude that nothing in paragraph 2 of the reply, which refers to matters occurring before the completion of the contracts sued on, in any way shows a waiver by the defendant of any one of their stipulations.

This conclusion, we think, is sustained by the opinion of the Circuit Court of Appeals in *United Firemen's Ins. Co. v. Thomas*, 82 Fed. 406, 27 C. C. A. 42, 47 L. R. A. 450. Nor is this conclusion affected by an attempt in the second paragraph to show that on the morning after the fire, and while it was yet smoldering, the defendant's local agent desired or attempted to do all he could to save as much of the insured property as possible. This was in the interest of all parties. He did not undertake to do more, and this was not intended; nor was anything that he said at the time intended as a settlement of anybody's rights in the premises. It is not alleged that the agent then had any authority to make a new contract whereby his principal might become bound, if not already liable, and it could scarcely be supposed that the agent had authority to make a contract so obviously out of the usual line and course of business. It is not alleged that he then had knowledge of the legal bearing of the altered situation, or that with such knowledge he ratified any claim of the plaintiff, or that he had any authority so to ratify or agree to it. Ratification must always be based upon full and adequate knowledge of the situation, as well as upon authority to make it. In short, it is not alleged that the agent intended to make anything binding upon anybody by what he did or said at the time, nor that he had any authority to do so. Indeed, it is hardly more than the imagination of some important effect resulting from a casual and possibly kindly act. Upon this phase of the question we think light is thrown by the opinion of the Circuit Court of Appeals in *Washburn & Moen Manufacturing Co. v. Reliance Marine Ins. Co.*, 82 Fed. 296, 27 C. C. A. 134.

The third paragraph of the reply, like the first, appears to deny legal conclusions only, and not the allegations of fact set out in the answer. This paragraph, therefore, is insufficient in law.

The fourth paragraph practically states the facts as to the mob and the destruction of the insured property precisely as defendant had stated them in its answer, except that plaintiff calls the assemblage which committed the outrage organized "incendiaries," and seems to think that the acts of incendiaries cannot be properly characterized as a riot. Ordinarily we connect incendiarism with secrecy of action. Here the acts of the rioters or mob were open and audacious, even if, with due regard to their own personal safety, they chose the hour of midnight. This circumstance, however, cannot make the conduct of the assemblage any less a riot. Many of the most famous riots have occurred at midnight, and, if there was not a riot in this instance, new definitions of old words must be found.

We think the parties here made plain contracts, that they are alike bound by the terms and stipulations thereof, that the plaintiff agreed that the defendant should not be liable under such circumstances as here existed, and that plaintiff is therefore prevented by his own express contract from recovering against the defendant.

The demurrer to each paragraph of the reply will be sustained, and the plaintiff will be given leave to amend. The plaintiff, however, declines to amend its reply, and it and the defendant join in requesting the court now to decide the case on the pleadings as left after the termination of the various demurrers. By a failure to controvert them, the allegations of the answer stand admitted by the plaintiff to be true, and, those allegations being true, the court is of opinion that the answer presents a good and sufficient defense to the action; and it follows that the plaintiff's petition must be dismissed, with costs.

A judgment accordingly may be entered.

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UNITED STATES v. CHAS. M. TAYLOR'S SONS.

(Circuit Court, E. D. Pennsylvania. May 13, 1909.)

No. 95.

1. CUSTOMS DUTIES (§ 80\*)—REAPPRAISEMENT—JURISDICTION.

Part of the evidence was taken before one general appraiser and part before another, who decided the case later, but by oversight failed to consider the evidence taken before the first general appraiser. *Held*, that this oversight was only an error of procedure, and did not deprive him of jurisdiction.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 80.\*]

2. CUSTOMS DUTIES (§ 84\*)—ERROR IN PROCEDURE—MODE OF CORRECTION.

Where a general appraiser through oversight failed to consider a portion of the evidence in a reappraisement case which he decided, the remedy of the aggrieved party was by appeal for reappraisement by a Board of General Appraisers, as provided in Customs Administrative Act June 10, 1890, c. 407, § 13, 26 Stat. 136 (U. S. Comp. St. 1901, p. 1932), rather than by protest as provided in section 14, 26 Stat. 137 (U. S. Comp. St. 1901, p. 1933).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 200; Dec. Dig. § 84.\*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below is reported as G. A. 6,641 (T. D. 28,299), and reversed the assessment of duty by the collector of customs at the port of Philadelphia.

J. Whitaker Thompson, U. S. Atty., and Jasper Yeates Brinton, Asst. U. S. Atty.

Everit Brown, for importers.

J. B. McPHERSON, District Judge. The facts in this case appear in the following majority and minority opinions of the board:

"Before Board 2 (Fischer, Howell, and De Vries, General Appraisers).

"FISCHER, General Appraiser. This protest concerns the validity of a reappraisement proceeding before this board. It appears that the appraiser at Philadelphia added to make market value on certain guns imported at that port in the name of Chas. M. Taylor's Sons, customhouse brokers, for the Norwell-Shapleigh Hardware Company, St. Louis. The importers duly filed an appeal to reappraisement, as provided in section 13, c. 407, Act June 10, 1890, 26 Stat. 136 (U. S. Comp. St. 1901, p. 1932); the collector forward-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed all the papers in the case to the board; and, in accordance with the request of the importers, a hearing was held at St. Louis, where the place of business of the ultimate consignees is located. At that hearing, which was held on November 13, 1906, by General Appraiser Somerville, testimony was introduced by the importers in support of the appeal and their contention that the invoice price was the correct market value. The following memorandum is found attached to the papers:

"No. 12,224. Testimony taken at St. Louis on November 13, 1906. Case continued for further evidence at Philadelphia, per request of special agent H. M. Somerville, General Appraiser. November 13, 1906.

"Pursuant to this request, another hearing in the case was held at Philadelphia, the port where the goods were entered and originally appraised, and testimony in support of the appraised value was there given. This latter hearing was presided over by General Appraiser Hay, and took place on December 10, 1906. It appears further from the testimony before us and from the record of the reappraisalment that on December 12, 1906, General Appraiser Hay rendered a decision sustaining the advance made by the local appraiser, and that his decision was made without consideration of the evidence previously offered by the importers, and that he did not, in fact, know of the existence of such evidence, or that the importers had presented their case to another general appraiser. The testimony the importers had given is not to be found among the papers. The validity of the reappraisalment thus decided is now questioned by the importers, who contend that they have not been allowed the full measure of the remedy provided by the law (section 13, Act June 10, 1890), which grants to an importer the right of an appeal to a general appraiser if he is dissatisfied with the appraisalment made by the local appraiser. The bestowal of this right would seem to imply that the importer also has a right to have the evidence he has offered in response to the opportunity afforded him taken into consideration in the decision of the case, as well as that offered by the government. In the case at bar the importers ask not only that the reappraisalment proceeding had been declared to be valid, but that they be granted the opportunity to be heard, as contemplated by the statute cited.

"The general appraiser who heard the importers' case did not render a decision, and the general appraiser who did render the decision did not hear the importers' case. The decision was therefore made without the importers' having been heard, and they have not had their day in court. Where a complainant has been heard by one tribunal and the defendant by another, which then proceeds to decide the case, it can scarcely be said that the issues have been heard; and such a proceeding cannot fairly be called a trial. That was what happened in this case, and our chief concern is to determine how the importers may be put in a position to enjoy the right to a valid reappraisalment such as is contemplated by the statute, and of which they have undoubtedly been deprived. That the importers are not divested of their right to a valid reappraisalment by reason of the fact that reappraisalment proceedings which turn out to have been invalid have been held, is affirmed by Judge Lacombe in the opinion of the Circuit Court of Appeals in the case of *United States v. Curnen & Stiner*, 146 Fed. 45, 76 C. C. A. 503 (T. D. 27,262).

"The importer is of course entitled to a reappraisalment if he gives notice of dissatisfaction. If that is denied him by refusal of the general appraiser to act at all, or to comply with jurisdictional requirements, the importer may have an appropriate remedy to obtain such reappraisalment. But until there is such reappraisalment as will take the place of an original, valid, and proper appraisalment, it is difficult to understand upon what theory it can be vacated or set aside.

"The court did not indicate just what is the 'appropriate remedy to obtain such reappraisalment' which it states the importer may have, and we have been cited to no precedent which points it out.

"Counsel for the government contends that the importers' remedy in this case was an appeal to a board of three general appraisers. It is true that such a board could have passed upon the merits of the case; but the query is whether the importers did not have the absolute right to a valid reappraisalment by a single general appraiser, as the law provides, before ap-

peeling to a board of three. To hold otherwise would result in cutting off a trial by a lower tribunal. It is no answer to the importers' appeal here to say that they might have taken a different proceeding. It is well settled that, if a reappraisal is invalid by reason of jurisdictional defects or illegality of procedure, the importers may have a remedy by protest, as provided in section 14 of the administrative act (26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]).

"It will be noted that the prayer of the importers in this case is entirely different from the contention urged by the importers in the Curnen Case, *supra*. There the importers demanded that the reappraisal proceeding be declared to be void, and that the basis for the assessment of duties be relegated to their entered value; while in the case at bar the importers simply ask that they be restored to the position that they were in when they filed their notice of dissatisfaction with the appraisal of their goods made by the local appraiser. It would seem that there would be no unfairness to either party by allowing a reappraisal *de novo*, for the government could then produce its testimony, and the importers would be getting no more than what the statute allows them, and of which they have been unintentionally deprived through inadvertence. It would be quite different if the importers asked that their entered value be sustained by setting aside the reappraisal proceedings; for the appraisal made by the local appraiser has not been attacked in any way, and appears to have been made in a legal manner. It would be equally wrong, however, to set aside the reappraisal proceedings, and to hold that the original appraisal is final. As already stated, the importers would thereby be deprived of the right to a reappraisal conferred by section 13 of the administrative act, which right cannot legally be taken from them either by accident or design.

"We are of opinion that there was no legal or valid reappraisal of the merchandise covered by this appeal, and that the importers are still in the position in which they were when they had submitted their evidence in support of the correctness of the entered value of the goods, just as if no decision of the case had been made by a general appraiser. We are of opinion that the protest sufficiently and clearly sets out the proper claim.

"The appeal for reappraisal should, together with all the papers in the case, be remanded to a general appraiser, to the end that he shall hear both sides, and the evidence offered by them shall be considered, and a decision based on all of said evidence shall be formulated.

"The protest is sustained, and the decision of the collector assessing duties on the basis of the appraised value is reversed, with instructions to withhold the reliquidation of the entry until the conclusion of the reappraisal proceedings."

DE VRIES, General Appraiser. I dissent. The facts in this case are not disputed. Certain guns were imported by the Norwell-Shapleigh Hardware Company, of St. Louis, Mo., and entered at the port of Philadelphia, September 25, 1906. The local appraiser advanced the value. From this appraisal timely appeal was taken by the importers under the provisions of section 13, Customs Administrative Act 1890, to a single general appraiser. The collector, in accordance with the provisions of said section, forwarded the papers to the office of the United States general appraisers at New York. Thereafter a written request that the importers be given an opportunity to submit evidence in St. Louis to a general appraiser was granted. Accordingly the case was regularly docketed at the port of St. Louis, and due notice in accordance with the regulations was given the importers of such hearing; and on November 13, 1906, General Appraiser Somerville took testimony in St. Louis in said case, at which the importers appeared. The case was then continued for further hearing at the port of Philadelphia.

"Thereafter said case was regularly docketed for hearing on December 10, 1906, at the port of Philadelphia, and due notice, as prescribed by the regulations, given the importers of such hearing. On said date testimony was taken before General Appraiser Hay at said port on behalf of the government. None was offered by the importers. They did not appear, though they received notice of such hearing and ample time was afforded for appearance. On December 12, 1906, General Appraiser Hay rendered decision in the case.

Due notice of such decision, as prescribed by the law, was given and received by the importers. This notice was in regular form, and advised them, among other things, that 'if you appeal from this appraisement it will be necessary to do so within two official days after the day of this notice.' The importers did not avail themselves of this notice or of their right to appeal to a board of three general appraisers, but upon liquidation commenced this proceeding under the provisions of section 14 of the customs administrative act.

"The absence of any notice of either hearing is not asserted. That such were duly and regularly given is admitted. The sole point made by the importers is that, in view of the fact that General Appraiser Hay was not advised of the taking of the testimony at the port of St. Louis by General Appraiser Somerville, and proceeded to the decision without an examination of the same, the decision is open to question in this proceeding.

"Section 13 of the Customs Administrative Act provides that:

"The decision of the appraiser \* \* \* or of the general appraiser in cases of reappraisement, shall be final and conclusive as to the dutiable value of such merchandise against all persons interested therein, unless the importer, owner, consignee or agent of the merchandise shall be dissatisfied with such decision, and shall, within two days thereafter, give notice to the collector, in writing, of such dissatisfaction. \* \* \*

"That is to say, unless appeal is taken to a board of three general appraisers, the decision of the single general appraiser becomes final and conclusive, and is not the subject of review in any court.

"The Supreme Court, however, in the case of *Passavant & Co.*, 169 U. S. 211, 18 Sup. Ct. 219, 42 L. Ed. 644, and other courts, have maintained the jurisdiction of a board of three general appraisers acting under the provisions of section 14 of said act, and of the courts upon appeal from such decision to review the decision of a single general appraiser or a board of three general appraisers, where it appears they proceeded without jurisdiction. The measure of authority of the board, and, consequently, of the courts, is aptly stated in the case of *United States v. Curnen* (T. D. 27,262), wherein the Circuit Court of Appeals for the Second Circuit states:

"No one disputes the proposition that a decision as to the valuation or appraisement of imported merchandise cannot be reviewed under section 14, except for jurisdictional defects.

"Jurisdiction is power to hear and determine. Jurisdiction to hear in this case consists of giving due notice to the importer of the hearing.

"Inasmuch, however, as the Board of General Appraisers and a single general appraiser is a special tribunal and derives jurisdiction from compliance with the statutory requirements creating it, the proceedings are without jurisdiction unless the board of the single general appraiser has proceeded according to statute. In such cases the mode is the measure of the power, and any deviation therefrom is without authority of law. It being conceded, however, that due notice has been given the importer of a hearing, and the general appraiser having proceeded in accordance with the law in his ascertainment of facts, his decision in such a case is not illegal, although it may have been irregular. The distinction must be observed between an illegal or void decision and a decision which is irregular and voidable. In the one case the general appraiser has proceeded without jurisdiction. In the other case he has proceeded within his jurisdiction, but in an irregular manner. Any infraction of one of the statutory limitations upon the general appraiser's powers would amount to an illegality; but there being none such after due notice, any error would amount to no more than an irregularity.

"In this case no statute is pointed out, and no regulation of the Treasury Department is offered, which it is asserted was either infringed or not followed by the general appraiser in reaching decision. The fact that the general appraiser rendering decision overlooked testimony taken by another general appraiser does not amount to an illegality. The sum and substance of the irregularity alleged is that a part of the testimony in the record was not considered by the general appraiser. The fact that such testimony was taken by another general appraiser in a more deliberate manner does not change the case. It did not differ from other testimony received in such cases—

sometimes *ex parte* on affidavits, sometimes in the form of reports of special agents gathered abroad, and sometimes in the form of letters, bills, receipts, etc. It is a common and necessary practice of the board to gather data by some other officer than the deciding one, as do courts by depositions. It would be no different case whether the failure to examine part of the testimony be by design or inadvertence, as in this case. If it is to be held that the failure of a general appraiser to examine a part of the testimony in the record, whether by design or inadvertence, nullifies the decision and renders it void as without jurisdiction, then we may expect that every decision of a single general appraiser or a Board of General Appraisers in reappraisal proceedings would be assaulted upon that ground under the provisions of section 14. It would be only one step further in the same direction to hold that not sufficient weight was given to one class of testimony as distinguished from another.

"The courts have uniformly held that the weight to be given evidence or whether it is considered at all in a reappraisal case by an appraising officer is not the subject of review by the courts.

"This point was precisely passed upon by the United States Supreme Court in the case of *Hilton v. Merritt*, 110 U. S. 97, 106, 3 Sup. Ct. 548, 554, 28 L. Ed. 83. The plaintiff's counsel claimed the right to go to the jury upon—

"Whether the appraiser followed the evidence before him or disregarded it.

"The court said: 'We are of opinion, therefore, that the valuation made by the customs officers was not open to question in an action at law as long as the officers acted without fraud and within the power conferred on them by the statute. The evidence offered by the plaintiffs, and ruled out by the court, tended only to show carelessness or irregularity in the discharge of their duties by the customs officers, but not that they were assuming powers not conferred by the statute, and the questions which the plaintiffs proposed to submit to the jury were, in the view we take of the statute, immaterial and irrelevant.'

"This enunciation by the court received express approval in the case of *Auffmordt v. Hedden*, 137 U. S. 310, 325, 11 Sup. Ct. 103, 107, 34 L. Ed. 674, where the Supreme Court said that it was not allowable, in a proceeding at law, to review the decision of a general appraiser, 'to try before the jury the question as to the actual value of the goods, and whether the appraisers followed the evidence before them or disregarded it.'

"We must not lose sight of the fact that the decision was rendered by General Appraiser Hay; that due notice of this hearing was given; that due notice of his decision was given, and in each case admittedly received by the importer; and that the liquidation here assaulted by this protest was one made after such notice to the importer of the hearing by and decision of the general appraiser. Due notice having been given the importer and ample time allowed for appearance, and due notice of decision, he could have appealed to a board of three general appraisers. Upon such appeal a voidable decision could be reviewed and irregularities corrected. The general appraiser having had jurisdiction, however, and not having proceeded in contravention of any statute or regulation, his decision having been given, and regular notice thereof afforded the importer, the liquidation in this case was not illegal, if voidable. The duty is incumbent upon the importer to respond to notices sent of such hearings and present his case. Having failed to do this, and due notices having been given, and the general appraiser not having proceeded contrary to any statute or regulation, and the statutory requirements having been observed, it would seem the liquidation is valid and the protest is not well taken.

"In this view I have expressed no opinion as to the remedial character of the mandate of the majority opinion."

These opinions present clearly the opposing views concerning the only question that needs to be decided, and I shall only add that the position taken by General Appraiser De Vries, reinforced as it was by the convincing brief of the Assistant United States Attorney, seems to me to be correct. I think it clear that General Appraiser Hay had



full jurisdiction to decide the question of valuation upon appeal from the local appraisement, and that his right to decide was in no degree impaired by the fact that through an oversight he failed to examine and consider a part of the testimony. This was no doubt an error of procedure, but such an error does not go to the jurisdiction. The power to decide remained, and was exercised upon the precise subject committed to the general appraiser by the statute; the scope of the power was in no sense transgressed (as, for example, by valuation upon an illegal principle), but the error was merely in the method of proceeding, and could only be corrected by an appeal to the board, and not by the remedy of protest that has been adopted. The protest proceeds upon the ground that his failure to consider a part of the testimony deprived General Appraiser Hay of jurisdiction, and to this position I am not prepared to assent.

The decision of the Board of General Appraisers is therefore reversed.

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HAMILTON V. DAVID C. BEGGS CO.

(Circuit Court, S. D. Ohio, E. D. June 19, 1909.)

No. 1,434.

1. CORPORATIONS (§ 560\*)—RECEIVERS.

Receivers appointed for an insolvent corporation hold its property as officers of the court for the benefit of those ultimately adjudged to be entitled to it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253-2260; Dec. Dig. § 560.\*]

2. RECEIVERS (§ 153\*)—LIABILITIES OF FUND IN HANDS OF RECEIVERS—TAXES—OHIO STATUTE.

While there is no statute in Ohio directly making taxes a lien on personal property, Rev. St. Ohio § 3206a, providing that "where property of an employer is placed in the hands of a \* \* \* receiver, claims due for labor \* \* \* shall be first paid out of the trust fund in preference to all other claims against such employer, except claims for taxes and the costs of administering the trust," in effect makes the claims specified, including taxes, a lien on the fund in such cases, and they are entitled to priority of payment as against the claims of general creditors.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 276; Dec. Dig. § 153.\*]

In Equity. On final hearing.

Arnold, Morton & Irvine and B. W. Gearhart, for receivers.  
George W. Carpenter, for James T. Lindsay.

SATER, District Judge (orally). On June 17, 1908, receivers were appointed for the defendant, an Ohio corporation and a large employer of labor engaged in conducting a department store. The past due and unpaid taxes on its personal property, which was wholly free from mortgage and judgment liens, were more than \$7,000, to which was subsequently added a 10 per cent. penalty. The county treasurer had taken no steps to collect the taxes, but now asks that the receivers be

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

required to pay, as a prior claim, the full amount of taxes and penalty. The defendant's liability for the taxes and penalty is admitted, but the receivers deny that they are a lien on the property or its proceeds, or entitled to priority of payment.

Pending the litigation the receivers hold the property for the benefit of whomsoever in the end it shall be found to concern. Their possession is the possession of the court. The court, therefore, holds and administers the estate, through the receivers as its officers, for the benefit of those whom it shall ultimately adjudge to be entitled to it. *Thompson v. Phoenix Ins. Co.*, 136 U. S. 297, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Fosdick v. Schall*, 99 U. S. 251, 25 L. Ed. 339; *White v. Ewing*, 159 U. S. 38, 15 Sup. Ct. 1018, 40 L. Ed. 67. What, then, are the ultimate and relative rights of the creditors—treating the state as one of them?

The county treasurer may distrain sufficient goods and chattels, if found within his county, belonging to the person charged with past-due and unpaid taxes, to pay the same and accrued costs. Sections 1095, 1097, 2838, Rev. St. Ohio. He may also enforce their collection by civil action. Section 2859. There is, however, no statute which expressly declares that taxes on personal property shall be a lien on such property. The trial courts of Ohio are not in accord as to the status of such taxes, as appears from *Spence v. Frye*, 2 W. L. Gaz. 103 (decided in 1857), *Citizens' Bank Assignment*, 2 W. L. M. 121 (decided in 1859), *Eich v. McDonald*, 34 Bull. 228, and *Crech v. Railroad Co.*, 2 N. P. 164 (both decided in 1895). The only decision rendered by a federal court touching the question is that of *Metcalf v. Davies Screw Co.*, 3 W. L. B. 456 (decided in 1878), in which Judge Swing held that no lien is created by statute upon personal property for the taxes thereon, and that property of that character which had been seized on execution issued from a federal court could not be subjected to the payment of previously accrued taxes as a prior claim. In that case and in *Wastenev v. Schott*, 58 Ohio St. 410, 416, 51 N. E. 34, it is said that no lien is created on personal property for taxes laid against it, because the Legislature has deemed it impracticable to do so; but whatever may have been the legislative belief in Ohio, it is manifestly not impracticable, within proper limitations, to provide by statutory enactment that personal property shall be subject to a lien for the taxes assessed against it, as will appear from cases cited in the footnotes in *Cooley on Taxation* (3d Ed.) 854, 855.

It is earnestly affirmed, and as vigorously denied, that this case is ruled by *Treasurer of Athens Co. v. Dale*, 60 Ohio St. 180, 53 N. E. 958, in which it was held, in a per curiam, that the right of the state to the receipt of its taxes is paramount to that of all others. The facts of the *Dale Case* and of *Security Trust Co. v. Root*, 72 Ohio St. 535, 74 N. E. 1077, in which the priority of taxes on realty was maintained over a mortgage lien, are not the same as in the case at bar. It may be that the Supreme Court of Ohio is veering toward the doctrine that the state's right to the payment of taxes is paramount, but a federal court, so long as it may find other specific satisfactory grounds on which to rest its conclusions, can well afford to await an unequivocal announcement from the state court on that question. The unreported

case of *Heintz v. Cameron*, 70 Ohio St. 491, 72 N. E. 1159, is more nearly in point than any of the cases thus far mentioned. An examination of the record in that case discloses that in 1901 receivers were appointed for a corporation. No returns for taxation having been made by the corporation for the years 1899 and 1900, taxes for those years were charged against it by the proper taxing officer. The common pleas court adjudged that the receivers should pay the taxes for those two years as a prior charge. Its judgment was affirmed by the circuit court, excepting perhaps as to a point not affecting the question of taxes. The circuit court was affirmed by the Supreme Court. The state's right to priority of taxes was not strenuously opposed by the receivers in the lower courts, and they did not notice the question in their briefs filed in the Supreme Court, but it was argued at some length in the brief filed in behalf of the state. No conclusion, however, can be drawn from the case with entire certainty, as the Supreme Court's affirmance may have been placed on some one or more of the other issues involved.

On April 18, 1883, the General Assembly enacted a law entitled "An act supplementary to section 3206 of the Revised Statutes of Ohio, providing a lien for laborers, miners, mechanics and others, for their labor" (80 Ohio Laws, p. 183), now known as section 3206a, Rev. St., which, among other things, provides:

"And in all cases where property of an employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within a period of three months prior to the time such assignee, receiver or trustee is appointed, shall be first paid out of the trust fund, in preference to all other claims against such employer, except claims for taxes and the costs of administering the trust."

This section of the law does not appear to have been considered in any reported case affecting taxes. It does not expressly provide that taxes, costs of administering the trust, and labor claims accruing within the time mentioned shall be liens on the employer's property, but it fixes the order of distribution of employers' estates, and fastens on the property of an employer of labor, as prior charges, the items named, and provides for their payment in preference to all other claims whatsoever. This section was under consideration in a case involving a labor claim in *Re Laird*, 109 Fed. 550, 48 C. C. A. 538, in which Judge Day said:

"This being the object and purpose of the statute, it seems to us tantamount to charging upon such funds a specific lien in favor of this class of creditors. Persons who deal with an employer after the passage of this statute must be held to know that, in case the property is placed in the hands of an assignee or receiver, the resulting fund from the administration of such trust shall first be subjected to the payment of such liens. Such a charge is in fact a lien. \* \* \* In the fund realized from the administration of the trust, labor claimants who have performed service within three months before the property was taken to the uses of the trust have an interest. The statute charges the fund in their favor with the amount of their claims. We are of opinion that this is a charge or lien which cannot be interfered with to the prejudice of those entitled to it under the statute. \* \* \* The statute has vested this right in cases of this character by a distinct charge upon the fund, which, if it could be said not technically to constitute a lien, has, nevertheless, all the characteristics and effect of one."

If labor claims are to be first paid out of the corporate estate, excepting taxes and costs of administration, taxes and costs must necessarily have a preference over all other demands. Taxes are placed in the same category as costs of administering the trust, but the latter have always been paid before distribution was made to the creditors, and those who dealt with the defendant company were charged with knowledge that, if it passed into the hands of a receiver, its personal property would be subject to the payment of taxes and costs and labor claims, and would be charged with the aggregate of their respective amounts. This is in harmony with the statement made in *Re Bennett*, 153 Fed. 673, 676, 82 C. C. A. 531, that the decision in the *Laird Case* was rested upon the proposition that the property came into the trustee's possession charged with the prior payment of labor claims, which were held to be, in legal effect and force, a lien created by the statute, and thus not avoided by the bankrupt law. *Trust v. Miami Oil Co.*, 19 Ohio Cir. Ct. R. 727, is in accord with the last two cases. It is said, however, that the provision of section 3206a, above quoted, assumes that taxes were already made a prior lien on personal property passing into the hands of a receiver, and, as no such statutory enactment exists, such assumption does not make the provision in question the law. The language relating to taxes is not senseless, but has a plain and obvious meaning, and cannot be disregarded in construing the statute. Whether it was the opinion or not of the Legislature that taxes on chattels were a prior lien on personal property, the statute ought to be construed as giving what is tantamount to a lien on property falling within the terms of its provisions, if it did not already exist, in order that the effect of the language relating to taxes may not be destroyed. The title of the act is cited to sustain the proposition that the section was not framed with the intention of making taxes a prior lien on personal property, but it is well settled that the title cannot restrain the enacting clause. The language employed by the Legislature is competent to make the law for the future, dating from the time the act became operative, and I know of no principle which can deny this effect. *Postmaster General v. Early*, 12 Wheat. 136, 6 L. Ed. 577; *State v. Miller*, 23 Wis. 634. The priority is plainly implied in the language of the statute, and has the same force and effect as if it had been expressed in unequivocal language. *Doyle v. Doyle*, 50 Ohio St. 330, 34 N. E. 166; *Cincinnati v. Oliver*, 31 Ohio St. 377.

The taxes and penalty in question as against the common creditors are entitled to priority of payment, and an order may be drawn accordingly.

RUSSELL v. GIRARD TRUST CO.

(Circuit Court, E. D. Pennsylvania. June 8, 1909.)

No. 65.

1. PERPETUITIES (§ 8\*)—RE MOTENESS OF GIFT TO CHARITIES—CONDITIONS.

If a charitable gift is present in its terms, and is intended to take effect at once, without any intermediate estate, and has therefore vested, the rule against accumulation does not apply; but where it is contingent, or is not intended to vest until the happening of some inevitable future event, the test of the rule against remoteness is to be applied, and if the contingency or the happening of the condition precedent may by possibility be deferred beyond a life or lives in being and 21 years and a fraction thereafter, the limitation is bad under the rule, and a resulting trust will immediately arise in favor of the settlor, and he may reclaim the fund at any time.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 57-66; Dec. Dig. § 8.\*]

2. PERPETUITIES (§ 8\*)—VALIDITY OF CHARITABLE TRUST—RE MOTENESS.

A settlor deposited money in trust, to be "accumulated for the benefit of the state of Pennsylvania in the way and manner hereinafter mentioned." The contract then provided that the trustee should invest the money and all its accumulations in the public stocks of the state whenever they could be purchased within a certain price, otherwise in government or other stocks, until the time should arrive when the fund so accumulated, together with any other sums which might be deposited with the trustee for a like purpose, should "be equal to the debt at that time owed by the state," when it should be paid over to the Treasurer of the state, "for the purpose of discharging the whole indebtedness of the state, and for no other purpose whatsoever." The amount deposited was \$2,000, and the indebtedness of the state at that time was \$40,000,000. *Held*, that the state took no vested interest in the fund, but was to receive the benefit of it only on a contingency which might never happen, or might happen at some indefinite time in the future, which might exceed the limitation of the rule against remoteness or accumulations, and that the trust was therefore void, and the fund recoverable by the personal representative of the settlor after his death, as held by the trustee on a resulting trust for the benefit of the decedent.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 57-66; Dec. Dig. § 8.\*]

In Equity. On final hearing.

Arthur W. Machen, Jr., and George Wharton Pepper, for complainant.

A. H. Wintersteen, for defendant.

J. B. McPHERSON, District Judge. This record presents an unusual case for determination. The complainant is the ancillary administrator of Charles F. McCay, and is suing the defendant company on the ground that a trust which the decedent established in his lifetime was void ab initio because it offended the rule concerning perpetuity or accumulation, and therefore that the defendant is holding the fund upon a resulting trust of which McCay himself could have claimed the benefit until his death in 1889, and to which his administrator, suing in behalf of the decedent's estate, or of the children and next of kin, may now make successful demand. The trust was established by a

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

written agreement executed in December, 1848, between McCay, who was then a citizen of Georgia, and the Girard Trust Company of the city of Philadelphia. Apparently McCay was curious about the possible results to be attained by compounding interest, for it is difficult to divine what other reason would have induced him to make the extraordinary provision that is disclosed by the trust agreement:

"\* \* \* Whereas, the said Charles F. McCay has deposited with the said company the sum of three hundred and seventy-seven dollars and thirty-five cents for the purpose of having the same, together with such other additional sums of money as he may hereafter deposit, accumulated for the benefit of the state of Pennsylvania in the way and manner hereinafter mentioned: Now these presents witness that, in consideration of the premises and of the sum of one dollar, lawful money unto them paid by the said Charles F. McCay at the time of the execution hereof, the receipt whereof is hereby acknowledged, the said Girard Life Insurance, Annuity & Trust Company of Philadelphia, for themselves and their successors, do hereby covenant, promise and agree to and with the said Charles F. McCay, his heirs, executors and administrators, in manner following, to say: First, that they, the said company, shall and will invest the said sum of three hundred and seventy-seven dollars and thirty-five cents so as aforesaid deposited, and all and every such other sum and sums as may hereafter be deposited in like manner by the said Charles F. McCay, in the public stocks issued by the state of Pennsylvania, and collect the interest on these stocks, and after deducting two and one-half per cent. of this interest as their compensation for performing the duties of this contract, shall and will invest the remaining ninety-seven and one-half per cent. of said interest promptly and without delay in the said stocks before mentioned, and shall and will continue collecting the interest on all the said stock and reinvesting ninety-seven and one-half per cent. of the same so long as said stocks can be purchased by said company at a price not exceeding one hundred and twenty dollars for each one hundred dollars of the said stocks, and in case the price of said stocks rise above said limit the said company shall invest in the public stocks of the United States or in good first bonds and mortgages of real estate until the said Pennsylvania stocks shall fall back to or below said limit, so that the said sum or sums deposited shall accumulate at compound interest until the time shall arrive when the fund accumulated from the said deposits, together with such other sum or sums of money as may be deposited with the said company by others than the said Charles F. McCay for the purpose aforesaid, if any, and the accumulation thereof, shall be equal to the debt at that time owed by the state of Pennsylvania, and the said company further agrees to pay over at that time the said accumulated fund to the Treasurer of the state of Pennsylvania or other officer or agent legally authorized to receive the same, for the purpose of discharging the whole indebtedness of the state and for no other purpose whatsoever; and the said company further agrees to collect the principal of any of the said stocks and other securities and to reinvest the same in the manner before mentioned."

Then follow provisions with reference to the management of the trust, which do not seem to be of importance now, and one other paragraph which may perhaps throw a little further light on the controversy:

"Sixth, And the said company further agree that if the state of Pennsylvania shall at any time hereafter pay the interest due on the said stocks belonging to the said accumulating fund by issuing to the said company new stocks or other obligations in lieu of money to pay the said interest, then, unless this shall be the usual way in which the interest shall at that time be paid by the said state on the remaining portion of the said debt of the said state, this trust and all benefit and advantage to the said state therefrom shall cease and become determined, and the said company shall pay over to the oldest male heir of the said Charles F. McCay then living, his executors,

administrators, or assigns, the whole amount belonging to the said accumulating fund at that time uninvested in the said stocks of the state of Pennsylvania, and also all the amounts they shall hereafter receive from the said state as principal and interest on said stocks, and all stocks of the United States and bonds and mortgages and interest thereon belonging to the said accumulating fund, reserving only to themselves their two and one-half per cent. on all interest received by them, which per cent. is above provided as their compensation for performing the duties of this contract."

Under this agreement McCay paid to the defendant the \$377.35 mentioned therein, and afterwards other sums; the whole aggregating \$2,000. The accumulation has been so far proceeded with that the defendant, on April 24, 1908, when the pending bill was filed, had in its hands cash and securities amounting to \$20,407.24. When the agreement was executed, the debt of the state of Pennsylvania amounted to over \$40,000,000; but it has gradually been reduced until on November 30, 1908, the total was only \$2,689,617.02. In 1848 the state had not yet established a sinking fund, but this was provided in the following year. And on November 1, 1908, it contained the following assets applicable to the discharge of the state's outstanding debt whenever it should become due, and to no other purpose:

Allegheny Valley Railroad bonds.....	\$ 100,000 00
Cash in banks.....	2,507,179 48
Suspended account, Allegheny National Bank.....	35,351 63
	<hr/>
	\$2,642,531 11

All these assets are believed by the state to be perfectly good and secured beyond any probability of loss; but they cannot be applied to the payment of the debt until it becomes due, and some of it does not mature until the years 1912 and 1922, respectively. The interest derived from the securities and the cash in the sinking fund has so enlarged that fund since November 30, 1908, that now (say June 10, 1909) it is probably within \$12,000 of the outstanding debt, and is larger than the debt if the trust fund in controversy is available by the state.

In considering whether or not the trust created in 1848 was valid, it is to be noted that there is no dispute between the parties about the character of the trust. It is conceded to be a charity, and it is therefore to be regarded from the same point of view as if its object were the building of a hospital or the endowment of a church. But, although the object of the trust is charitable, the trust itself may still be objected to on the ground that it transgresses the rule concerning remoteness, or perpetuity, or accumulation—whichever may be the properly applicable word. (It is plainly a trust for accumulation, and will be so spoken of hereafter.) While charitable trusts, after they have once been determined to be valid, are favorites of the law, the first question must always be: What are the terms of the trust? And the answer must be discovered by applying the ordinary rules of construction to the language that has been employed. After determining the scope of the trust, the further question must also be answered: Is the trust valid? Before attempting to answer these questions, it may be as well to say that section 9 of the Pennsylvania act of April 18, 1853 (P. L. 507), does not attempt to lay down a rule concerning accu-

mulations made, or to be made, under a deed that was executed before the passing of that statute. And although the act of May 9, 1889 (P. L. 173), does declare that "no disposition of property heretofore \* \* \* made for any \* \* \* charitable use shall fail \* \* \* by reason of \* \* \* being given in perpetuity," and directs any court of equity having jurisdiction to carry the intention of the donor into effect, "so far as the same can be ascertained and carried into effect consistently with law or equity," it seems clear that the act (whatever its true meaning may be) cannot be permitted to interfere with such right as the plaintiff may be found to possess. He is either seeking to enforce a resulting trust in favor of his decedent, and in that event the trust came into existence by operation of law as soon as the deed was executed in 1848, or he is representing the rights of the next of kin, and in that event, as the settlor died on March 13, 1889, several weeks before the last-mentioned act was passed, the rights of the next of kin had already vested and could not be disturbed by subsequent legislation. I do not understand, however, that the defendant's counsel relies upon either of the statutes just referred to, and therefore nothing further need be said about them. Both the plaintiff and the defendant appeal to the rules of the common law to sustain or to overthrow the trust, and to those rules therefore I shall briefly refer.

Confining the discussion to the case of a trust for a charity, it is clear and undisputed that if the gift is vested, if it is present in its terms, is intended to take effect at once, without any intermediate estate, the rule against accumulation does not apply at all. As a charity is for a public purpose, and is intended to be perpetual unless it be expressly limited as to time, there is no reason why indefinite accumulation may not be permitted. But where the gift is contingent, or where it is not intended to vest until the happening of some inevitable future event, this being a condition precedent to the vesting of the beneficial interest, the test of the rule against remoteness is to be applied, and if the contingency, or the happening of the condition precedent, may by possibility be deferred beyond a life or lives in being and 21 years and a fraction thereafter, the limitation is bad under the rule, although the trust be charitable. A resulting trust will immediately arise in favor of the settlor. *Coggins' Appeal*, 124 Pa. 30, 16 Atl. 579, 10 Am. St. Rep. 565. His purpose is stricken down by the policy of the law—or, rather, it is never allowed to take effect at all—and he may reclaim the fund at once. If he does not thus reclaim it, the mere lapse of time does not affect his right so far as the trustee is concerned, and he may require an account and repayment whenever it may suit his convenience.

This brings me to the point upon which the case must turn, namely, the meaning of the trust agreement. Does it give to the state of Pennsylvania an immediate, vested interest? Or does it give a contingent interest, or an interest which is not to vest until the happening of a future condition precedent? If the interest taken by the state was contingent, or if the vesting was deferred until the accumulated fund should equal the whole debt of the state, the defendant does not deny that there was at least a possibility that the



condition might not happen within the time allowed by the rule against accumulation, and therefore that the rule prevented the trust from taking effect. If, however, the state took a vested interest in 1848, even though the actual enjoyment was deferred, the trust for accumulation was valid, and the complainant has no interest in the fund, either on behalf of the decedent's estate or of the next of kin. In other words, the case depends upon the construction of the agreement, there being no real dispute between the parties concerning the legal principles that should be applied after the meaning of the written instrument has been ascertained. What, then, is the ordinary meaning of the language used by the settlor, and what intention is fairly to be gathered from the words he has used?

As it seems to me, the significant language lies within a narrow compass. The settlor begins with a recital that he has deposited a sum of money and may deposit other sums with the defendant. These sums are not for the present, or the unrestricted, benefit of the state—to which there are no words of present gift—but are “accumulated for the benefit of the state of Pennsylvania *in the way and manner hereinafter mentioned.*” The phrase italicized points forward to what follows almost immediately in paragraph “First,” where the “way and manner” of accumulation is defined with precision. The state is to benefit in this particular way and manner, and no other is suggested or implied. I need not repeat the details of the paragraph. The public stock of the state is to be bought under a maximum price, or stock of the United States or bonds and mortgages may be acquired in place of the state's stock, until by the compounding of interest a fund shall be produced. No time is specified when the accumulation is to cease, and none could be specified for obvious reasons. How long it would take to accumulate a fund of the necessary size was beyond the possibility of foresight. In the first place, the settlor contemplated the possibility that his example might be followed by other persons. He refers to “such other sum or sums of money as may be deposited with the said company by others than the said Charles F. McCay for the purpose aforesaid, if any.” And in the second place he knew that the state debt would not continue of the same amount as when he executed the agreement, but would either increase or diminish. No one could forecast what might happen in either particular, and he was therefore obliged to leave both of these contingencies to the future. But, however distant or indefinite the time might be, he anticipated the ultimate arrival of a day when a certain condition should come to pass, namely, when upon the one hand the defendant should have in its possession a fund accumulated from deposits made by himself and by such other persons as might share his purpose, and when, upon the other hand, “the debt at that time owed by the state of Pennsylvania” should be equal to the fund.

How distant and indefinite the happening of this event might be will appear more clearly if we take into account another possibility, namely, that the debt might increase more rapidly than the accumulation of the fund, so that the fund would never overtake the total

obligation of the state, or at least would only overtake it after centuries of growth. Numerous and imperative demands might impose continually recurring burdens on the state. Frequent and serious disaster might be suffered by the fund; so that for a period scarcely to be measured from a practical point of view the gap between the fund and the debt might only grow wider. Whether probable or not, this was an undoubted possibility. Moreover, the arrival of the time when one sum should equal the other was made more uncertain by the possible perplexities growing out of the fact that the time named by the settlor was when the accumulated fund should equal the debt "owed" by the state. A debt "owed" might not be a debt due. If the holders of the state's obligations should refuse to receive payment in advance of the time appointed therefor, the interest on their obligations would, of course, go on, and might also be properly regarded as a debt "owed." In such event, was the fund to be applied to the principal merely, or was it to go on accumulating, so as to earn money to pay accruing interest also? I mention these matters to show the uncertainties that surround the whole subject and the difficulty of carrying out the settlor's intention.

For present purposes, however, I shall assume that "the debt at that time owed by the state of Pennsylvania" means the principal of the debt, whether due or not due, and that the psychological moment (if I may use a convenient phrase) contemplated by the settlor would arrive when the accumulated fund should equal the debt thus "owed." Certainly, as it seems to me, not until that moment was the state to derive the slightest benefit from the trust, and if, as conceivably might be the case, the moment (from a practical point of view) should never arrive, the state would never profit by the settlor's elaborate and somewhat fantastic scheme. But, if the moment did arrive, then, and then only, was the trust to be executed; for only at that precise point of time could the direction of the settlor be carried out and the fund be paid to the State Treasurer for the purpose of discharging "the whole indebtedness of the state." Even if no other words were added to this direction, it is plain that the whole indebtedness of the state could not be discharged before that time; for until then, by the necessity of the case, any payment to the state must be a partial payment. But to show beyond the possibility of doubt that a partial payment was not to be permitted, the settlor added the negative words, "and for no other purpose whatever." There is no other subject to which this phrase can be applied than the subject immediately preceding, namely, the discharging of the whole indebtedness of the state, and, as the settlor therefore declared, both affirmatively and negatively, that he intended to discharge the whole indebtedness of the state, and not any part thereof, large or small, it is clear that the fund could not be available for this purpose until it should equal the indebtedness. The settlor had a single definite object in mind. He desired to accomplish this object, and no other, and therefore the state was never to have a beneficial interest in the accumulated fund unless and until the time referred to should arrive. Without prolonging the dis-

cussion, it seems to me to follow inevitably that the interest of the state was either contingent upon the happening of an event which might never happen, or might happen centuries in the future, or (what comes to the same thing) the vesting of the state's interest was deferred until the happening of the same distant and indefinite event. However the matter may be described, I think that no vested interest passed in 1848, and that the interest attempted to be given was of such a character as to violate the rule against perpetuities, or accumulation, or remoteness—if I may use these three terms for the moment, because they have sometimes been employed loosely and interchangeably in the discussion of this subject.

I have not thought it necessary to refer to the cases that have been cited in the briefs of counsel. They have all been considered; but I think it would be superfluous to point out in detail that there is no essential antagonism among them concerning the rules to be applied to a charitable trust. The first problem is always: When does the trust vest? This is a question of construction, and after it has been answered, if the vesting is to take place within the period allowed by law, accumulation may go on thereafter without interruption from the common law. If the vesting cannot take place, or by possibility may not take place, until after the period allowed by law, the trust fails, and it is not saved by the fact that the object was a charity.

Nothing has been said in this opinion about the effect of the sixth paragraph in the trust agreement. Its meaning seems to be this: If, for any reason, the state should issue new stock in order to pay therewith the interest due on the stock already in the trust fund, such action should end the trust at once, unless the interest on the rest of the debt in other hands should be treated in the same way. This seems a most unlikely contingency; but, of course, it might happen, and, if it did happen, the result would be to lengthen somewhat the period of accumulation by increasing the debt of the state. This of itself, however, was apparently not objectionable; for, if the debt were still further increased by paying in stock the interest due to all other debt holders, the settlor seems to have been indifferent to the increase. What he did object to appears to have been a possible inequality of treatment meted out to the stocks in his fund and to the stocks in other hands. What prompted this excess of precaution I do not know; but the paragraph seems to have had this unlikely situation in mind, and to have no special significance in the present controversy. It may, perhaps, be capable of some other meaning; but none has been suggested that gives it great importance.

Neither have I considered what bearing the existence of the sinking fund should have upon the duration of the trust. This is a fund not actually applied to the debt, but set apart in order to be applied when the debt shall accrue. Whether or not it should be treated as a potential payment pro tanto is not material. If the trust never took effect, the matter has no importance. If the trust

is valid, the complainant has no interest in the question, which concerns only the trustee and the state.

A decree may be drawn in accordance with this opinion.

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CLEMMENS v. WASHINGTON PARK STEAMBOAT CO.

(Circuit Court, E. D. Pennsylvania. June 28, 1909.)

No. 89.

**PARTIES (§ 95\*) — MISNOMER OF DEFENDANT — AMENDMENT OF RECORD AFTER JUDGMENT.**

A ferry company, which was a corporation of New Jersey, operated a line of excursion boats from Philadelphia under the assumed name of the "Washington Park Steamboat Company." A passenger to whom it sold a ticket under such name was injured, and brought suit against the steamboat company. The attorney for the ferry company, who was also a director, accepted service for the defendant, and appeared and defended the case on the merits; the trial resulting in a judgment for the plaintiff. Neither plaintiff nor the court was informed of the true facts until after an attempt to collect the judgment failed, and plaintiff moved to amend the record by substituting the name of the ferry company as defendant. *Held*, that such company, which was the real defendant, having in fact appeared and defended the suit, and there being no such person as the defendant named, the court had power to permit such amendment, under Rev. St. §§ 948, 954 (U. S. Comp. St. 1901, pp. 695, 696), authorizing amendments to cure defects of form.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 164; Dec. Dig. § 95.\*]

On Rule to Amend the Record.

See, also, 162 Fed. 815.

Goodman & Mitchell, for plaintiff.

Charles H. Downing, for defendant.

J. B. McPHERSON, District Judge. In May, 1907, the Gloucester Ferry Company, a corporation of New Jersey, owned and operated a line of steamboats that ran between Arch Street wharf in the city of Philadelphia and Washington Park, a place of amusement on the Delaware river. For their own convenience—the exact reason is not important—the ferry company sold tickets between these two points in the name of the "Washington Park Steamboat Company," and the plaintiff bought and used one of these tickets. She was injured in the course of her excursion, and supposing, as was natural, that such right of action as she might possess was against what appeared to be a corporation in control of the line, she brought suit against the "Washington Park Steamboat Company." Of course, if the marshal had been obliged to search for a company by this name, or its officers, it would have speedily appeared that there was no such corporation in existence, and that the suit should have been brought against the ferry company. The discovery at that time, however, that the steamboat company did not exist, was prevented by the action of the ferry company, whose counsel (he is also a member of its board of directors) ac-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cepted service of the summons as "attorney for defendant," and afterwards pleaded the general issue in the same character. He also tried the case, and made a defense both on the merits and also on the ground that, while the ferry company owned and operated the boats, it had no control over the trolley car in the park that was carrying the plaintiff when she was injured. He called the assistant treasurer of the ferry company, who testified as follows:

"Q The boats that run from Arch Street wharf to Washington Park belong to the Gloucester Ferry Company, do they not?

"A. Belong to the Gloucester Ferry Company; yes, sir."

Thereupon this offer was made:

"I offer to prove by the witness that he is the assistant treasurer of the Gloucester Ferry Company; that the Gloucester Ferry Company own the boats that run from Arch Street wharf to the pier of Washington Park; that they pay the Washington Park Amusement Company or some one else, for the privilege of landing there, so much a passenger; that they have no control whatever over these trolley cars, and no power over them whatever; that when they land passengers at the pier, that that is Washington Park—the pier is Washington Park."

The witness testified in support of this offer, and upon cross-examination answered further as follows:

"Q. You are connected with the Gloucester Ferry Company?

"A. Yes, sir.

"Q. That is what you are talking about?

"A. That is what I am talking about.

"Q. We are suing the Washington Park Steamboat Company.

"A. The Washington Park Steamboat Company and the Gloucester Ferry Company are one.

"Q. They are the same?

"A. They are the same.

"Q. They own the boats, do they not?

"A. They own the boats; yes, sir.

"Q. You say the Washington Park Steamboat Company and the Gloucester Ferry Company are the same?

"A. Are the same identical one."

This ambiguous testimony was understood by the court to mean that the ferry company and the steamboat company were owned and controlled by the same persons, as will appear by the following quotation from the charge:

"It has also been testified that the Gloucester Ferry Company, which it has been said by one of the witnesses owned these boats, was the same thing as the Washington Park Steamboat Company; that they were identical, and, as I understand the effect of the witness' testimony to be, they were owned and controlled by the same people, so that under different names they were the same persons. What was the case with regard to this railroad? Was that also operated and controlled by the defendant company, the Washington Park Steamboat Company? Because, if it was, as matter of course it would be responsible for any negligence of its employes in the operation of that railroad. If it were not, if it were a different corporation, or if it were owned and operated by different persons—I am speaking now of an individual as distinguished from a corporation—there would be then a plain distinction between the defendant company and this other person or corporation, and in that event the defendant company would not be responsible."

This apparent mistake of the court certainly afforded the ferry company another opportunity to correct the error into which both

the plaintiff and the court had fallen. It was the ferry company's plain duty to explain then, if it had not been its duty before, that the steamboat company was a mere name, and was not a corporation at all. But, instead of so doing, the ferry company continued its policy of implying that the suit had been brought against a real person, and not against a mere shadow, as will clearly appear by the following colloquy that took place at the conclusion of the charge:

"Counsel for Ferry Co.: Will your honor give me an exception to that part of your charge wherein you said if these were two or three corporations controlled by the same parties—

"The Court: I did not say that at all. I said distinctly to the jury, and I will say it again, so as to make it plain, that unless the defendant company controlled and operated this mile of road, it would not be responsible. That is what I said.

"Counsel for Ferry Co.: It does not matter who were the owners.

"The Court: If the defendant company controlled and operated this road, of course, it makes no difference who owns it. I will say in plain terms, as I have said, it makes no difference who owned it. The question is: Who controlled it, and who operated it? Who ran these cars? Who were responsible for what is said to have been the negligence of these motormen? Of course, the person who would be responsible for it would be the person who controlled, or the corporation who controlled and operated, the road. It might be owned by anybody; but, if it were controlled and operated by somebody else, the person that controlled and operated it would be responsible."

There was a judgment for the plaintiff, and ineffectual efforts were thereupon made to collect it, both by fi. fa. and by attachment execution. The fi. fa. was defeated by the claim of the ferry company that the boats sought to be seized were its own property. An alias attachment execution, in which the ferry company was made the garnishee, was met by a distinctly misleading affidavit of the ferry company's secretary, in which he swore that the ferry company—

"knows the Washington Park Steamboat Company. \* \* \* It has had business dealings with the Washington Park Steamboat Company. At the time said writ was served there were no accounts between said company and this garnishee; neither did the garnishee have, at the time of the service of said writ nor at the time of the making of this answer, any balance in its hands belonging to the said Washington Park Steamboat Company.

By this time the plaintiff began to suspect the true condition of affairs, and obtained the rule now under consideration, which seeks to amend the record by substituting the ferry company as the defendant, adding the words, "doing business as the Washington Park Steamboat Company." To this rule the ferry company appeared and filed an answer, and a good deal of testimony has been taken in support of the petition. There is no dispute concerning the essential facts. The depositions show that the ferry company is a New Jersey corporation, that it owned the line in question, that it used the name of the Washington Park Steamboat Company as a mere convenience for bookkeeping reasons, that no such corporation ever existed, and that all the business carried on in the name of the steamboat company was really carried on by the ferry company. As already stated, it was the ferry company that appeared and made defense to the suit, and it is the ferry company that has been interposing all the obstacles to the collection of the judgment.

Under these circumstances, I not only see no legal difficulty in the way of allowing the amendment; but I think it would be a discredit to the administration of justice if the true defendant could not be put formally upon the record. The ferry company is proved to be a New Jersey corporation; it voluntarily appeared to the suit by its counsel, who was also a member of its board of directors—for it need hardly be said that the steamboat company could not appear, whatever the pretense on the record may have been. It made defense on the merits, and was fully heard, declining to take a writ of error; and only after all this did it interpose the technical defense that the name of the defendant is not the name of a real person. This is not the situation with which some of the decisions are concerned, where a real person has been sued, and, after it has been ascertained that the suit has been erroneously brought, an offer is made to substitute another real person as defendant. Here the right defendant has been sued, has appeared and pleaded, and taken defense on the merits, and the only mistake is that the right defendant was called by a wrong name. But it is the wrong name only in the sense that it is not the defendant's corporate name. It is, however, the precise name that the ferry company has been using, and using moreover in the very transaction out of which the cause of action arose. I think, therefore, that it may be said with some force that the ferry company is hardly in a position to object to the amendment, since the so-called wrong name was assumed by the ferry company itself, and has been fully recognized by its conduct in the suit. And, still further, it is a case where the real defendant, knowing the mistake and having had abundant opportunity to correct it, has continued to mislead the plaintiff down to the last possible moment. It is a satisfaction to feel confident that the court is not so impotent as to be obliged to allow such conduct to succeed.

An analogous case is *Bainum v. American Bridge Co.* (C. C.) 141 Fed. 179, recently decided by Judge Buffington. The facts appear by the following quotation from the syllabus:

"The plaintiff's statement, in an action for personal injury against a foreign corporation, alleged to be a corporation of New Jersey, specifically set out the facts, clearly identifying the defendant, the work in which it was engaged, and the time and place of the injury. There were in fact two corporations, closely connected and having the same name, except that one was 'of New Jersey' and the other 'of New York.' Both had the same resident agent, on whom the process was served, and the same attorneys, who entered appearance for defendant and prepared the case for trial, when it was discovered that the New York corporation was in fact the one doing the work."

Under such circumstances it was held that the court had power, under sections 948, 954, Rev. St. (U. S. Comp. St. 1901, pp. 695, 696), to permit the plaintiff to amend by substituting the name of the real defendant intended; the court saying:

"There was no question as to the locality of the accident or of the identity of the company engaged in the work or employing the plaintiff. The counsel for that company appeared and prepared its defense and all parties supposed the real parties to the accident were the parties to the suit. Now, to refuse the beneficent power of amendment, so as to place on record the parties who had all along supposed they were on record, would be shocking to the sense of justice, and especially so when the statute of limitations would

bar another suit by plaintiff. The similarity of names misled counsel for defendant, and the failure of the plaintiff to know that there were two corporations of substantially the same name and engaged in the same general business was quite natural. There was no new cause of action stated, and the fact that the statute of limitations would bar the plaintiff unless the amendment was allowed has been held ground for such allowance. \* \* \* By permitting this amendment, neither the nature of the case nor the real issue between the real parties is changed; and the federal courts permit amendments in furtherance of justice. *Bamberger v. Terry*, 103 U. S. 40, 26 L. Ed. 317; *Hodges v. Kimball*, 91 Fed. 845, 34 C. C. A. 103."

In the pending case the court is simply asked to make its record speak the truth, and I think there is no doubt that this may be done. As was said by Mr. Justice Strong in *Insurance Co. v. Boon*, 95 U. S. 126, 24 L. Ed. 395:

"Every court of record has power to amend its records, so as to make them conform to and exhibit the truth."

And accordingly an important amendment was allowed after the term at which judgment had been entered.

The rule to amend is made absolute, and the record is now amended wherever necessary, so that the suit may stand against the Gloucester Ferry Company, a corporation of the state of New Jersey, doing business as the Washington Park Steamboat Company.

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### THE OCEANA.

(District Court, E. D. New York. June 29, 1909.)

#### 1. SHIPPING (§ 132\*)—CARRIAGE OF GOODS—ACTION FOR DAMAGE TO CARGO—BURDEN OF PROOF.

A vessel which was new, properly constructed, and in all respects seaworthy cannot be held liable for leakage under bills of lading exempting her from loss on that account and from weather, heat, and perils of the sea, unless it is affirmatively shown that there was negligence in the stowage which it should reasonably have been anticipated would cause such damage, and the libellant must make out a case showing the cause of injury with sufficient clearness before the burden is cast upon the vessel to show that the exemption is broad enough to cover the damage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 479-482; Dec. Dig. § 132.\*]

#### 2. SHIPPING (§ 132\*)—CARRIAGE OF GOODS—ACTION FOR DAMAGE TO CARGO—SUFFICIENCY OF PROOF.

A new steel steamer carried for libellant a consignment of cocoanut oil in casks from Colombo, Ceylon, to New York in the winter, under bills of lading exempting her from liability for loss or damage caused by heat, leakage, or perils of the sea. A part of the consignment was stowed in the lower hold and a part on the bridge deck, and in the latter part there was an excessive leakage, but the cause of it was not definitely shown. *Held* that, under the evidence, there was not sufficient proof that the bridge deck, which appeared to be well ventilated, was an improper place for such cargo, to charge the master with negligence, or render the vessel liable for the loss.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 484; Dec. Dig. § 132.\*]



In Admiralty. Suit for loss of cargo from leakage.

Hunt, Hill & Betts (George W. Betts, Jr., of counsel), for libelants.  
Convers & Kirlin (John M. Woolsey, of counsel), for claimant.

CHATFIELD, District Judge. In the year 1907 the Oceana, a new iron steamship, started from Glasgow, Scotland, and, after a voyage through the Suez Canal to Hong Kong, returned to Calcutta, and thence proceeded to Colombo, Ceylon, with certain cargo in what was called the "bridge deck space" and "hold No. 3." This cargo was discharged at Colombo, and the spaces indicated filled with other goods for a voyage to Boston and New York. The port of Colombo was left upon the 31st day of December, 1906, and the vessel proceeded through the Indian Ocean and the Red Sea, to the Suez Canal, which was entered upon the 16th day of January, 1907. Two days were occupied in passing through the canal, and the vessel finally reached Boston on the 14th day of February, 1907, thence proceeding to New York, and arriving there on the 23d day of February, 1907, where the cargo was discharged.

Among the cargo taken on at Colombo were four lots of cocoanut oil in pipes, puncheons, and hogsheads; a puncheon being larger than a hogshead, and a pipe larger than a puncheon. The weight of a pipe full of oil is something over a ton, a pipe being a straight staved barrel, some 5 feet long, with a uniform diameter of  $3\frac{1}{2}$  feet. There is considerable testimony to the effect that the large and heavy pipes are difficult to handle, and subject to great strains, also that under excessive heat the wood of the pipes shrinks, the hoops expand, and the heads of the pipes thus become loose enough so that there is leakage around the heads. Cocoanut oil congeals at a temperature of 62 degrees Fahrenheit, becoming more fluid as the temperature rises, and the testimony shows that a reasonably well-ventilated and cool place should be used for stowing cargo of this character in order to avoid excessive leakage. The four lots of cocoanut oil taken on at Colombo were marked by a keystone device, with the numbers 90, 91, 92, and 93. Lots 90 and 91 were stowed in the hold, and all the lots were stowed in a single tier of pipes, with casks of plumbago properly chocked and dunnaged in a second tier. No fault has been shown in any way with the manner or method of loading, and the dunnage seems to have kept in place and served its purpose throughout the entire trip. The same is true as to lots 92 and 93, which were carried in what is known as the bridge deck space, with the exception of a few packages of lot 93 in one of the holds. While the testimony of one of the experts was to the effect that the cargo showed some working or slight shifting, indicating that it had been subject to the movement of the vessel in severe weather, it was generally in good order upon arrival. The only point as to which discussion could arise, and upon which the present action has been based, is with reference to the leakage of the cocoanut oil in the four lots referred to, which were the property of the libellant, and as to which there was a considerable shortage in the quantity of the cocoanut oil when the delivery was made at New York. As has been said, the testimony shows that the packages were in good condition at Colombo, and again ap-

peared to be in good condition at New York, and the temperature of the air and the water in the North Atlantic, up to the time of unloading the vessel, was such that the coconut oil was then entirely congealed. The leakage in the bridge deck space was shoveled up, some 32 barrels of drainage, a portion of which, 25 barrels, was awarded to the libelants as their share of the loss by leakage. This award was refused, claim was made for the amount of oil involved, and a libel filed, in which the libelants allege that they lost from the four lots of oil in question some 18,697 pounds, valued at \$1,916.44.

The libelants allege that there was negligence in the loading, storing, and caring for this oil by the steamship, failure to properly deliver, to make the vessel seaworthy, and in furnishing a proper place of stowage for the oil. The bill of lading contained the following exceptions, and is sufficient to cover all of the allegations of the libel, except that in which it is alleged that the officers and agents of the vessel caused this oil to be carried in an improper place:

"(2) Carriers are not liable for \* \* \* heat, or any accidents, loss or damage arising from \* \* \* any other peril incident to steam navigation, or perils of the sea," etc.

"(4) Drainage and leakage, breakage, loss or damage by \* \* \* rain \* \* \* frost \* \* \* heating \* \* \* or any loss or damage arising from the nature of the goods," etc.

Each bill of lading has, in addition to these printed exceptions, a stamp, "Not responsible for leakage, unless caused by improper stowage."

Testimony has been offered to show that the particular part of the vessel where these lots were stowed was not a proper place because of the intense heat to which the oil was subjected upon this particular voyage. Some testimony was offered as to the loss of oil in hold No. 3, which is at the bottom of the vessel, but immediately aft of the engine room. The testimony shows that the oil in that hold was properly stowed and dunnaged, was separated from the partition or bulkhead of the engine room by a space of some 30 feet, and no negligence of any sort has been shown with respect to the cargo in that part of the vessel. One witness testified that a greater amount of partly empty packages existed in that hold than in the bridge deck space, and the officers of the vessel testified that a large quantity of oil was pumped out by the engines from the bilges of the vessel, into which leakage would run from the lower hold.

The Oceana is what is known as a three-island ship, built of steel, and the boiler room and engine space extend upward in a shaft or trunkway, terminating in a skylight, through which the smokestack projects. A cargo space, called the "bridge deck space," surrounds this trunkway or space upon four sides. The upper part of the boilers, engine, and smokestack extend through the trunkway, to the level of the bridge deck space. The boilers and engine were protected by asbestos, and a large hatchway in the bridge deck, together with four ventilator or grating hatches and two doors at each end of the bridge deck space, give considerable and probably sufficient ventilation to this space when the hatches and doors can

be left open for that purpose. The testimony shows that the only rough weather encountered by the Oceana, which is a large vessel, some 370 feet in length, was in the Mediterranean and the North Atlantic. The temperatures there, both atmospheric and of the sea water, and also in the engine room and bunkers, was not excessive; the atmospheric temperature, in fact, being such that the cocoanut oil would be congealed for a greater part of the time, and no leakage would seem to have been possible on that part of the voyage, except from the working of the cargo under the effect of the rough weather before the oil became congealed. Such leakage was covered by the bill of lading. The voyage occurred at a season when the northeast monsoon was blowing, and the temperatures in the Indian Ocean and the Red Sea were lower than at other portions of the year. While in the Red Sea, for about four days, from January 9th to 12th, the wind blew from the southeast, constituting a following wind, which the witnesses all agree would produce the most extreme conditions of heat upon the decks and inside of the vessel, where the temperature was dependent upon the breeze. Some of the hatches were uncovered, and the cargo space ventilated regularly, and through the Indian Ocean and the Red Sea the hatches in the bridge deck were used for ventilating purposes to a greater or less extent. The rear doors of the bridge deck space were left open during the entire voyage. Those in front were closed. But the witnesses who are familiar with iron steamers of this class practically agree that the ventilation afforded was as extensive and successful as could have been secured by hoods or funnels, and that the bridge deck space in question was not defective in any way that could have been remedied by her officers, or in any way which would affect the safe carrying of a cargo which could properly be put in such a place for transportation. The testimony shows that cocoanut oil has to be separated from any part of the cargo that will be affected by its odor; and, in view of the exemption covering loss from weather, leakage, heat, etc., no liability can be imposed upon the vessel for the acts of its officers merely because the leakage occurred, whether due to heat or otherwise, unless it can be affirmatively shown that there was negligence on the part of the claimant in respect to some improper method of stowage which should reasonably have been anticipated would cause the damage which the testimony shows did result. *The Claverburn* (D. C.) 147 Fed. 850; *The Fanny Skolfield* (D. C.) 65 Fed. 814.

Under these circumstances, it is evident that the libelants have made out no case with respect to any of the cargo in the lower hold, nor with respect to any of the cargo carried in the bridge deck space, unless the testimony shows that it was negligence for the officers of the vessel to put the cargo in that space for the voyage from Colombo to New York. The temperature of the engine room and of the coal bunkers was high throughout the entire period that the Oceana was on the way from Colombo to the Suez Canal. The temperature in the engine room reached the point of 133 degrees, which was admitted by all of the witnesses to be an excessive heat, in the Indian Ocean. But, as has been said, the temperature

of the air and the condition of the winds were then favorable to ordinary temperatures upon the vessel; and when the following wind and warm atmosphere, with a clear sky, in the Red Sea, would naturally be expected to have occasioned a further rise in the temperature of the engine room, the testimony shows that the engine room and bunkers were at a lower temperature than had previously existed under more favorable conditions. Under these circumstances, it is impossible to hold that the captain should have anticipated excessive temperatures from which loss or leakage would result merely from the weather and sun alone. On the other hand, as has previously been said, the testimony of the claimant's witnesses does not satisfactorily explain the leakage as the result of any working of the cargo when severe weather was encountered, inasmuch as low temperature then existed such that the oil would be solidified, or nearly so. The dispute as to whether more leakage resulted in the bridge deck space than in the lower hold seems to be conclusively determined by the testimony of the weighers who discharged the cargo and found a great shortage in lots Nos. 92 and 93, and a smaller shortage in lots Nos. 90 and 91, from the lower hold. But lot No. 93 suffered much less than No. 92, and yet both were in the bridge deck space. Again, the working of the vessel under the effect of weather would have a much greater tendency to cause leakage in the upper portions of the vessel, but no responsibility therefor under the bill of lading could be imposed upon the vessel if leakage resulted from that cause, for that would be an ordinary peril of the sea. The libelants' witness Clarke testified to the effect that:

If "one cask loosened owing to the head starting, or from any other cause, the probability would be that the working of the ship would cause all the remaining casks to work, and this at so high an elevation in the ship would be more likely in consequence of the motion being heavier."

Mr. Clarke's opinion from observation of shipments of cocoanut oil under such conditions is that the oil becomes very thin, and that the reflected heat from the iron plating of the ship causes the casks to shrink and the oil to flow more readily.

Under such conditions, and upon all the testimony in the case, it would seem that the leakage must have occurred through the working of the packages when subjected to heat of more than ordinary degree. But the libelants have given no satisfactory testimony to explain why this resulted upon this particular voyage, or in this particular part of the ship, other than that damage did occur. It does not seem that this, in view of the exceptions in the bill of lading, can of itself prove negligence. Ordinary working of the cargo in any part of the vessel is a "peril of the sea" if the character of the cargo is not such that some greater care than ordinary good stowage is plainly required. The same rule would apply to leakage and heating when the cargo is not stowed in a place known to be improper, or in which bad results should reasonably have been anticipated. The libelants must make out a case showing the cause of the injury with sufficient clearness before the burden of proof can be thrown upon the claimant to show that the exception is broad enough to cover the damage, if it in terms

is applicable to the damage proved. This seems to be the doctrine of *The Patria*, 132 Fed. 971, 68 C. C. A. 397, and *The Folmina*, 153 Fed. 364, 82 C. C. A. 440. The testimony in the present case does not satisfy the court that the bridge deck space was of such construction or arrangement that the responsible parties should have anticipated the extraordinary damage shown. The conditions on the *Oceana* upon this her first voyage do not seem to have indicated that such excessive temperatures would ordinarily result, and the cargo space in question was apparently well ventilated. That excessive temperatures existed in this cargo space is only inferentially demonstrated, and such temperatures existed, if they existed at all, at intervals when the temperature would reasonably from the reports of the log have been lower than at other times.

Further testimony of a number of witnesses offered on the part of the defense as to the carrying of cargoes of cocoanut oil upon vessels similarly constructed in tropical regions, and of the customary methods of loading at Colombo, furnish no evidence of any facts of which the officers of the *Oceana* should have had knowledge, or which they should have considered in assuming that the bridge deck space of the *Oceana* could not be used for this purpose. The libelants offered without objection the testimony of several witnesses as to whether the space used for the carrying of cocoanut oil on this voyage was a proper space. It is considered that this is the question before the court, and the testimony of these men, in so far as they were offered as experts, was of value only in pointing out what in their opinion would be the effect of certain conditions and methods of construction in an iron vessel with respect to the carrying of such a cargo. The claimant offered in evidence the testimony of a number of witnesses, as has been said, as to the customary methods of loading, and cites a number of cases, including *The Dan* (D. C.) 40 Fed. 691, *The Keystone* (D. C.) 31 Fed. 412, *The City of Alexandria* (D. C.) 23 Fed. 826, and *The Tjomo* (D. C.) 115 Fed. 919, where customary methods of stowage or loading were proven in determining whether the duty of properly stowing a cargo had been fulfilled. But it was held upon the trial, and now seems to the court, that such testimony is not conclusive upon the precise question as to whether it was negligence to use the bridge deck space of the *Oceana* for cocoanut oil upon the voyage in question.

It may be assumed that the captain of the *Oceana* was entitled to rely upon his knowledge of what was customary in determining what would be expected of him as the result of his experience, and that of others, in properly stowing a cargo, and that testimony as to custom furnishes some evidence as to what experience has shown with respect to certain conditions. But evidence as to custom will not by itself answer the charge that the captain of the *Oceana* should have reasonably anticipated that the bridge deck space of his vessel would be too hot a place for the safe stowage of barrels containing cocoanut oil. If experience continued to show that the bridge deck space of the *Oceana* could not be kept properly ventilated, and produced a degree of heat so great as to affect packages of cocoanut oil in the manner indicated, it would certainly be negligence for the captain to use the bridge deck space for that purpose. But the libelants have not satisfactorily met the

burden of proof resting upon them to show that upon this first voyage, at a favorable time of the year, on a vessel constructed similar to other vessels in which weather alone had not caused similar results, it was negligence to carry a cargo of cocoanut oil in the bridge deck space, when the bill of lading excepted the vessel from responsibility for heat, from the effects of any working of the cargo when properly stowed, and from leakage caused by any of those sources. It is apparent that some damage resulted, that this damage was substantially confined to the bridge deck space, and that the damage was in the nature of leakage; but it has not been clearly indicated whether this leakage came from the working of the packages or from the shrinkage of the staves, nor whether excessive heat (which should have been guarded against) affected these packages, rather than that they leaked under what would be ordinary heat in those localities.

The conclusion must be that the libelants have failed to sustain the burden of proof upon them, and the libel should be dismissed, even with respect to the cargo in the bridge deck space. As to the leakage in the hold, which was included in the libel, no negligence of any sort has been shown by the testimony, and as to this, therefore, there is not even necessity for discussion.

The entire libel must be dismissed.

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## HARRISON v. PHILADELPHIA CONTRIBUTIONSHIP FOR INSURANCE OF HOUSES FROM LOSS BY FIRE.

(Circuit Court, E. D. Pennsylvania. June 4, 1909.)

No. 99.

### 1. INSURANCE (§ 226\*)—MUTUAL COMPANIES—CONTRACTS WITH MEMBERS.

By the fundamental law of a fire insurance society organized in 1752, comprised in its deed of settlement and subsequent charter from the state, every person insuring therein was required to deposit a sum proportioned to the amount of his policy, and become a member of the society during the continuance of his policy, on the expiration of which without a loss his deposit, subject to certain deductions, was returned. By an amendment adopted in 1836 it was provided that all policies thereafter issued should be made to continue in force for an unlimited period, but that the society should have the right on 30 days' notice to cancel any policy and return the deposit, or the insured might on notice surrender his policy and withdraw his deposit less 5 per cent., and such provisions were incorporated in all subsequent policies. *Held*, that a policy thereafter issued was subject to such provisions as a part of the contract, and that the holder had no standing to enjoin the society from canceling the policy and terminating his membership on the ground that the amendment of the deed of settlement was ultra vires.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 498; Dec. Dig. § 226.\*]

### 2. CORPORATIONS (§ 29\*)—CORPORATE POWERS—PERSONS ENTITLED TO QUESTION.

Under the law of Pennsylvania, the validity of a corporate charter or of a particular power apparently conferred thereby cannot be inquired

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

into collaterally, but must be the subject of direct attack by the commonwealth.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 78; Dec. Dig. § 29.\*]

In Equity. On final hearing.

R. Mason Lisle, for complainant.

W. W. Montgomery and John G. Johnson, for defendant.

J. B. McPHERSON, District Judge. This controversy was heard upon bill and answer. The facts are not in dispute, and may be stated as follows: In March, 1752, certain persons in the city of Philadelphia entered into a mutual agreement or deed of settlement of which the object appears in the following paragraph:

"Whereas the Insurance of Houses from Loss by Fire hath, where the same has been practised, proved very useful and advantageous to the Publick:

"Now know ye, that we the said Subscribers hereunto, as well for our own mutual Security as for the common Security and Advantage of our Fellow-citizens and Neighbors, and for the promoting of so great and publick a Good as the Insurance of Houses from Loss by Fire, upon the most equal Terms and apart from all Views of private or separate Gain or Interest, have of our own Motion offered each to the other, and have unanimously resolved and agreed, and by these Presents do covenant, promise and agree for ourselves severally and respectively, and for our several and respective Executors, Administrators and Assigns, to form, erect and settle an Office, Society or mutual Contributionship, by the Name or Stile of the Philadelphia Contributionship, for the Insuring of Houses from Loss by Fire, and to be and continue Contributors unto, and equal Sharers in the Losses as well as the Gains and Advantages arising, accruing and happening in and by the same, upon the Terms, and according to the Articles and Agreements, and subject to the Provisions and Conditions hereinafter mentioned."

Every subscriber then or thereafter, his executors, administrators, and assigns, "being allowed to be and continue as Persons insuring in this Society, as hereinafter is mentioned and provided," were to be "Members thereof, to all Intents and Purposes, and shall be concluded by the Covenants and Agreements herein contained, and shall have, and bear his, her and their proportionate Part and Share of all the Profits and Advantages as well as of all the Losses and Charges arising in and by the same, for and during the respective Terms in his, her or their respective Policies." The term of insurance was to be for seven years. The cost of insuring was in part provided for by a small preliminary payment, but chiefly by the deposit of money in accordance with the following paragraph:

"Every Person insuring shall deposite in the Hands of the Treasurer, as a Pledge, for the Performance of his Covenants, a certain Sum for every One Hundred Pounds insured, according to the greater or less Hazard of the Building on which the same is insured, agreeable to the Table hereto annexed. Which Deposite Money shall be returned to the Person or Persons so depositing it, his, her, or their Executors, Administrators or Assigns, at the Expiration of his, her or their respective Policies, together with a proportionable Dividend of the Profits in the meantime, after Deduction of Losses and incident Charges only. Provided, and it is hereby agreed, that for the better and more certain adjusting the accounts of the Society, the said Deposite Money shall be demanded within one Year next after the Expiration of each respective Policy: And in Default thereof, the same Deposite Money shall become forfeit, and be sunk to the Benefit of this Society."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

All policies "at their respective Expirations, and the returning or accounting for the Deposit Money and the mean Profits, shall be delivered up to this Society to be cancelled." It was further provided that:

"All and every Person or Persons insuring in this Society shall stand and be obliged to pay his, her and their Proportion of all Losses and Charges happening and incurring in and to this Society, and for that Purpose shall sign and execute these Presents: Yet so as no Person or Persons shall be obliged beyond his, her or their Deposit Money, to pay a Sum exceeding one Half the said Deposit, for his, her or their Proportion and Contribution towards the Loss which shall be occasioned by any single Fire that shall happen."

After a loss the directors were to settle a rate of contribution, from which a method of appeal was provided.

"Yet nevertheless it is hereby declared and agreed, that in the mean Time, when such Rate or Rates shall exceed the Deposit Money, all and every the Members of this Society shall be obliged to pay into the Hands of the Treasurer, his, her and their proportionable Parts and Shares of all and every such Rate and Rates, within Thirty Days next after such Publication of the same respectively aforesaid; and in Default of such Payment, he, she, and they, and every of them, making such default therein, shall forfeit double the said Rates; and, neglecting to pay the said Forfeiture ten Days more, shall or may, by the Directors for the Time being, be excluded and debarred all Benefit and Advantage of his, her and their Insurance and Insurances respectively, and all Right to the Stock of this Society, and shall notwithstanding be liable to the Payment of the said Rates, pursuant to his, her, and their Covenants and Engagements in these Presents contained."

The net profits arising by interest or otherwise were to be "divided yearly to every Member in Proportion to his Insurance, for which each Member's Account shall have Credit in the Society's Books, to be paid at the Expiration of their Policies. Contributions to Losses shall likewise be settled yearly, and every Person insuring shall contribute in Proportion to his Insurance: \* \* \*" A general meeting of the members was to be held each year; "and all and every the said General Meetings may, and are hereby declared to have full power to consider, treat of, and determine of and concerning all or any the Matters and Things relating to this Society, and the Support, Preservation and good order thereof, and to alter and amend the present Articles, and make any additional Rules or Articles, for the better and more orderly and successful or satisfactory Management of the Affairs of this Society. At all which Meetings, the Determination of a Majority of the Members present, shall be conclusive and binding on the whole Society."

The deed of settlement contained many other details, which do not seem to be now important.

In February, 1768, the Provincial Assembly incorporated the society, declaring that:

"\* \* \* All and every Person and Persons, who have heretofore subscribed the said recited Articles of Agreement [the deed of settlement], by him, her, or themselves, or by his or their Attorney or Agent, and each and every one, who shall hereafter in like manner subscribe the same, or shall at any Time or Times hereafter insure in or with the said Society, their respective Heirs, Devisees and Assigns, shall be and they, and every of them are hereby declared to be Members of the said Society, and are hereby made a Body Politic and Corporate in Law. \* \* \*"



Among other provisions the charter appointed an annual meeting of the contributors, who were—

"\* \* \* empowered to consider, treat and determine of, and concerning all or every the Matters and Things, relating to the prudent and just Management, and good Order of the said Society; and to establish and confirm all such Articles and Rules, as have been heretofore agreed to, and not ratified and confirmed by this Act, to alter and amend the same, and to make and establish any other additional Rules and Articles, for the better and more perfect Prosecution of the true Intent and Design of the said Society. At all which Meetings the Determination of a Majority of the Contributors present shall be conclusive and binding on the whole Society; provided always, That the said Rules and Articles be not inconsistent with, or contrary to, the Regulations and Establishments made and declared by this Act."

In April, 1810, at a general meeting of the society, the deed of settlement (the details of which had not been seriously disturbed by the charter) was revised, and it was provided, inter alia:

"All persons insuring in and with this Society shall be deemed members of the same during the continuance of his, her, or their interests in their respective Policies."

"IV. Every policy hereafter to be issued by this Society shall be made to continue in force for an unlimited period. But whenever a total loss of the property insured shall happen, the policy, upon the payment of the said loss or upon the re-building of the property as is hereinafter provided, shall be delivered up to the Society, who shall be entitled to retain the deposit money, and the insurance shall from thenceforth cease and be of no effect. And it shall moreover be lawful for either the Assured or this Society, at the expiration of seven years from the date of any such policy, or at the expiration of any period of seven years thereafter, to cancel the same, or to withdraw the deposit money, thirty days previous notice being given of an intention so to do. And in case the party assured shall sell the property insured before the expiration of any such period of seven years, it shall be lawful for him to give up the policy and to withdraw the deposit money upon paying to the Society five per centum upon the amount of such deposit. But in all cases in which the deposit money shall be withdrawn as aforesaid, if it shall have happened during the period such policy has been in force, that the stock of the Society has been lessened by losses, then and in such case a just proportion of all such losses as the interest money has been insufficient to satisfy, shall be first deducted out of the said deposit money."

Assignment of a policy might be permitted by the directors, but—

"\* \* \* in all cases, in which the Directors shall not permit an assignment, or transfer, so circumstanced to be entered, the party entitled to the Policy, shall be at liberty to withdraw the deposit money, paying to the Society five per centum upon the amount thereof."

A general meeting of the members was to take place each year—

"and the said members at every such general meeting shall and may treat and determine of and concerning all matters and things relating to the management of this Society; and they, or a majority of the members met, may alter or amend the present articles, or make any additional articles, for the more perfect prosecution of the design of this Society, provided the same be not contrary to the Act of Incorporation."

On April 11, 1836, at a general meeting of the contributors, certain alterations were recommended by the directors, who stated in their report, that:

"These alterations do not in any respect change the contract at present existing between the Society and the parties Insured except in regard to the return of Deposit money in Certain cases. \* \* \* They are one and all in-

tended to authorize and to effectuate the same contract in future cases rendering it in a few particulars more explicit and adapting its form to the more convenient mode of transacting business now undertaken by the office."

Among these alterations or amendments is the following italicized provision, which is of the utmost importance in the present controversy:

"IV. Every Policy hereafter to be issued by this Society shall be made to continue in force for an unlimited period. But whenever a total loss of the property shall happen, the Policy, upon the payment of the said loss or upon rebuilding of the property as is hereinafter provided, shall be delivered up to the Society, who shall be entitled to retain the deposit money, and the insurance shall from thenceforth cease and be of no effect. *And it shall moreover be lawful for this Society, upon giving thirty days' notice, to cancel the Policy, returning the deposit money upon a surrender of the Policy.* It shall also be lawful for the Assured, on giving five days' notice and surrendering the Policy to withdraw the deposit money, allowing a deduction of five per centum thereon. But in all cases in which the Assured shall withdraw the deposit money, if it shall have happened during the period such Policy has been in force, that the Stock of the Society has been lessened by losses, then and in such case, a just proportion of all such losses as the interest money has been insufficient to satisfy shall be first deducted out of the said deposit money."

On June 3, 1856, the defendant issued a policy of fire insurance for \$4,500 on certain premises in the city of Philadelphia, the insured having deposited in consideration therefor the sum of \$225; and on February 27, 1871, the defendant issued another policy of fire insurance for \$7,500 upon other premises in the city, the insured having deposited the sum of \$490 as consideration therefor. The plaintiff has succeeded to the rights of the original insured, and was the owner of both policies when this bill was filed. Each policy recites that the insured has become a member of the defendant company "pursuant to the deed of settlement hereto annexed, and having deposited in the hands of the treasurer of the said society the sum of \_\_\_\_\_ dollars." In consideration thereof the defendant insures a specified sum to the policy holder, his heirs, executors, administrators, and assigns "on the terms, conditions, and provisions in the said deed of settlement and in this policy contained or referred to." As has already been stated, among the conditions contained in the deed of settlement is the foregoing amended article 4 that was adopted on April 11, 1836. This article is repeated in each policy with immaterial omissions and variations. The insurance contracts thus entered into continued undisturbed until September 20, 1907, when the defendant notified the plaintiff of its intention to cancel the policies at the expiration of 30 days, and to return the deposit money, unless the plaintiff would accept a partial reduction of the risk and an increase in the rate with the return of a proportionate part of the deposit. No cancellation has actually taken place, but the bill avers that the company proposes to take this step whenever it may elect so to do. On December 31, 1907, five months before the bill was filed, the assets of the defendant were \$5,314,103.14 and the deposit moneys were \$625,044, and the plaintiff, averring that his proportion of the deposit money was 1/874 thereof, and that he was therefore equitably interested in the assets in a similar proportion, and averring, further, that the cancellation of his policies and the return of the de-

posit money would deprive him of his interest in the assets and his right to participate in any future profits therefrom, asks for a decree declaring his proportionate interest in the assets, and enjoining the defendant from depriving him thereof, and from depriving him also of his membership in the society.

I have found the facts fully upon which the plaintiff rests his claim to an indefeasible ownership in order to present his case with fairness; and I may add that the true nature of the company, and the rights of its members and policy holders, so far as the controversy might involve these matters, would require consideration, if it were not for one objection to the bill that lies upon its surface and in my opinion is fatal to the plaintiff's case. This objection is to be found in the fact that the claim now set up is in direct opposition to the contracts contained in the policies, and violates a fundamental term of those agreements, and of the company's apparent chartered powers. It is true that the plaintiff attacks the amendment of April, 1836, providing for cancellation on 30 days' notice as *ultra vires* so far as it refers to returning the deposit money, and thus depriving the plaintiff of his interest in the assets and his membership in the defendant company; but the difficulty in my mind is to discover upon what sound theory of legal or equitable right the plaintiff rests his claim to make such a contention, entirely aside from the fact that he is making a collateral attack upon an apparent corporate power of the society. When he (or his predecessor) approached the defendant in 1856 and 1871 with a proposition for insurance, he found the society transacting business on the terms *inter alia* set forth in the amendment of 1836. The fundamental law of the corporation contained the provision that cancellation and return of the deposit might be made after due notice. The policy repeated these provisions, and therefore unequivocal notice was given to all who desired the society's protection that only upon these terms would the relation of policy holder or member and insurer be established. It was open to the plaintiff at that time to accept or to refuse these conditions. Conceivably he might have said, as he now says:

"I deny your power to make the amendment which in form you adopted many years ago. If you take me as a member, I shall assert the right to continue my membership, even although you cancel my policy, and I shall demand that you retain my deposit, and pay me profits thereon until I elect to reclaim it."

If the society had accepted him on such a footing, something might be said in favor of considering the argument that is now advanced to justify his claim. But he made no such declaration, either expressly or impliedly. He accepted the policy without demur precisely as it stands, with the condition that is based upon the amendment of 1836; and now, when the company seeks to enforce the condition to which he unquestionably agreed, he tries to evade its enforcement by denying its validity. In other words, he attempts to make a new contract with the defendant, and to make it of his own separate motion against the defendant's will. It is not to the point to say that, if this provision was *ultra vires*, it was wholly void, and should be treated as if it had never existed. This is merely playing with words. It is impossible so to treat the provision. Void or not void, it did exist in fact. It was,

in fact, adopted by the corporation. It was printed as part of its fundamental law, and it became a clause in each of its policies. No one doubts that the society adopted it in good faith, exercising what was at least a *prima facie* right of amendment in this particular, and no policy holder has ever questioned its validity until this bill was presented. Good or bad, the amendment was an essential term of the contract between the plaintiff and the corporation, and in my opinion he can no more repudiate it than he can deny the force of any other provision to which he may concede that he can offer no objection. How can it possibly be determined that his policies would have been issued at all if they had not contained this condition? The presumption is that the parties to a contract regard all its conditions as important; and therefore to permit the plaintiff to request and to receive a policy that contains the condition now attacked, and then to allow him of his own volition to strike it out of the written agreement, is to clothe him with the power to write a new contract to which the mind of the defendant has never assented.

But, apart from these considerations, there is the further objection that the plaintiff is not permitted to assert such a position. If the defendant has overstepped the limits of its corporate authority, if it has undertaken to do what its chartered powers do not allow, there is a supervising authority that may be invoked whose right in the premises (speaking generally) is supreme and exclusive. The commonwealth has the power to control her creatures, and ordinarily it is for her alone to take care that they do not transgress their proper bounds. There are some exceptions to this proposition, but the general rule is I think correctly stated. That the validity of a charter or of a particular power apparently conferred thereby cannot be inquired into collaterally, but must be the subject of a direct attack by the commonwealth, has been often decided in Pennsylvania. Some of the cases are *Cochran v. Arnold*, 58 Pa. 399; *Spahr v. Farmers' Bank*, 94 Pa. 429; *Freeland v. Insurance Co.*, 94 Pa. 504; *Johnston v. Elizabeth, etc., Ass'n*, 104 Pa. 397; *Hamilton v. Railroad Co.*, 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779. Or, if a policy holder in the society antedating April, 1836, conceives himself to have been injured by the action taken in that year, he may perhaps have a standing to attack the amendment when it is employed against him; but where, as here, a plaintiff has deliberately taken a policy containing the provision in question, he must (in my opinion) abide by the agreement and must stand upon the contract as he chose to make it, and as the corporation was *prima facie* authorized to execute it.

If this position is correct, it is unnecessary to consider the plaintiff's argument that by paying the deposit money his membership in the society became indefeasible and wholly independent of the fact of insurance; so that, even though his policy should be canceled, he would continue to be a member, entitled to share in the profits and the assets; the right so to continue being altogether beyond the defendant's power.

A decree may be entered dismissing the bill at the costs of the plaintiff.

## In re INMAN &amp; CO.

(District Court, N. D. Georgia. June 7, 1909.)

**1. BANKRUPTCY (§ 320\*)—PROVABLE DEBTS—CONTINGENT CLAIMS—FUTURE SALARY OF EMPLOYÉ.**

Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), does not authorize the proving in bankruptcy of contingent debts or liabilities, nor is anything added in that respect by section 63b. providing for the liquidation of unliquidated demands, and on that ground an employé of a bankrupt whose contract of employment had not expired, but whose services were dispensed with by reason of the bankruptcy, cannot prove for salary beyond the date of the filing of the petition, which would be for a contingent liability.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 479; Dec. Dig. § 320.\*]

**2. BANKRUPTCY (§ 318\*)—PROVABLE DEBTS—EFFECT OF ADJUDICATION IN BANKRUPTCY—CONTRACTS OF EMPLOYMENT.**

An adjudication in involuntary bankruptcy against an employer terminates a contract of employment by operation of law, especially where the bankrupt is a partnership, and the employé has no claim for damages for breach of the contract provable against the estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 318.\*]

In Bankruptcy. On certificate from referee.

Lamar & Callaway and McDaniel, Alston & Black, for claimants.  
Slaton & Phillips, for trustee.

NEWMAN, District Judge. The claim made in this case will appear from the paper sent up by the referee on the petition for review, as follows:

"I, Percy A. Adams, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to said proceeding:

"T. B. Ketterson filed a proof of claim wherein he claimed of the estate of Inman & Co., bankrupt, \$225. By amendment which was allowed by consent, it was set up that 'the consideration of said debt being that on the 1st day of October, 1907, deponent was employed for 10 months at the rate of \$150 per month, that deponent entered upon said employment on October 1, 1907, and continued in the employment of said firm until May 4, 1908, when the said firm was adjudged bankrupt, and that the sum of \$225 now due is the amount due under said contract for the period from May 4, 1908, to July 1, 1908, the date fixed in the contract for the termination of the said contract of employment and for damages for the breach thereof.'

"To the original claim the trustees through their counsel demurred, and for demurrer set up that said claim is not a provable claim in bankruptcy as to any amount claimed subsequent to the filing of petition in bankruptcy. The trustees without waiving demurrer also answered.

"To the claim as amended the trustees filed a motion to expunge on the grounds that the said claim is not a provable claim in bankruptcy; that the amount claimed to be due was not due and owing at the date of bankruptcy; that said claim was not a fixed liability absolutely owing at the time of the filing of the petition in bankruptcy in this cause; that it was an existing demand at such time, but both the existence and the amount of the possible future demands are contingent upon unforeseen events; and that it is neither an unliquidated nor liquidated provable claim, nor was it an unliquidated or liquidated provable claim on the date of the bankruptcy.

"Said matter having come on for hearing before me on the said demur-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rer and the motion to expunge, I have passed an order expunging the said claim and sustaining the demurrer thereto. The said T. B. Ketterson being dissatisfied with said judgment, and having requested that the same be certified to the judge of the United States District Court for the Northern District of Georgia, the said question is accordingly certified to the judge of said court for his opinion thereon.

"A copy of the original proof of claim and the demurrer thereto, and of the answer thereto, and of the amended proof and the consent of counsel allowing the said amendment and of the motion to expunge filed on behalf of the trustees are attached hereto."

It will be perceived from the foregoing that T. B. Ketterson was in the employment of the bankrupt firm at the time the proceedings in bankruptcy were filed, and that the term for which he was employed had not expired when the bankruptcy occurred. He seeks to prove a claim for the unexpired portion of the time of his employment. He was allowed without objection the amount that was due him at the time the bankruptcy proceedings were instituted, and, as it was less than three months, he was allowed priority for the same.

The question presented is an interesting one, and is almost without direct authority since the passage of the present bankruptcy act. The right to prove, if it exists at all, is under paragraph 4, § 63, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]). Section 63 provides that:

"Debts of the bankrupt may be proven and allowed against his estate which are \* \* \* (4th) founded upon an open account or upon a contract expressed or implied."

Section 63b provides that:

"Unliquidated claims against the bankrupt, may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

It is conceded that if a breach of contract had occurred prior to the commencement of the bankruptcy proceedings, and the claim for damages on account of the breach already existed, that the amount of such damages might be liquidated in such manner as the court might direct; but the immediate question is whether where there is a discontinuance of employment growing out of, and resulting from, the filing of a petition in bankruptcy, and that only the right to damage exists and may be proved and the amount of such damage ascertained. Stating the inquiry somewhat differently, it is this: Whether, where proceedings in involuntary bankruptcy are instituted, followed by an adjudication, and the bankrupt is a party to a contract of employment not terminated, this of itself is a breach of the contract on the part of the bankrupt, or is the contract simply terminated and annulled by operation of law without any default on the part of the bankrupt? The latter being true, there is no cause of action arising as for a breach of contract.

The present bankruptcy act is entirely different from Act March 2, 1867, c. 176, 14 Stat. 517, as to the right to prove claims such as are presented here. That act provided in section 19 (Rev. St. 5067, 5068):

"In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the div-

idends, if the contingency shall happen before the order for the final dividend, or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained. \* \* \* If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise \* \* \* the court may cause such damages to be assessed in such mode as it may deem best and the sum so assessed may be proven against the estate."

There is no such language in the act of 1898. This omission is significant, and is important in passing on the question here presented.

The only case decided by the Supreme Court of the United States which throws any light on this question under the present act, so far as the citation of counsel, and my examination, show, is *Dunbar v. Dunbar*, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084. In that case there was an effort to prove in bankruptcy by a wife, who, anticipating divorce, had separated from her husband, a claim against him on an agreement to pay her a certain amount yearly for her own support and a certain amount for the support of their children. The agreement was to pay the wife the amount stipulated so long as she remained unmarried, and the children until they came to the age of 21 years. It was held that the contract, so far as it related to the wife, was not a contingent liability provable under the act of 1898, and, as to the children, it was held that his duty as a father to his minor children was an obligation from which it could not be supposed it was the intention of the bankruptcy act to discharge him. In the opinion Mr. Justice Peckham, after referring to the English bankruptcy act of 1869, says:

"No such broad language is found in our bankruptcy act of 1898. Section 63a provides for debts which may be proved, which, among others, are (1) 'a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest on such as were not then payable and did not bear interest;' (4) 'founded upon an open account, or upon a contract express or implied.'"

"In section 63b provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct and may thereafter be proved and allowed against his estate. This paragraph 'b,' however, adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim coming within the provisions of section 63a to be liquidated as the court should direct.

"We do not think that by the use of the language in section 63a it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove.

"The language of section 63a of the act of 1898 differs from that contained in the bankruptcy act of 1867, and also from that of 1841. Act March 2, 1867, c. 176, § 19, 14 Stat. 517, 525, carried into the Revised Statutes as section 5068, provided expressly for cases of contingent debts and contingent liabilities contracted by the bankrupt, and permitted applications to be made to the court to have the present value of the debt or liability ascertained and liquidated, which was to be done in such manner as the court should order, and the creditor was then to be allowed to prove for the amount so ascertained.

"Section 5, Act Aug. 19, 1841, c. 9, 5 Stat. 444, provides in terms for the holders of uncertain or contingent demands coming in and proving such debts under the act. But neither the act of 1841 nor that of 1867 would probably cover the case of such a contract as the one under consideration."

According to this, section 63b adds nothing to section 63a as to the class of debts which may be proven, and it was not intended by section 63a to admit proofs of contingent debts or contingent liabilities. The liability here on the part of the employers was certainly contingent. It was contingent upon the life, health, and ability to render services on the part of the employé in the future, and contingent also upon the life of the members of the firm of Inman & Co. The death of one member would have dissolved the firm and necessitated the winding up of its affairs.

A number of decisions have been cited from other District Courts and some from Circuit Courts of Appeals in other circuits. The only one I have seen in the Circuit Courts of Appeals for this circuit is *Atkins v. Wilcox*, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118. This was an effort to prove a claim for future rental and the judgment of the District Court refusing to allow the claim was affirmed. This decision is in line with the decisions on the subject of rent contracts, and it is conceded by counsel for the claimants here that contracts for future rent are not provable under the present bankruptcy act. The latest decision I have seen on this question of the right to recover rent not due is *In re Rubel et al.* (D. C.) 166 Fed. 131. The case was decided by Judge Quarles of the District Court for the Eastern Division of Wisconsin. In that opinion it is said:

"The text-books and the authorities all seem to concur in the proposition that rent upon such a lease which has not accrued at the time of adjudication cannot be proven as a claim in bankruptcy. *Loveland on Bankruptcy* (3d Ed.) 265, 268; *Collier on Bankruptcy*, 479; *In re Jefferson* (D. C.) 93 Fed. 948; *Bray v. Cobb* (D. C.) 100 Fed. 270; *Atkins v. Wilcox*, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118; *In re Hays and Foster* (D. C.) 117 Fed. 879; *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719. These authorities are not in accord as to the method of reasoning by which the conclusion is reached. Some of them hold that the adjudication destroys the relation of landlord and tenant, and practically annuls the lease. Others hold that the claim, not being provable in bankruptcy, is not affected by the discharge; that the bankrupt remains bound by his covenant; but that the trustee is not bound thereby. It is conceded on all hands that the trustee has a reasonable time after his appointment to determine whether he will adopt the lease as an asset of the estate, and offer the same for sale, or whether he will ignore it entirely. For practical purposes it makes no difference in the instant case which line of authority is adopted, for either is fatal to a recovery of rent, as such, for the unexpired term."

After some other discussion immaterial here the judge concludes:

"It may be remarked in passing that, if application had been made to liquidate the claim pursuant to section 63b, the proceeding would have been ineffective unless the claim were of such a nature that, being liquidated, it might have been proven under section 63a. *Dunbar v. Dunbar*, 190 U. S. 340, 350, 23 Sup. Ct. 757, 47 L. Ed. 1084. We have seen that the unearned installment of rent, although liquidated by a written lease, cannot be proven under section 63a, so that the proceeding to liquidate would have been unavailing in the instant case."

Counsel for the claimants here rely mainly upon the following cases: *In re Swift*, 112 Fed. 315, 50 C. C. A. 264, *In re Stern*, 116 Fed. 604, 54 C. C. A. 60, and *In re Pettingill & Co.* (D. C.) 137 Fed. 143, and upon the cases therein cited, particular stress being laid upon the case cited by Judge Lowell, *Ex parte Pollard*, Fed. Case No. 11,252



(2 Lowell, 411, and 17 N. B. R. 228). The second headnote in the latter case is to this effect:

"The filing of a petition in bankruptcy by a corporation ipso facto dissolves the contract with an employé, and is tantamount to a dissolution, and he may have his damages assessed and prove his amount in a bankruptcy court."

It may be remarked that this decision, *Ex parte Pollard*, was under the act of 1867, which, as has been stated, in reference to the proof of claims of this character was entirely different from the present act. None of the other cases relied upon were cases of employer and employé. In *re Pettingill & Co.* (D. C.) 137 Fed. 143, Judge Lowell in the opinion says:

"It seems, therefore, that the test of provability under the act of 1898 may be stated thus: If the bankrupt at the time of bankruptcy by disabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is equivalent of disablement and repudiation. For the assessment of damages proceedings may be directed by the court under section 63b (30 Stat. 562 [U. S. Comp. St. 1901, p. 3447])."

Counsel for the claimants here also consider *In re Silverman* (D. C.) 101 Fed. 219, as favorable to them. In that case Silverman Bros. on the 9th day of January, 1899, made a deed of trust of their stock of goods in favor of their creditors. One Swift was named as trustee in the deed of trust, and took possession of the stock of goods, and on the same day, January 9, 1899, discharged from the store the employés under Silverman Bros., including one Rosenberg. On the 18th day of January thereafter proceedings in involuntary bankruptcy were instituted against Silverman Bros., and Swift was appointed receiver. Rosenberg's claim was based upon the breach of his contract of employment, and he claimed \$1,200 for the remainder of the contract year. In the opinion in this case Judge Philips says:

"There can be no question but what if on the 9th day of January, 1899, there was a breach of the contract between Silverman Bros. and Rosenberg by his discharge from their service, or by their voluntary act which rendered the performance of the contract on their part impossible, a cause of action at once arose in favor of Rosenberg against Silverman Bros. for damages; and it is equally clear that the subsequent adjudication of bankruptcy in February, 1899, did not put an end to the cause of action, as it was then an existing right, which the mere adjudication in bankruptcy could not destroy. So the real question in this case is not whether an adjudication in bankruptcy against the employer would put an end to a contract with an employé like the one in question, so that the discharge of the employé would be under the operation of the bankruptcy law, and not by reason of the voluntary act of the employer, but it is whether or not the act of Silverman Bros. in making the deed of trust and placing Swift in absolute charge of the store and its business, whereby Rosenberg was displaced as manager and employé, did not constitute a breach of the contract, and create a subsisting cause of action, three weeks before the adjudication in bankruptcy."

The court then holds that there was such a breach of contract, and fixes the amount that Rosenberg would be entitled to recover. I do not consider this case of *In re Silverman* authority either way.

In the case of *In re Imperial Brewing Company* (D. C.) 143 Fed.

579, decided by Judge Phillips for the Western District of Missouri, it is said:

"The question to be decided is; Did the adjudication in bankruptcy against the Imperial Brewing Company in and of itself constitute such a breach of the contract as to mature the whole executory contract, entitling the claimant to prove up and have allowed against the estate in bankruptcy the damages claimed? While the statement of the petition is a little indefinite respecting the proceedings leading to the adjudication, the court will take cognizance of its own records, which show that it was an involuntary proceeding in bankruptcy—necessarily so because the corporation could not on its own voluntary petition be adjudged a bankrupt. While the petition herein states that the Imperial Brewing Company was permanently disabled from performing said contract and repudiated the same in all its parts, and that it retired permanently from business and was hopelessly insolvent, etc., these results are alleged to follow 'by reason of said bankruptcy proceedings.' At the time of the adjudication in bankruptcy, there was no debt owing by the bankrupt to the claimant. There had been no delivery or tender of delivery prior thereto, and none since. It may be conceded as the law of this jurisdiction that where a party is bound from time to time, as expressed in the contract, to deliver articles to be manufactured or products to be grown, each parcel as delivered to be paid for at a certain time and in a certain way, a refusal by the vendee to be further bound by the terms of the contract or to accept further deliveries constitutes a breach of the contract as a whole, and gives the vendor a right of action to recover the damages he may sustain by reason of such refusal. In such case the positive refusal of the vendee to perform when tender is made, or notice by him to the vendor before maturity of the time for delivery that he will not carry out the contract, will release the vendor from making any tender, and entitle him to an action in advance of the fixed period for delivery on his part to recover damages as for breach of the whole contract. *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. The sole reliance of the claimant to bring it within this rule for such breach is predicated on the adjudication in an involuntary proceeding in bankruptcy against the vendee. I am unable to consent to the proposition that such an adjudication in bankruptcy, *ex vi termini*, is in law tantamount to a refusal of the bankrupt to perform, or that it thereby permanently disabled itself from performance to bring the claim asserted by petitioner within the operation of the rule laid down in *Roehm v. Horst*, supra."

The judge then cites and quotes from the opinion in *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, decided by the Circuit Court of Appeals for the Eighth Circuit, and in *Re Swift*, supra, and says:

"In *Re Swift*, 112 Fed. 315, 50 C. C. A. 264, a broker had made a contract to deliver certain stock to a customer. It was held that he made it impossible to fulfill his agreement to deliver the stock by his adjudication in bankruptcy, for the reason that it took the stock from him and vested it with all his property, in his trustee. But that is clearly not this case."

Judge Phillips refers to *In re Pettingill & Co.*, supra, in this way:

"I may say that I can concur in the syllabus of that case that, under the bankruptcy act, the provability of a claim depends upon its status at the time of the filing of the petition in bankruptcy. If not then a provable debt, as defined in the act, it cannot be proved, although it may thereafter come within such definition. \* \* \* If, however, it was intended to hold that as applied to an executory contract for the sale of annual crops to be raised in successive years, where no breach had occurred at the time of an involuntary adjudication in bankruptcy, the mere act of such declared statutory insolvency constituted such a breach of the contract as to enable the vendor to prove up against the estate the contingent damages, as, on a repudiation of the contract by the vendee, I cannot consent thereto. There was no renunciation by the vendee company of the contract after the commencement of

performance or renunciation before the time for performance had arrived. Nor has the vendee deliberately incapacitated itself or rendered performance of the contract impossible within the rule laid down in *Roehm v. Horst*, 178 U. S. 18, 20 Sup. Ct. 787, 44 L. Ed. 953. As a discharge in bankruptcy under section 1, cl. 12, means no more than 'the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by the act,' and the claim for damages for a possible future breach of a contract is not a debt provable against the estate, in the absence of any refusal on the part of the bankrupt to recognize the contract, and he has not voluntarily or positively disabled himself from performing it, where its performance does not become obligatory until after the adjudication in bankruptcy, my conclusion is that the claim in question is not one provable in bankruptcy. It is a noteworthy fact that, under the bankrupt acts of 1841 and 1867, the right was given to prove 'uncertain and contingent demands' against the estate. This provision was omitted from the present bankruptcy act of 1898. In my judgment this omission is significant."

The important question in the instant case, and the one which in my judgment is controlling, is discussed in the cases to which I shall now refer. The first of these is *In re Jefferson* (D. C.) 93 Fed. 948, decided by Judge Evans for the District of Kentucky. The syllabus in that case is as follows:

"A lease for a term of years, reserving rent payable in monthly installments, is terminated by the adjudication of the lessee as a bankrupt during the term; and the landlord has no provable claim against the tenant's estate in bankruptcy for the rent which would have accrued under the lease after the date of such adjudication."

The reasoning of the court in the opinion to the effect that proceedings in bankruptcy terminate the relation of landlord and tenant applies, it seems to me, with equal force to the relation of employer and employé. The next case in order is that of *Bray v. Cobb* (D. C.) 100 Fed. 270, decided by Judge Purnell for the Eastern District of North Carolina. In the opinion he says:

"The relation of landlord and tenant is severed by operation of the bankruptcy law."

The question was again presented before Judge Evans in *Re Hays, Foster & Ward Company* (D. C.) 117 Fed. 879, and the opinion expressed in *Re Jefferson*, supra, was reiterated. In both cases the conclusion reached is based largely upon the decisions in *Bailey v. Loeb*, 2 Fed. Cas. 376; *In re Webb*, 29 Fed. Cas. 494; *In re Breck*, 4 Fed. Cas. 43. In *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, decided in the Circuit Court of Appeals for the Eighth Circuit, the opinion being delivered by Circuit Judge Sanborn, the court differs from the views expressed in the three cases just referred to, although it reaches the same result; that is, that a claim for damages for a breach of a contract in a lease to pay installments of rent for the use of the premises at times subsequent to the filing of the petition in bankruptcy is not provable under the bankruptcy law of 1898. In the opinion it is said:

"An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt, notwithstanding the decisions to the contrary in *Re Jefferson* (D. C.) 93 Fed. 448; *Bray v. Cobb* (D. C.) 100 Fed. 270; and *Re Hays, Foster & Ward Company* (D. C.) 117 Fed. 879. Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce

these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contracts or obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements and subject to the liabilities he has incurred. It is the discharge of the bankrupt alone, not his adjudication, that releases him from liability for provable debts in consideration of his surrender of his property, and its distribution among the creditors who hold them. Even the discharge fails to relieve him from claims against him that are not provable in bankruptcy, and, since the filing of the petition in bankruptcy may not be the basis of a provable claim, his liability for them is neither released nor affected by his adjudication in bankruptcy, or by his discharge from his provable debts. One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years, he agrees to purchase or to convey property, and he then becomes insolvent and is adjudicated a bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rents, to render the services, and to fulfill all his other obligations, notwithstanding the fact that his insolvency may render him unable immediately to do so. Nor are those who contracted with him absolved from their obligations. If he or his trustee pays the stipulated rents for his place of residence or for his place of business, the lessors may not deny to the payor the use of the premises according to the terms of the lease. If he renders the personal services, he who contracted to pay for them may not deny his liability to discharge this obligation. His trustee does not become liable for his debts, but he does acquire the right to accept and assume or to renounce the executory agreements of the bankrupt as he may deem most advantageous to the estate he is administering, and the parties to those contracts which he assumes are still liable to perform them. And so, throughout the entire field of contractual obligations, the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability. In re Curtis, 9 Am. Bankr. Rep. 286, 109 La. 171, 33 South. 125; In re Ellis (D. C.) 98 Fed. 967, 968; Witt-haus v. Zimmerman, 11 Am. Bankr. Rep. 314, 315, 91 App. Div. 202, 86 N. Y. Supp. 315; White v. Griffing, 44 Conn. 437, 446, 447; In re Pennewell, 119 Fed. 139, 55 C. C. A. 571."

It will be seen from the foregoing that the conclusion reached in this case of *Watson v. Merrill* was that claims for future rent, and probably, from the language used in the opinion, for future personal services, are not provable in bankruptcy, though the reason given therefor is entirely different from that given in the other cases. According to this last opinion contracts such as those in question here will remain of force and unaffected by the bankruptcy proceedings. *Bailey v. Loeb*, 2 Fed. Cas. 376, was decided under the act of 1867 by Circuit Judge Wood, afterwards a Justice of the Supreme Court. An extract from the opinion in that case will show the view that Judge Wood entertained of the matter, as follows:

"For instance, a business man has a manager or bookkeeper hired by the year, at a salary payable quarterly. At the end of two months he is adjudicated bankrupt. His manager or bookkeeper may prove for a proportionate part of his salary up to the time of the bankruptcy, but he cannot prove for any part that may accrue and fall due after the bankruptcy. The clear purpose of the bankruptcy act is to cut off all claims for rent to accrue, or for services to be rendered, after the date of the bankruptcy."

The fact that this decision by Judge Wood was under the bankruptcy act of 1867 strengthens it as an authority, because it is generally conceded that the bankruptcy act of 1867 was more liberal as to the proof of claims for contingent liabilities than is the present act. In

*Malcomson v. Wappoo Mills et al.* (C. C.) 88 Fed. 680, Judge Simon-ton held that:

"Damages are not recoverable against a corporation for its failure to perform a contract for the sale and delivery of merchandise, where performance was prevented solely by the action of a court in appointing a receiver for the corporation, and enjoining all others from interfering with its business or property. In such cases the breach of contract is *damnum absque injuria*."

It seems clear to me that adjudication in bankruptcy ends contracts for rent, and for personal services, and I agree with the views expressed in the opinions in *In re Jefferson*, *supra*, *Bray v. Cobb*, *supra*, *In re Hayes*, *Foster & Ward Company*, *supra*, and *Malcomson v. Wappoo Mills et al.*, *supra*. The case of *James Dunlap Carpet Company* (D. C.) 163 Fed. 541, is a case favorable to the contention of the claimants here to the extent of allowing proof of claim. The difficulty about the case to my mind is that the learned judge based his decision on *Moch v. Market Street National Bank*, 107 Fed. 897, 47 C. C. A. 49. In the case of *Moch v. National Bank* the person seeking to prove had indorsed for the bankrupt and the paper matured after the bankruptcy proceedings were instituted. The indorser paid the paper, and then proposed to prove it as a debt against the bankrupt in the bankruptcy proceedings. I can see no similarity at all between such a case and the case of an employ  seeking to prove for salary to be earned by services to be rendered in the future. The indorsement in the *Moch Case* was a definite and fixed liability which the indorser had undertaken for the bankrupt, and it was in existence before the bankruptcy proceedings commenced. It matured, and the indorser was compelled to pay the debt pending the bankruptcy proceedings. This is entirely different from a contract to render personal services. Such services depend upon the life, health, and ability otherwise of the employ  to render the services, and also upon the life, certainly, and perhaps other contingencies as to the employer. But it is a partnership in bankruptcy here, and whatever is true as to individual cases there would seem to be no doubt, first, that a partnership is dissolved by the bankruptcy proceedings (22 Am. & English Cyclopedia of Law [2d Ed.] 202, and 30 Cyc. 657, and cases cited in both); and, second, if the firm is dissolved by operation of law, then certainly the contracts of that firm are ended.

In *Griggs v. Swift*, 82 Ga. 392, 9 S. E. 1062, 5 L. R. A. 405, 14 Am. St. Rep. 176, it is held in the opinion by Chief Justice Bleckley:

"From the very nature of a contract for the rendering of personal services to a partnership in its current business, where nothing is expressed to the contrary, both parties should be regarded as having by implication intended a condition dependent on the one hand upon the life of the employ , and, on the other, upon the life of the partnership, provided the death in either case was not voluntary."

Wood on Master and Servant, § 163, is then quoted with approval to the following effect:

"Where a servant is employed by a firm, a dissolution of the firm dissolves the contract, so that a servant is absolved therefrom; but, if the dissolution results from the act of the parties, they are liable to the servant for his loss therefrom, but, if the dissolution results from the death of a member of the

firm, the dissolution resulting by operation of law, and not from the act of the parties, no action for damages will lie. \* \* \* So, if a firm consists of two or more persons, and one or more of them dies, but the firm is not thereby dissolved, the contract still subsists, because one or more of his partners is still in the firm, and this is so even though other persons are taken into the firm. The test is whether the firm is dissolved. So long as it exists, the contract is in force. but, when it is dissolved, the contract is dissolved with it, and the question as to whether damages can be recovered therefor will depend upon the question whether the dissolution resulted from the act of God, the operation of law, or the act of the parties.' "

None of the cases cited from the United States courts seem to bear directly upon the question immediately involved here—that is, of the right of an employé to prove for future services—except, perhaps, the case of James Dunlap Carpet Company, *supra*, and with the utmost respect for the learned judge deciding the case I am, for the reason stated above, unable to agree with his conclusion. I have, perhaps, cited authorities at unnecessary length, but the question is an interesting one, and is presented in its present shape for the first time in this district. I do not believe that it was the intention and purpose of the bankruptcy act that contracts extending into the future for rent and personal services should be left hanging over the bankrupt to embarrass and harass him after his discharge in bankruptcy. It is said that if this is not true, and he is relieved of such liability by the bankruptcy act, it follows that claims for such rent and personal service should be admitted to proof in the bankruptcy proceedings. I do not think this follows at all. The adjudication in bankruptcy ends all such contracts. Of course, proof may be allowed for any amount due prior to the institution of the proceedings in bankruptcy. It is provided by the bankruptcy act that for most personal services the employé would have priority for any amount due him for as much as three months preceding the bankruptcy proceedings. This fact of priority of payment for three months extending to so large a class of employés is another reason why I believe it was the intention, in passing this act, that such contracts should terminate with the adjudication in bankruptcy. All this is certainly true as to a partnership. The adjudication dissolves it by operation of law, and that dissolution ends all its liabilities except such as are expressed in the act.

My conclusion is that the referee in bankruptcy correctly decided that this claim should not be admitted to proof.

What has been said in the foregoing applies equally to the claim of J. F. Maybank, which is of the same character, and which was argued at the same time as was the claim of T. B. Ketterson.

## In re READING HOSIERY CO.

(District Court, E. D. Pennsylvania. June 30, 1909.)

No. 2,878.

## 1. BANKRUPTCY (§ 314\*)—CLAIMS—DETERMINATION—TIME.

The rights of creditors to share in the distribution of a bankrupt's estate are fixed by the status of their claims at the beginning of the proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 470; Dec. Dig. § 314.\*]

## 2. BANKRUPTCY (§ 314\*)—CORPORATIONS—PREFERRED STOCK—BONDS—EXCHANGE—ELECTION.

Where a corporation provided a bond issue with which to take up the preferred stock, and the holder of such stock, on being tendered bonds in the place thereof, refused the tender and demanded money, to which he was entitled under the retirement proceedings, after which the bonds so tendered were kept in the corporation safe in an envelope, with the stockholder's name indorsed thereon, for more than a year, until the corporation became bankrupt, the stockholder was bound by his election, and could not then demand the bonds from the trustee in exchange for his stock.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.\*]

## In Bankruptcy.

Isaac Hiester, for petitioner.

T. Jaeger Snyder, for trustee.

J. B. McPHERSON, District Judge. The facts upon which the question for determination is presented are thus stated in the report of the referee (Samuel E. Bertolet, Esq.):

"On December 15, 1902, the Reading Hosiery Company issued a certificate to Josiah W. Johnson, entitling him to 60 shares of the preferred stock of the company, par value \$50, with interest payable annually at 6 per cent. The certificate provides that the preferred stock is subject to redemption at \$52.50 on April 1, 1908, or any dividend day thereafter. The by-laws and minutes of the company do not disclose on what other terms, if any, this preferred stock was issued.

"On June 1, 1904, the stockholders of the Reading Hosiery Company held a special meeting for the purpose of voting on a resolution to mortgage the company's property, in an amount sufficient to retire the preferred stock; the stockholders having first waived in writing the required legal notice of such meeting. At this meeting a motion was adopted authorizing the officers to mortgage the property and use the money to retire the preferred stock.

"Nothing seems to have come of this action, for on September 14, 1905, the common stockholders held a special meeting called for this and other purposes, authorizing the directors to direct the officers to execute a mortgage on the company's properties for \$150,000 to secure a bond issue of like amount, to sell any part of said bonds, or all except \$20,000 worth, which were to be used to pay for property at Pottstown, the first \$75,000 arising from the sale of the bonds to be placed in the treasury of the company for the use of the company, as the directors might determine, including the retirement of the then outstanding preferred stock, any further sale of bonds to be applied to retiring said preferred stock, or the officers were to exchange bonds for preferred stock outstanding, or hypothecate bonds, and use the proceeds to retire any or all of said preferred stock, and the officers might enter into an agreement with any or all of the holders of preferred stock to apply the proceeds

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of bonds sold, after the first \$95,000 worth had been disposed of, toward the retirement of preferred stock.

"The directors met on the same day, and among other things they directed the officers of the company to apply any part of the first \$75,000 resulting from the sale of the proposed bonds, as they might deem proper and expedient, toward the retirement of any of the preferred stock, and also directed them to give the company's note and pledge any of the unsold bonds as collateral to borrow money to retire any outstanding preferred stock.

"After this action had been taken, it was realized that it did not comply with the act of February 9, 1901 (P. L. p. 3), relating to increasing the indebtedness of corporations. The directors accordingly held a meeting on October 25, 1905, and passed a resolution to increase the company's indebtedness \$150,000, to place a mortgage on the property of the company, to secure an issue of bonds of like amount, and to call a meeting of the stockholders for December 28th to submit the proposition to them. The stockholders met on December 28th, after notice according to the act, and judges selected by the directors received ballots for or against the increase of indebtedness. The increase was authorized without a dissenting vote. On January 29, 1906, the directors met and authorized the president to deliver for certification 150 bonds, of \$1,000 each, to the Colonial Trust Company of New York, trustee for the bondholders. The president and secretary were directed to sign and seal the bonds, and the president was given authority to receive all of them, and to sell, hypothecate, or otherwise dispose of them for the benefit of the Reading Hosiery Company.

"It does not clearly appear how the president disposed of the bonds; but it seems that in accordance with this resolution, and resolutions previously adopted by the stockholders, he exercised the options therein given, and sold some, hypothecated others, and exchanged some with the holders of preferred stock. It is also probable, though it does not appear, that some of the money realized was used to pay off certain preferred stock. Be this as it may, it does appear that some time after January 29, 1906, and prior to July of the same year, he caused three bonds, of \$1,000 each, to be taken to Josiah W. Johnson, who held \$3,000 worth of preferred stock. The superintendent of the company put them in a wrapper, Johnson's name was written upon it, together with the numbers of the bonds, and the superintendent then took the package to Johnson and offered it to him, saying that these were his bonds, to be given to him in exchange for his preferred stock. Johnson refused to take the bonds, saying that he understood that the preferred stock was to be paid off in cash. The package was then returned to the company's safe, and remained there, unopened, until the company became bankrupt on September 4, 1907. When the trustee was elected, he took possession of the safe, and found the original package containing the bonds. Some time later Johnson learned that the bonds were so found by the trustee and still remained in his possession. When this discovery was made does not appear; but on February 17, 1909, he filed his petition asking that the trustee be directed to turn the bonds over to him, offering at the same time to surrender his certificate of preferred stock."

Upon these facts the referee refused Johnson's petition, and his action is now before the court for review.

It is to be assumed for the purpose of this decision that Johnson had the legal right to insist upon cash for his preferred stock, and that he was not obliged to accept the company's bonds in exchange therefor. The company did not deny his right to demand cash; but they gave him the option of accepting bonds, instead of money. This was the sole purpose of offering the bonds in the spring of 1906; for they took no action that was equivalent, or intended to be equivalent, to delivery, and they did not set apart the bonds, so that in any event and at any time in the future he should be entitled to claim them. They were put in an envelope indorsed with his



name before they were offered to his option, and the envelope with its contents was afterwards placed in the company's safe; but there is no evidence that this indorsement was intended to have any special significance. It was simply a customary memorandum of convenience, to indicate the contents of the envelope, and the bonds were necessarily retained in the company's possession for safe-keeping and also awaiting such further action as Johnson or the company itself might see proper to take in the premises. Undoubtedly the company was at liberty to sell them, for Johnson had distinctly refused to accept the securities, insisting upon his right to cash, and there was no agreement whatever that gave him any interest in their future disposition. So far as appears he maintained this attitude until after the company's bankruptcy, when for the first time he announced that he had changed his mind and was now willing to accept the bonds. I agree with the referee that he had delayed too long. At the time when the company went into bankruptcy, Johnson's claim was either for the value of his stock or for damages resulting from the company's failure to redeem it in cash. He had been offered the option to take bonds, but had refused it, and, of course, he had then no right to ask for the delivery of these securities. It has been argued that if he had chosen to sue for the par value of his stock he might have enjoined the company from disposing of the bonds until the suit should be decided, and therefore that the bonds should now be regarded as subject in equity to his claim. But the answer to the argument is, I think, that in fact he brought no such suit and asked for no such relief. Apparently he was content to wait upon the company's convenience, hoping, perhaps, that they might sell the bonds that he had refused and from their proceeds might pay him in cash the par value of his stock, or at all events expecting that from some source the needful money might be obtained. In other words, he deliberately chose one course of action out of two or three that were open to him, and only attempted to choose another course after the company's bankruptcy had shown that his original choice was unlikely to be profitable. In my opinion the effort cannot succeed. The rights of other creditors have intervened, and the status of his claim against the bankrupt has been fixed by the institution of proceedings in the district court. It has been often decided, in various forms, that the rights of claimants to share in the distribution of a bankrupt estate are fixed by the status of their claims at the beginning of the proceedings. *Swarts v. Bank*, 117 Fed. 5, 54 C. C. A. 387; *Re Bingham* (D. C.) 94 Fed. 796; *Re Swift*, 112 Fed. 316, 50 C. C. A. 264; *Re Dreher Shoe Co.* (D. C.) 112 Fed. 404; *Re Garlington* (D. C.) 115 Fed. 999, 8 Am. Bankr. Rep. 602; *Re Graff* (D. C.) 117 Fed. 343, 8 Am. Bankr. Rep. 750; *Re Adams* (D. C.) 130 Fed. 381; *Re Pettigill* (D. C.) 137 Fed. 143; *Collier* (6th Ed.) 507; *Loveland* (3d Ed.) 337.

This is not the case of a creditor liquidating a claim after bankruptcy, or proving upon a liability that was originally contingent, but has now become fixed; but it is the wholly different case of a

creditor who by his own choice occupied a definite relation to the bankrupt estate when the proceedings began, but now seeks to abandon such relation and to take up a new position merely because he finds it to be more advantageous. If more advantageous to him, it is nearly certain to be detrimental to other creditors, and I am unable to see upon what ground the change of attitude can be permitted.

Even if the Pennsylvania decisions were controlling upon the subject of his right to change, the cases he cites are in my opinion not in point. In *Reading Trust Co. v. Reading Iron Works*, 137 Pa. 282, 21 Atl. 169, it appeared that a corporation, being about to distribute new stock among its stockholders, refused to issue certain shares to Charles Hunter, claiming the right to withhold the stock until an account between Hunter and the corporation should be adjusted. Thereupon Hunter filed a bill in equity to compel the issue of the stock, and in that proceeding it was decided that the company's refusal was not justified, and that Hunter was entitled to a money decree for damages notwithstanding the fact that while the suit was pending the company had become insolvent and had made an assignment for the benefit of creditors. In Pennsylvania an assignee for creditors is merely the hand of the assignor for purposes of distribution, and on this ground the decision was sustained on appeal; the Supreme Court saying (page 301 of 137 Pa., and page 170 of 21 Atl.):

"On the 28th of March, 1899, the corporation made an assignment for the benefit of creditors, and at the time of the final decree its stock was worthless. The assignee was admitted to defend, and it is now claimed that a decree for money is improper, because it may affect injuriously the general creditors. It is conceded that, but for the assignment and insolvency of the corporation, the decree in this respect is unobjectionable, because it was the plain duty of the corporation under its own resolutions to issue the stock. But we are unable to see how these can affect the rights and liabilities of the original parties to this litigation. The assignee succeeded to the defenses of the assignor and is limited to them."

When the controversy came up a second time (*Reading Iron Works' Estate*, 149 Pa. 182, 24 Atl. 202) the present Chief Justice made the court's position still more clear. He said on page 184 of 149 Pa., and page 204 of 24 Atl.:

"Nor do we think the equities of the other creditors superior to that of the appellant. The wrong done to it was in 1882, long before the insolvency of the company, and before many of the debts to the other creditors were incurred. It is true that the capital stock of a corporation is a trust fund for the security and payment of creditors, and that stockholders as such cannot withdraw or diminish any part of it. But it is liable for the obligations of the corporation, including those growing out of its torts, and equally in this latter respect to stockholders as to others. The appellant had been practically ousted from its position as a stockholder long before the insolvency, and the protracted litigation had postponed its reinstatement until it would have been of no value. As already said, if the right to the stock had been abandoned, and damages claimed for the conversion, there could have been no question of the appellant's position as a creditor, nor would it have been of any avail for the other creditors to set up the diminution of their dividend. This is a disadvantage to them that always happens when another creditor comes in to take part of a fund insufficient to pay those already claiming it. The case is no different when a court of equity having the facts before it determines

the status of an ousted stockholder to be that of a creditor, and grants relief in damages for an act antecedent to the insolvency in the same manner that a court of law would have done if the suit had been for the tortious act in the first instance. When the assignment was made the wrongful act had been committed, and the relief to be given was under consideration by the court of equity, and the assets passed to the assignee for the benefit of creditors, subject to the complainant's claim and the relief the court might give it. When the court determined that such relief should be by compensation in damages, it was doing equity by giving the only relief that would be substantial, and the other creditors had no ground of complaint that a claim as old and as meritorious as their own had been put upon an equality with theirs, although it grew in the first instance out of a wrong done to the complainant as a stockholder."

Manifestly the present case does not resemble the claim of Hunter for his stock or for damages in lieu thereof. Here there was a positive refusal to accept the securities that Johnson had been offered, and an insistence upon being paid in cash the par value of his stock. No suit was ever brought, and Johnson persisted in his claim for money until the rights of other creditors, as well as of himself, were fixed by the bankruptcy proceedings. It must, of course, be understood that there is no attempt to interfere with any claim that he may have had when the proceedings were begun. The ruling of the court simply is that he cannot be allowed to bring forward now a new claim, materially different in kind, to the prejudice of other creditors' rights.

The order of the referee is affirmed.

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## THE CAPTAIN BENNETT.

### THE FLORENCE.

(District Court, E. D. Pennsylvania. June 23, 1909.)

Nos. 20, 21.

#### 1. COLLISION (§ 90\*)—VESSELS ON CROSSING COURSES—STARBOARD-HAND RULE.

The starboard-hand rule for vessels on crossing courses, requiring the one which has the other on her starboard hand to keep out of the way and the other to keep her course and speed, has its usual application upon the open sea or upon a comparatively broad expanse of water, where each vessel is free to maneuver, and ordinarily cannot be applied to vessels in a narrow and winding channel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 182, 183; Dec. Dig. § 90.\*]

#### 2. COLLISION (§ 20\*)—RULES—DUTY OF PRIVILEGED VESSEL.

A privileged vessel entitled under the rules to keep her course and speed as between her and another vessel approaching loses such privilege as soon as it appears that the other vessel is failing in her duty to take such course as to keep out of the way, and is then required by Pilot Rules (Ed. 1905) p. 4, rule 3, to sound alarm signals, and, if the vessels are within half a mile of each other, to slow down, until an understanding is reached.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 17; Dec. Dig. § 20.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. COLLISION (§ 102\*)—STEAM VESSELS ON CONVERGING COURSES—MUTUAL FAULTS.**

The steam barge *Florence*, passing down the Delaware from Philadelphia at night, came into collision with the steamship *Bennett*, coming up. The vessels saw each other when a mile and a half apart, and were on converging courses; the *Florence* having the *Bennett* on her starboard hand. The evidence as to the signals was conflicting; the *Florence* claiming to have blown two whistles, and starboarded, although she received no answer, and to have then again given the same signal, which was crossed, while the *Bennett* claimed to have given the first signal of one whistle, which was assented to, when she ported. *Held*, that both vessels were in fault accepting their own testimony; the *Florence* for attempting to cross ahead of the *Bennett* without an agreement, and the *Bennett* for being on the left-hand side of the channel, and both for continuing their speed after it was apparent that they were not maneuvering in harmony.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 102.\*]

In Admiralty. Cross-suits for collision.

Henry R. Edmunds, for the Captain *Bennett*.

Francis C. Adler and John F. Lewis, for the *Florence*.

J. B. McPHERSON, District Judge. These are cross-litigations for collision, in which the usual conflict of testimony is presented. I find the facts to be as follows: The steam barge *Florence* is a large vessel of her class, about 100 feet long and 22 feet beam, and runs regularly between Philadelphia and Bridgeton. On the afternoon of April 10, 1906, she left Philadelphia on one of her trips, carrying freight and drawing about 8 feet of water, and was proceeding south on the Delaware river. The tide was ebb, and there was no wind that need be noticed. The collision took place after dark between 7:30 and 8 o'clock; but the night was clear, and there was nothing to prevent each vessel from seeing the lights of the other for at least two miles. Both vessels displayed the proper lights, both had lookouts, and each was aware of the other's presence more than a mile and a half away. The *Florence*, whose master was at the wheel, was following the New Castle range; the lights being at her back, and her course being about S. S. E. But she was keeping the lights somewhat open to the westward, thus being in a proper position on the starboard side of the channel. She had passed Ft. Delaware on the southern end of Pea Patch Island, when her attention was first directed to the *Bennett*, which was then coming up the river on the Finn's Point range, in charge of a licensed pilot. The *Bennett* is a Norwegian steamship, and was bound to Philadelphia with a cargo of bananas from Port Antonio. The Finn's Point range bears to the N. N. E., and intersects the New Castle range obtusely at a point about a mile south of Ft. Delaware. (It is supposed by counsel for the *Bennett* that the two ranges intersect at buoy No. 20; but this is a mistake. It is the Reedy Island range that intersects the New Castle range at the buoy; the Finn's Point range intersecting about a quarter of a mile farther to the N. N. W.) The *Bennett* observed the *Florence* at about the same time,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the vessels were then not less than a mile and a half apart, as shown by the chart. (The barge had recently passed Ft. Delaware, and the steamship was not far away from Reedy Island, where she had stopped for inspection by the quarantine officials.) The Florence was on a course bearing S. S. E., and the Bennett on a course bearing about N. N. E. At least this would have been the Bennett's course if she had been running the Finn's Point range closely; but, as she was concededly running the range open to the westward, it is probably more accurate to say that she was headed N. by E. It will be observed that these were converging courses, and this fact was clearly evident to both vessels. The Bennett admits that she saw the masthead light and the green light of the Florence, and I have no doubt that the Florence saw the masthead light and the red light of the Bennett. It is true that the master of the Florence testified that he saw the masthead light and both lights of the Bennett when he first observed the steamship; but his testimony is not corroborated, and I cannot accept it as credible. The lookout upon his vessel was not produced—apparently no serious effort was made to find him—and, as no one else was on the deck of the Florence until just before or just after the collision, there is no other witness to strengthen the master's story. On the other hand, while I think it likely that the Bennett was cutting the angle of the ranges somewhat in the effort to save time on her voyage to Philadelphia, I see no sufficient reason to doubt the testimony that puts her not far off the Finn's Point range, although she was certainly to the westward in the channel, and was therefore not in her proper position. This was a narrow channel, and no reason is shown for her failure to obey article 25 of the Pilot Rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), which expressly provides that:

"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of the vessel."

The Florence was moving with the tide at a speed of about 7 miles an hour, while the Bennett was coming at full speed at a rate over the ground of 12 or 13 knots, so that the vessels were rapidly converging toward a point where danger might be anticipated, and where both vessels were manifestly required to exercise caution and to proceed strictly in accordance with the rules of navigation. Concerning what now took place there is positive conflict in the testimony; each vessel claiming to have given the first signal, and each accusing the other of fault in failing to accept, or in crossing, the whistle. Whatever the fact may be, I think the Florence at least is chargeable with fault at this juncture. Accepting her own account of the signals as correct, she blew two blasts as soon as she discovered the Bennett and starboarded her wheel at once without waiting for a reply. Receiving no answer, she blew two blasts a second time, and again put her wheel to starboard. To this second signal the Bennett blew one blast, ported her wheel, and thus made the collision inevitable, if it had not been inevitable before. One of the Bennett's arguments is that the "starboard-hand" rule applied,

and that the Florence was therefore bound to keep out of the way. At the date of this collision rules 2 and 3 (Pilot Rules [Official Edition 1905], page 4) were in force, and these rules provide as follows:

"Rule 2. When steamers are approaching each other in an oblique direction, as shown in the diagrams of the fourth and fifth situations, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other, which latter vessel shall keep her course and speed; the steam vessel having the other on her starboard side indicating by one blast of her whistle her intention to direct her course to starboard, so as to cross the stern of the other steamer; and two blasts, her intention of directing her course to port, which signals must be promptly answered by the steamer having the right of way, but the giving and answering signals by a vessel required to keep her course shall not vary the duties and obligations of the respective vessels.

"Rule 3. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short rapid blasts, not less than four, of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other.

"Vessels approaching each other from opposite directions are forbidden to use what has become technically known among pilots as 'cross-signals'—that is, answering one whistle with two, and answering two whistles with one. In all cases, and under all circumstances a pilot receiving either of the whistle signals provided in the rules which for any reason he deems injudicious to comply with, instead of answering it with a cross-signal, must at once observe the provisions of this rule."

If rule 2 is to be applied, the Bennett was the privileged vessel, for the fourth situation was presented (as shown in the diagram on page 9 of the rules), and it is therefore clear that the Florence had the Bennett on her starboard side and was in the first instance bound to keep out of the way. She might pass to starboard under the Bennett's stern, or, at her option and risk, she might pass to port, if the conditions seemed to call for such a maneuver; but the Bennett had the right of way, and, in the first instance, was bound to keep her course and speed. Assuming that the Florence knew the rules of the road and was aware of her obligation to follow them, and assuming also that she whistled first, signaling with two blasts, and thus indicating that she intended to pass the Bennett on her starboard hand, she selected the more hazardous course of crossing the Bennett's bow. The reason given for this choice is that she was close to the Pea Patch Shoal, and that she was afraid to go to starboard, because of the risk that she might run aground. Whatever her reason may have been, rule 2 allowed her to choose between passing to starboard or passing to port; but certainly, if she chose the more dangerous course, she was the more bound to exercise care in following the other requirements of the rules in order that the maneuver might be executed in safety. I shall take it for granted, also, that the Bennett heard the two whistle signal, and that she made no reply. The Florence, however, without waiting for an answer, starboarded her helm, changing her course to port, and thus increasing the danger of collision, unless the Bennett should accept

the signal and change her own course to port. Instead of accepting the signal, however, the Bennett kept her course and speed, while the Florence continued to move to port, although the silence of the Bennett must have at least given ground to suspect that the proposed maneuver was either not understood or was not accepted. This is clear from the fact that the Florence was obliged to signal a second time that she was going to port, and here, I think, was an unmistakable fault. Instead of persisting in her effort to cross the bows of the Bennett—which was the privileged vessel, having the right of way—the Florence should have obeyed rule 3, and, as she certainly did not understand the course or intention of the Bennett, she should have blown danger signals; and, as the vessels were then within half a mile of each other, she should also have been immediately slowed until the proper signals had been given, answered, and understood, or until the vessels had passed each other. I am aware that there is testimony on behalf of the Florence that she did blow danger signals before the collision, and that she stopped and reversed, so that her way was entirely stopped; but I do not believe that such signals were given until after the collision, or, at the best, until just before it happened, when it could not be avoided. To my mind, the convincing proof that the Florence had not slowed down is to be found in the testimony concerning the effect of the blow, and in the photographs that show her condition shortly afterward. It is undeniable that she struck the Bennett a glancing blow aft of amidships on the Bennett's port side, and even a casual glance at the photographs will show its severity, and that the Florence delivered the blow. If her story were true, she would have received the blow while lying "dead in the water" (as her master described the situation), and it is hardly necessary to point out that in such event she would have been scraped rather than struck, and that in no case could she possibly have been struck on the port side of her stem so severely as to break her bow nearly down to the water line, tear off her planking, shift her boiler, disconnect her piping, and injure her so badly that she would have sunk if she had not been taken hold of by a passing tug (the George F. Brady) and put on the flats near by.

But I think it may well be doubted whether the starboard-hand rule applied to the situation disclosed by this testimony. The Supreme Court seems to be of this opinion, as appears by the following quotation from *The Victory*, 168 U. S. at page 418, 18 Sup. Ct. at page 153, 42 L. Ed. 519:

"Indeed, the rule applicable when two vessels 'are crossing so as to involve risk of collision,' that 'the vessel which has the other on her own starboard side shall keep out of the way,' is ordinarily inapplicable to vessels coming around bends in channels, which may at times bring one vessel on the starboard of the other. It has often been held as a general rule of navigation that vessels approaching each other in narrow channels, or where their courses diverge as much as  $1\frac{1}{2}$  or 2 points, are bound to keep to port and pass to the right, whatever the occasional effect of the sinuosities of the channel. *New York & Baltimore Transportation Co. v. Philadelphia & Savannah Steam Navigation Co.*, 22 How. 461, 16 L. Ed. 397; *Union Steamship Co. v. New York Steamship Co.*, 24 How. 307, 16 L. Ed. 699; *The Vanderbilt*, 6 Wall. 225, 18 L.

Ed. 823; *The Johnson*, 9 Wall. 146, 19 L. Ed. 610; *The John L. Hasbrouck*, 93 U. S. 405, 23 L. Ed. 962; *The Berkshire*, 33 U. S. App. 531, 540, 74 Fed. 906, 21 C. C. A. 169."

The starboard-hand rule has its usual application upon the open sea, or upon a comparatively broad expanse of water, where each vessel is free to maneuver without regard to the dangers inseparable from a narrow channel; but where vessels are approaching each other on a river such as the Delaware, where the channel winds about and is usually not broad, the vessels are necessarily put into positions that would mean one thing at sea, while they may have a different meaning upon the river. Ordinarily therefore the rule cannot be applied. When vessels are running intersecting ranges, as in the present case, each is bound to know where the ranges lead and to know the effect that their respective directions may have upon the other's lights. Each may properly assume, and is bound I think to assume, until the contrary appears, that the other will obey the rules of navigation and will be guided by the ranges as the only safe course. If the *Florence* had acted in accordance with this principle, she would have known that, while her course and the course of the *Bennett* were converging, they were not necessarily crossing courses, and that if each followed the ranges and obeyed the rules of the road they were likely to pass in safety. She would not have been forced aground on the *Pea Patch Shoal*, because the *Bennett* would have been on the eastern side of the channel; and, even if there had been any danger from the shoal, she could have been absolutely safe by blowing danger signals and by slowing or stopping and reversing. But she preferred to run the risk of crossing the *Bennett's* bows, instead of proceeding with caution on the starboard side of the channel until the turn of the ranges should be reached, when it is quite certain, I think, that the vessels would have been found at a safe distance apart. In my opinion the collision is primarily due to the fault of the *Florence* in crossing toward the eastern side of the channel unnecessarily and without sufficient justification, and also to her fault in failing to blow danger signals and to slow or stop and reverse when her maneuver had brought her into a dangerous situation.

This being so, the burden of proof is upon her to prove that the *Bennett* was also guilty of contributory fault. *The Victory*, *supra*. Upon this point I think there is little room to doubt. In the first place, she was on the wrong side of the fairway when she discovered the *Florence*, and I am not satisfied that this position did not in some degree contribute to the disaster. It is true that the pilot testified that he got back promptly upon the *Finn's Point* range; but, even if he did, I think he should have taken his vessel somewhat to the eastward of the range so as to comply strictly with rule 25. Unquestionably, if he had been to the eastward, the collision would not have happened, for (even as it was) the *Florence* nearly missed the steamship, and would have missed her altogether if there had been a few feet more space; but, without insisting on this consideration, there is a much more important particular in which the *Bennett* was equally at fault upon her own testimony. Of course, if the account given by the *Florence* is correct, the *Bennett* was undoubtedly to blame, for upon that



supposition she not only failed to hear and answer the first signal of the barge, but she crossed the second signal, meanwhile continuing her course and speed, instead of respecting the requirement of the first paragraph of rule 3; but, taking her own account of the occurrence for granted, she was no less clearly to blame. Her testimony is that she signaled first, blowing one blast, and thus indicating her intention to pass to starboard. To this the Florence replied with one blast, thus accepting the proposition in form, although she kept her course without change. This doubtful situation continued for several minutes, so that, as the testimony shows, the Bennett was perplexed and did not understand what the Florence was intending to do. In this condition of affairs, the first paragraph of rule 3 is explicit. If the starboard-hand rule should be applied, while rule 2 made the Bennett the privileged vessel, it did not give her the right to hold her course and speed indefinitely and under all circumstances. She was entitled to hold on in the first instance (*The Delaware*, 161 U. S. 469, 16 Sup. Ct. 516, 40 L. Ed. 771); but, as soon as there was some distinct indication that the Florence was about to fail in her duty, the Bennett lost her privilege and was then bound to obey rule 3 and to take the wise precautions enjoined by its first paragraph. This she wholly failed to do, for, instead of giving danger signals and slowing down, as required by the rule, she signaled again with one blast and went on at full speed. Without doubt, as it seems to me, this conduct contributed actively to the collision, and I have no hesitation in finding that she was also to blame; and, if the starboard-hand rule does not apply, she was as clearly to blame for continuing at full speed, in spite of her knowledge that the Florence (however wrongfully) was persisting in a course that threatened disaster. If the steamship had stopped and reversed, or even if she had slowed down, the vessels would have passed in safety. As it seems to me, this collision is another illustration of the danger that accompanies the constantly observed reluctance of vessels to slow up even for a short time, in spite of the fact that going on at speed means certain peril.

It is unnecessary to consider the allegation that the Bennett was in fault for not standing by after the collision. The Florence was in danger of sinking and was signaling for help. Unquestionably it was the duty of the Bennett to aid her if she herself was in condition so to do, and if it be true that she got off the ground in a few minutes and proceeded up the river without making any effort to find and help the Florence, as the testimony of the Brady seems to indicate, she was presumptively at fault. If, however, as she asserts, she was herself aground and remained in that predicament for more than a half hour, her failure to offer help would no doubt be sufficiently explained. The question is not important, however, if (as I have found) she was at fault in other respects, and therefore I need not consider the testimony upon this point.

There is some dispute also between the vessels concerning the place of collision; the Bennett insisting that it happened below the intersection of the ranges, and the Florence being equally positive that it took place above the intersection. In the view I have taken of the obligation and conduct of the parties, it is not material to decide with ac-

curacy where the vessels came together, although I think the decided weight of the evidence tends to the conclusion that the point of contact was close to the intersection and certainly was before either vessel had turned to follow the new range. This is indicated by the testimony concerning the color of the side light that was visible upon either vessel respectively, by the angle at which the Florence delivered the blow, and by the fact that both were grounded on the New Jersey shore not far below the intersection. As the Florence was disabled by the collision and drifted helplessly with the ebb tide for some minutes before the Brady came to her assistance, it is evident that she must have been below the point of contact when she was picked up, for she was no doubt put on the flats as speedily as possible. The Bennett had put her helm hard aport just before the collision, and this maneuver, combined with the blow, drove her aground not far from the point to which the Florence was afterwards towed.

A decree may be entered finding both vessels at fault, and referring the subject of damages to a commissioner.

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UNITED STATES v. McGEE et al.

(Circuit Court, W. D. Missouri, W. D. June 12, 1909.)

UNITED STATES (§ 67\*)—CONTRACTS FOR PUBLIC WORKS—LIABILITY OF SURETY ON CONTRACTOR'S BOND.

A contract for government work provided that, in case of default by the contractors, the United States might annul the contract and complete the work at the expense of the contractors, or in lieu of such annulment might waive the time limit and extend the time for completion, and that in either case it should have the right to recover the additional cost to it of inspection and superintendence after the expiration of the time fixed by the contract for completion of the work. *Held* that, where the government first granted an extension of time to the contractors, and on their becoming bankrupt without completing the work annulled the contract and let the remaining work to another contractor, it was entitled to recover from the original contractors and the surety on their bond the cost of inspection and superintendence both during the extension and the time the work was being completed by the new contractor.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.\*]

A. S. Van Valkenburgh, U. S. Dist. Atty.  
Lowe & Shannon, for defendants.

PHILIPS, District Judge. This is a suit based upon the bond executed by the defendants, McGee and Short, with the Title Guaranty & Trust Company as surety, to the United States for the performance of a contract between the plaintiff and said McGee and Short, as contractors, for the construction of a concrete wall with foundations for bear-trap sluice at Colbert Shoals, Tennessee river.

The fourth paragraph of said contract provided, in substance, that if said contractors should fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the contract, the United States would have power, with the sanction of the chief of engineers, to annul the contract by giving notice, etc.; and upon the giving of such notice all payments to the contractors should cease, and all money or reserved percentage due or to become due to them under the contract should be retained by the government until the final completion and acceptance of the work; "and the United States shall have the right to recover from the parties of the second part [the contractors] whatever sums may be expended by the party of the first part [the United States] in completing the said contract in excess of the price herein stipulated to be paid the parties of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the parties of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law."

The fifth paragraph of the contract provided that, in lieu of annulling the contract under the preceding paragraph, the government might waive the time limit and permit the contractors to finish the work within a reasonable period, to be determined by the said party of the first part, and that, should the original time limit be waived, all expenses for inspection and superintendence, and all other losses and damages due for the delay beyond the time originally set for the completion, shall be determined by the party of the first part and deducted as aforesaid, with the proviso that the government, with the sanction of the chief of engineers, may remit the charges and expenses of inspection and superintendence for so much of the time as resulted from specified incidents.

The time fixed by the contract for the completion thereof was December 31, 1906. There was an extension granted until some time in 1907 in which to complete the work. The contractors having failed to complete the work within such extension, and having become insolvent and bankrupt, the government, as provided for in the contract, proceeded to relet the contract to W. W. Harts, to complete the unfinished part of the work at an increased expense over the cost under the original contract. This suit is to recover on the bond given by McGee and Short, with the Title Guaranty & Trust Company as surety, for the recovery of this expenditure by the government.

It is conceded that under the evidence this excessive cost of construction amounted to \$7,469.90. The controversy, in its last result upon the hearing, is narrowed down to the additional item of \$1,159.10, charged by the government as costs for inspection and superintendence of the work under the new contractor. The contention on the part of the guaranty company is that this claim is not within the terms of the undertaking of the surety. After appropri-

ately referring to the contract in question, the condition of the bond is as follows:

"Now, therefore, if the above-bounden McGee & Co., their heirs, executors, or administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said McGee & Co., to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying them labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue."

As already indicated by the fourth paragraph of the contract, on annulment thereof by the government as provided for failure to perform, the government was expressly authorized to recover from the contractors not only whatever sums it expended in the completion of the contract in excess of the price stipulated, but also all costs of inspection and superintendence incurred in excess of those payable by the United States during the period allowed for the completion of the contract.

The fifth paragraph provided that if the contract was not completed within the prescribed period, in lieu of annulling it, the time limit might be waived, and the contractors permitted to finish the work within a reasonable period; and it further provided that, "should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for the completion, shall be determined by the party of the first part and deducted from any payments to become due to the party of the second part."

Unquestionably, under the latter provision, the contractors were liable for the expenses of inspection and superintendence during the period of extension from December 31, 1906, to July, 1907. The question to be decided therefore is narrowed down to whether or not, after the first failure to complete the contract within the period prescribed in the first instance, and the government elected in lieu of then declaring the contract at an end to extend the time for its completion to another fixed date, it could, as the evidence shows it did do, declare the contract annulled, and then charge the contractors also for the cost of inspection and superintendence under the relet contract.

While the fifth paragraph gave to the government the alternative, in case of default, of not declaring the contract annulled, the right in lieu thereof to grant an extension of time, it also expressly made the contractors liable for the costs of inspection and superintendence incurred during such extended period. Most certainly it was not expressed or implied that if the contractors should likewise fail to complete the work within the extended time, and should become bankrupt and abandon the undertaking, the right expressed in the fourth paragraph of the contract to annul and relet the contract would be lost to the government. This right would seem necessarily to reattach upon default under the extension agreement. This the learn-

ed counsel for the defendant concedes, as he makes no contention as to the difference in cost of the work done by the succeeding contractor. The corollary of this concession inevitably is the corresponding liability for the costs of inspection and superintendence incurred by the government during the period allowed for the completion of the contract. The two liabilities are coincident, being allied parts of the same section. In other words, as I read the two paragraphs of the contract, while it was not contemplated that the government should exact of the first contractors such costs during the period of performance prescribed in the original contract, it was expressly provided that, in case of extension of the period, the contractor should pay such costs; and if the contract should at any time be annulled by reason of the ultimate default of the contractor, and the work should be relet to another, a like liability would attach to the first contractor for the costs of inspecting and superintending the completion thereof.

It results that judgment must go for the plaintiff as prayed for in the petition.

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UNITED STATES v. MCGEE et al.

(Circuit Court, W. D. Missouri, W. D. June 12, 1909.)

No. 3,460.

1. UNITED STATES (§ 67\*)—CONTRACTORS' BONDS—ACTIONS—RIGHTS OF CREDITORS SUPPLYING LABOR AND MATERIALS.

Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), requiring bonds given by contractors for government work to contain an additional obligation securing the payment of claims for labor and materials supplied to the contractor, and providing for the enforcement of such obligation, has no relation to actions on such bonds by the United States, and, while labor and material creditors are authorized to intervene in such actions and have their claims adjudicated subject to the prior right of the United States, the government, in commencing such an action, is not required to serve or publish notice to such claimants, nor to bring the suit in the district where the contract was to be performed; such provisions of the act being applicable only to suits brought thereunder.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.\*]

2. UNITED STATES (§ 67\*)—CONTRACTORS' BONDS—ACTIONS—RIGHT OF CREDITORS FOR LABOR AND MATERIALS TO INTERVENE.

Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), which provides that, in an action by the United States on the bond of a contractor for public work, persons having claims for labor or materials supplied to such contractor may intervene and be made parties and have their claims adjudicated subject to the prior claim of the United States, gives them such right only subject to the ordinary rules and practice governing interventions, and such creditor will not be allowed to intervene after the action has been dismissed as to the contractor for want of service and as between the plaintiff and the surety has been fully tried and submitted for decision.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On Application for Leave to Intervene.

See, also, 171 Fed. 206.

A. S. Van Valkenburgh, U. S. Dist. Atty.

Lowe & Shannon, for defendants.

Karnes, New & Kranthoff, Almon & Andrews, and James Jackson, for interveners.

PHILIPS, District Judge. The Pocohantas Lumber Company et al. have presented an application for leave to intervene in this suit. They claim to be creditors of McGee & Short, the original contractors for the construction of the government work involved in the principal suit. Their demand is based upon materials and labor furnished to said contractors.

While it does not distinctly appear on the face of the application for intervention the dates when such materials and labor were furnished, it is quite apparent from the papers and proceedings in the principal suit that it was not later than May, 1907, as at that time the period extended by the United States to the contractors for the completion of the work expired; whereupon the contract between the United States and the contractors was annulled, and the unfinished part was relet to a new contractor.

The statute (Act Feb. 24, 1905, c. 778, 33 Stat. 811 [U. S. Comp. St. Supp. 1907, p. 709]), under which the contract in question was made, contains alternative provisions respecting the rights of such materialmen and workmen. The first provision gives them the right to intervene and to be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. Such claimants can only share pro rata in any excess of the amount of the bond after the payment of the claim of the government. The next provision is that, if no suit should be brought by the United States within six months from the completion and final settlement of said contract, then such claimants, under conditions prescribed by the statute, may have a right of action in the name of the United States, in the Circuit Court of the United States in the district in which said contract was to be performed and executed. Such action must be brought within one year after the performance and final settlement of said contract, and not later.

In respect to this latter provision, it is to be observed that the independent suit the creditors may bring upon the surety bond "shall not be commenced until after the complete performance of said contract and final settlement thereof." So long as the contract is not completely performed and final settlement thereof made between the contracting parties, no right of independent action accrues to the materialmen and laborers. When that condition exists, and the United States has failed for six months to bring any action on the bond, the creditor may proceed, provided he commence his action within one year from the performance and final settlement of the contract.

So while the contract between the government and McGee & Short was in April, 1907, annulled by the government by reason of the de-

fault of McGee & Short in not performing the work within the prescribed period, as the government was thereto authorized by the fourth paragraph of the contract, there was no settlement within the meaning of the statute between the contracting parties, and there could have been no such final settlement until after the completion of the unfinished work under the new contract therefor with another contractor. The suit by the United States on the bond is to recover for the cost to the United States in completing the unperformed contract. This construction is supported by the ruling in *U. S. v. Winkler* (C. C.) 162 Fed. 397.

It is therefore to be conceded that when the United States in January, 1909, instituted this suit on the surety bond given by McGee & Short, the creditors of the contractors, having unsatisfied claims for material and labor furnished for the construction of the work, had the right to intervene in said suit; but the statute does not admit of the construction that the provision in the latter part of the section respecting the giving of notice to all known creditors has any reference whatever to the obligation of the United States before it could prosecute its action to final judgment. Said provision has reference only to the duty imposed upon any creditor or creditors who bring an independent action after the failure of the government within six months to sue. This is palpably so for the reason that the pro rata apportionment, where the amount of the bond may be less than the sum of the creditors' claims, applies only to the creditors; and therefore, before any such creditor could take judgment on the bond for his claim, he is required to bring in, by the prescribed notice, the other creditors who are authorized to intervene in such creditor suit, so that the court could ascertain and determine the pro rata distribution of the fund among them.

The provision authorizing the surety to pay into court, for distribution among the claimants and creditors, the full amount of the surety's liability, to wit, the penalty named in the bond, clearly enough has reference only to the claims of such creditors, for it says that this payment into court shall be less than any amount which the surety may have had to pay to the United States by reason of the execution of said bond.

It is to be kept in mind that the statute in question, as its title expresses, was solely for the protection of persons furnishing materials and labor for the construction of public works, prescribing and regulating their right of action and mode of procedure. It does not purport to give the right of action or to regulate the procedure of the government on the contractor's bond. The government is left to proceed in the ordinary way by suit on the bond for its indemnity, just as the government did proceed in this case. The statute only gives to the materialmen and laborers the right to intervene in such suit after it is brought. It does not impose upon the government the duty of giving notice of any kind to such assumed creditors, advising them of such right to intervene. This for the reason that the penalty of the bond stands primarily for the protection of the government, and then for distribution among the creditors of any remaining part of the penalty after the satisfaction of the government's demand.

It is suggested in argument that the last proviso of the section of the statute in question, "that in all suits instituted under the provisions of this act, such personal notice of the pendency of such suits informing them of their right to intervene as the court may order, shall be given to all known creditors," etc., applies also to any suit instituted by the government on the bond. It is to be observed, however, that the language is, "all suits instituted under the provisions of this act," which clearly enough, in my opinion, has reference to creditor suits which alone are authorized by the act to be brought, and has no reference to a suit brought by the government on the bond. It does not derive the authority therefor from this statute.

The government proceeded regularly in the institution of its suit on the bond. The suit was brought in January, 1909, returnable to and triable at the present term of court, which began on the fourth Monday in April. The suit was properly brought in this district on the bond, as the principals in the bond resided at Kansas City at the time the bond was given and the contract made, as appears on the very face of the papers. They were adjudged bankrupt in the United States District Court of this district, as this was the place of their residence, and here the arrangement was made with the local agency of the surety company for the execution of the bond. While personal service was not had upon the principals in the bond, they not being found in the district, service was had upon the surety company, which entered its appearance and defended on the merits. The applicants for intervention had no reason to assume that the government would bring suit on this bond in the state of Alabama, where the work was done.

On the issues joined between the United States and the surety company, the case came on regularly for trial on the 7th day of May, of the present term, when the suit as to the principals in the bond was dismissed. By written stipulation between the parties, trial by jury was waived, and the cause was submitted to the court for final hearing. The evidence was taken, and the cause was argued by the respective counsel, and finally submitted to the court on the 7th day of May, and by the court taken under advisement. The court had prepared its opinion, reaching a final conclusion on the issues of law and fact therein, and was ready and intended to hand down the opinion and enter final judgment at 10 o'clock a. m., June 1, 1909, when the application for leave to intervene was first presented, which was then and there objected to by the defendant company.

The question to be decided is: Shall this intervention at this stage of the proceeding be allowed by the court? The statute is that the parties "shall have the right to intervene and be made a party to the (any) action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject however, to the priority of the claim and judgment of the United States." This language of the statute is but an expression of the usual provision respecting an intervention, "the right to intervene and be made a party to the action." The intervener comes into a pending action with the right to establish his claim against the contractor, with the consequent and unquestioned right as an intervener to question the amount of the recovery of the



United States. The amount of the bond is \$20,000. The amount of the judgment prayed for by the United States is \$8,629, with interest at 6 per cent. from the 1st day of December, 1908, and costs. There was a sharp issue presented on the hearing of this suit as to the liability of the defendant respecting an item of \$1,159.10 for superintendence and inspection.

It is quite clear to my mind that under this statute, which provides that the intervener may become a party to the action, the rights of the parties would all be determined in one judgment fixing the rights of the plaintiff and the rights of the interveners as between them and the plaintiff and the defendant. Had the intervener come into the action in time, the court would not have proceeded to trial until all the parties thereto were ready for trial, and the whole case would have been submitted to the same jury for hearing, or to the court sitting as a jury on stipulation waiving trial to a jury.

The situation of this case is nowise different from what it would have been had it been tried to a jury. Would a party be permitted to come in and intervene in the action after the case had been tried out between the plaintiff and the defendant to the original suit, argued, and submitted to the jury, and while the jury were considering their verdict in the case? The answer undoubtedly would be, "No." It seems to be the generally recognized rule, under all statutes and systems of legal procedure, that a party claiming an interest in the subject-matter may intervene at any time, "if it be done before the final submission of the cause, provided it does not delay the principal suit to the prejudice of others, and he cannot be permitted to retard the principal suit." *Eccles v. Hill*, 13 Tex. 67; *Smalley v. Taylor*, 33 Tex. 669; *Ragland v. Wisrock*, 61 Tex. 397; *Van Gordon v. Ormsby Bros. & Co.*, 55 Iowa, 664, 8 N. W. 625; *Teachout v. D. M. B. G. Ry.*, 75 Iowa, 722, 38 N. W. 145; *Gains v. Page, Bacon & Co.*, 15 La. Ann. 108.

If these applicants are permitted to intervene, the issues will have to be made up between the parties. It is stated in open court and conceded that it will necessitate the taking of testimony by depositions of witnesses in the state of Alabama, where this work was done and materials furnished, resulting in the delay of the verdict and judgment in the pending suit for an indefinite length of time.

Again, the contractors are not before the court. No service having been made upon them, the petition as to them, upon motion of the plaintiff, was dismissed. Before the interveners can take any judgment against the surety on the bond, they must establish the amount due them from the contractors. But I do not deem it essential to decide here whether or not the contractors should be before the court. But what I do decide is that, after the action had been dismissed by the plaintiff as to the contractors, the principals in the bond, and the cause had gone to trial, fully heard between the parties to the suit and submitted to the court sitting as a jury for its verdict, it was too late to admit the applicants to intervene, as much so as if the case had been tried to a jury and this application was presented just before the jury came in with their verdict.

It is true that the amount of the claims of the applicants is less than the penal sum of the bond; but if this case is reopened for the interposition of interveners, where is it to end? Another claimant since this application was presented has appeared before the court with another like claim and wishes to intervene. How many more like claimants exist, having as much right as the present applicant to come in, is not known. No notice has been given to other creditors to shut them out. The aggregate sum claimed by the newcomers might exceed the residue of the penal sum after the satisfaction of the government's claim. In such contingency the creditors would be interested in reducing the amount of the government's recovery as much as possible, thus rendering futile the trial of the case already had as between the government and the surety on the bond. There is no precedent for an intervention under such circumstances, and I am unwilling to make a bad one. The situation presents a fit application of the maxim: "*Vigilantibus et non dormientibus jura subveniunt.*"

The application is denied.

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UNITED STATES v. HALL, et al.

(District Court, E. D. Wisconsin. July 1, 1909.)

1. INDIANS (§ 35\*)—INTOXICATING LIQUORS—CARRYING INTO INDIAN RESERVATION—FEDERAL COURTS—JURISDICTION.

Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 390, provides that any Indian who adopts the habits of civilized life may become a full citizen, and 24 Stat. 388, declares that every allottee shall be subject to the laws, criminal and civil, of the state or territory in which they may reside. *Held*, that where an Indian reservation had been broken up and a large part of it was owned in trust by allottees or white men, who had obtained title from the allottee's heirs at law, such allottees became citizens of the state, and were not therefore subject to prosecution in the federal courts for carrying ardent spirits into the reservation in violation of Act Cong. Jan. 30, 1897, c. 109, 29 Stat. 506; the regulation of the liquor traffic in so far as it affected such allottees being within the exclusive jurisdiction of the state.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 35.\*]

2. GUARDIAN AND WARD (§ 1\*)—"GUARDIANSHIP."

"Guardianship" is a trust which is dual in its nature involving two distinct and separate functions, viz., the control of the person of the ward and the management of his estate.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3187.]

On Demurrer to Indictment.

The defendants, who are Oneida Indians, are indicted under the law of 1897 (Act Jan. 30, 1897, c. 109, 29 Stat. 506), for carrying ardent spirits into the Indian Reservation. A demurrer has been interposed to the indictment. The defendants are themselves allottees, to each of whom a tract of land has been allotted, and to whom has been given by the government what is known as a trust patent, whose terms and legal effect are discussed in several of the cases cited in the opinion. It is conceded in argument that a large fraction of the Oneida Reservation is now owned and occupied by white men who have obtained title through the heirs at law of deceased allottees pursuant to an

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

act of Congress. Act May 27, 1902, c. 888, 32 Stat. 245. It further appears by the statutes of the state that the former Oneida Reservation has been organized and divided into two townships—with provisions for local government.

H. K. Butterfield, U. S. Dist. Atty., and E. J. Henning, for the United States.

Kittell & Burke, for defendants.

QUARLES, District Judge (after stating the facts as above). The demurrer questions the jurisdiction of the government in the premises to enforce Act Jan. 30, 1897, c. 109, 29 Stat. 506. This is a serious and important question, which, for many reasons, ought to be speedily and finally settled.

The relation between the United States government and the Indians was settled by a learned and elaborate opinion by Mr. Justice Marshall in *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25, which opinion has been followed in many later cases. The United States, as in duty bound, assumed guardianship over the Indians as a dependent and inferior race, and as such has exercised all the functions of guardianship over them. It assumed personal control, and directed tribes to move west of the Mississippi river when their hunting grounds were obstacles in the way of advancing civilization. It corralled them upon reservations. Congress legislated to protect the Indian against the wiles of the white man as well as against his own appetite. Stringent laws were passed prohibiting the introduction of ardent spirits into the Indian country. For many years the tribes were recognized as possessing certain qualified sovereignty and capable of making treaties. But as time progressed experience demonstrated that the tribal relation was an insuperable obstacle to civilization. In 1871 Congress passed an act, now found in the Revised Statutes as section 2079, whereby no Indian nation or tribe as such should thereafter be recognized by treaty or otherwise. But finally the great truth was made manifest to the Indian Bureau that in civilization, as in education or religion, the individual is the unit, and that it is hopeless to undertake to civilize a tribe as such; that public sentiment is as strong a factor among a band of Indians isolated on a reservation as in a white community; that the influence of the tepee was neutralizing the training of the school. Experience showed that a graduate of Carlyle or Hampton who returned to his tribe was compelled to go back to the blanket with all that this implies. Education and culture were not popular, and were treated with ridicule and contempt. The reservation impaired the strength and vigor of the race, but did not weaken its instincts and prejudices. Finally Congress came to the wise conclusion that, if the red men were to be civilized, they must be dealt with like other foreign elements, and assume the duties and responsibilities of citizenship. Whereupon it was provided that any Indian who adopts the habits of civilized life may become a full citizen. Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 390. Thereupon Congress adopted the policy of breaking up reservations and allotting the territory to the individual members of the respective bands or tribes. In the enforcement of this policy Congress declared (24 Stat. 388) that each and every member of the respective bands or tribes to whom allotments have been made

shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside. This statute was construed by the Supreme Court in *Re Heff*, 197 U. S. 488, 499, 25 Sup. Ct. 506, 508, 49 L. Ed. 848. This case involved the supposed crime of selling liquor to an allottee outside the reservation. The Solicitor General argued that:

"The continuance of the relation as wards relates both to property and personal protection. The personal protection is at least as important, and the time of all others when Indians need this protection is when they are taking their first tentative steps as citizens."

The court held that the government was under no constitutional obligation to perpetually continue the relationship of guardian and ward; that it might at any time abandon its guardianship, and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. At page 505 of 197 U. S., at page 510 of 25 Sup. Ct. (49 L. Ed. 848), the court say:

"The general police power is reserved to the states, subject, however, to the limitation that in its exercise the state may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of state jurisdiction."

At page 508 of 197 U. S., at page 512 of 25 Sup. Ct. (49 L. Ed. 848), the act of 1897 is designated as a mere statute of police regulation. At page 509 of 197 U. S., at page 512 of 25 Sup. Ct. (49 L. Ed. 848), the court further say:

"When the United States grants the privileges of citizenship to an Indian, it gives him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state. It places him outside the reach of police regulations on the part of Congress. That the emancipation from federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the state," etc.

It is further held that two sovereignties cannot at the same time exercise the police power over a given territory.

The attention of the court was again called to the same subject in *Dick v. United States*, 208 U. S. 352, 28 Sup. Ct. 402, 52 L. Ed. 520, where the indictment was for introducing liquor into the Indian country. The court say:

"If this case depended alone upon the federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which at the time the Indian title had been extinguished, and over which, and over the inhabitants of which, the jurisdiction of the state for all purposes of government was full and complete."

The *Dick Case* was differentiated by the provision in a treaty which stipulated for the continuance of the jurisdiction and laws of the United States over the allotted territory. It would seem, therefore, that both features of the liquor law of 1897 have been considered as inapplicable to Indians who are allottees under the act of 1887. These cases would seem to rule the instant case.

To get a comprehensive view of the legal situation we must read *United States v. McBratney*, 104 U. S. 621, 26 L. Ed. 869, and *Draper v. United States*, 164 U. S. 240, 17 Sup. Ct. 107, 41 L. Ed. 419. These cases clearly recognize the exclusive jurisdiction of any state that is admitted upon an equal footing with other states to try and punish its own citizens for offenses committed upon a reservation, in the absence of any modifying clause in statute or treaty. This doctrine as to white citizens was clearly asserted by the Supreme Court of Wisconsin in *State v. Doxtater*, 47 Wis. 278, 2 N. W. 439, holding that, as there was no reservation of jurisdiction in the Wisconsin enabling act (Act Aug. 6, 1846, c. 89, 9 Stat. 56), the state jurisdiction over all its citizens wherever found is complete. In *United States v. Kagama*, 118 U. S. 381, 6 Sup. Ct. 1109, 30 L. Ed. 228, the court sustained the federal jurisdiction over an Indian who had committed the crime of murder upon a reservation located within a state pursuant to Act March 3, 1885, c. 341, § 9, 23 Stat. 362. On page 383 of 118 U. S. on page 114 of 6 Sup. Ct. (30 L. Ed. 228), the court say:

"These Indian tribes are the wards of the United States. They are communities dependent upon the United States. \* \* \* They owe no allegiance to the states, and receive from them no protection."

This is the basic proposition upon which the decision rests. It is obvious that the later legislation of Congress providing for allotments and consequent citizenship has changed the attitude of the parties. The defendants, being allottees, are citizens of the state of Wisconsin to all intents and purposes, receiving protection from the laws of the state, and being amenable thereto. Here the color line fades out. While conceding that this prosecution cannot rest on the police power, it is, however, strenuously urged that another line of decisions of the Supreme Court give countenance to the present contention of the government. *United States v. Rickert*, 188 U. S. 437, 23 Sup. Ct. 478, 47 L. Ed. 532, is cited in this connection. The *Ricker Case* involved the protection of the lands of allottee Indians against the taxing power of the state. The fee title of such lands being in the government, they were held to be an instrumentality of the government to carry out the purposes of Congress, and were therefore beyond the taxing power of the state. It was a case of the guardian interposing to protect the property of his ward. *Jourdan v. Barrett*, 4 How. 168, 177, 11 L. Ed. 924, is also relied upon, which merely holds that the federal government has power to punish a trespass on government lands. See, also, *United States v. Gardner*, 133 Fed. 285, 66 C. C. A. 663. *McKay v. Kalyton*, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566, emphasizes the supervisory control of the government over these allotted lands, and the court in that case expressly held that it was not in conflict with the doctrine of the *Heff Case*, *supra*. *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260, merely elaborates the doctrine of the earlier cases, vindicating the power of Congress to pass regulations to control the conservation and management of these lands which the government holds for the benefit of its wards; and that such regulations may even savor of the police power, but the opinion expressly limits its scope and meaning by the clause "so long as such power is directed solely to its own protection." The argument of the

government ignores a fundamental distinction. Guardianship is a trust which is dual in its nature, involving two distinct and separable functions. One is the control of the person of the ward, the other the management of his estate. We have seen that it has been settled that the government may at any time terminate this relation of guardianship. It follows, therefore, it may at its pleasure emancipate the Indian from personal control, and still retain the other function of managing and conserving his property. That the emancipation of the Indian from further federal control was the purpose of Congress is so plain from the language employed in the act of 1887 that no argument could make it plainer. The purpose of the government to protect the title of allotted land has been declared with equal distinctness. To control the habits and restrain the passions of a people is the peculiar province of the police power. This jurisdiction has been distinctly renounced by the United States, and is now clearly vested in the states. To say that temperate habits and correct living by the inhabitants will enhance the value of government land, and that, therefore, federal jurisdiction may find in this fact a substantial basis within the territory formerly occupied as a reservation is far-fetched and illogical. It is contended that it is competent for the government to determine what shall constitute a trespass upon its lands. To say that an allottee when entering upon his own land becomes a trespasser thereon if he carries a pint bottle of whisky in his pocket is a confusion of ideas. A trespass upon lands is something so familiar and well-defined that it cannot be distorted to cover the misconduct charged against these defendants.

Furthermore, it is conceded in argument that a large fraction of the territory formerly known as the Oneida Reservation is owned and occupied by white men. It is conceded that the state has complete and exclusive jurisdiction over such white men. If the theory of the government here presented were to be adopted, we should have this anomalous situation: a quarter section occupied by a white man would be under the jurisdiction of the state, while the next quarter section, occupied by an allottee, would fall under the federal jurisdiction. There would be two rules of conduct, which might be entirely different, operating at the same time upon the same township, according to the complexion of the inhabitants. This amounts to a *reductio ad absurdum*. When understandingly read, there is no conflict in the federal decisions. The Indian allottees are citizens of the state of Wisconsin upon an even footing with all other citizens. It is the exclusive prerogative of the state to pass and enforce laws relating to the liquor traffic which is wholly separate and apart from the jurisdiction which the federal government retains to protect and regulate the allotted lands. This jurisdiction of the state extends to all its citizens without regard to color, race, or former condition. Under the legislation of Congress, the allottee has certain vested rights. The state has assumed a vested jurisdiction. In the Heff Case it is distinctly held that these vested rights "cannot be set aside at the instance of the government without the consent of the individual Indian and the states."

For these reasons, I feel constrained to hold that the demurrer should be sustained, and that the defendants should be discharged.

## HOLMAN v. THOMAS et al.

(Circuit Court, W. D. New York. April 2, 1909.)

No. 203.

## 1. CORPORATIONS (§ 99\*)—STOCK ISSUES—ISSUANCE TO PROMOTERS—CONSIDERATION—INADEQUACY.

Plaintiff, who had assisted in devising a scheme to organize a co-operative sugar refining company, made an agreement that it should issue to him 750,000 shares of its capital stock at the par value of \$100 each, in consideration of which he agreed thereafter to pay the company \$10,000,000, less \$1,000,000 commissions, from the proceeds of shares of stock to be sold by him to retail grocers. The scheme, if carried out, would have resulted in obtaining \$9,000,000 from the grocers in return for 207,107 shares of stock, while plaintiff would receive 417,873 shares, and defendants, under the financial contract sued on, would receive 125,000 shares, in consideration of their providing \$100,000, in installments of \$10,000 each, to finance the company, to be repaid to them when \$10,000,000 had been received from stock sales. Plaintiff had no good will to transfer to the corporation, and there was no actual exchange of property for stock. *Held*, that the transfer of the stock by the corporation to plaintiff was invalid for want of sufficient consideration as a matter of law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.\*]

## 2. CORPORATIONS (§ 99\*)—STOCK ISSUES—CONSIDERATION.

Under Gen. St. Minn. 1894, § 3415, providing that corporations having capital stock divided into shares, unless specially authorized, shall not issue any shares for a less amount on each share than the par value of the share first issued, a scheme to dispose of the capital stock of a Minnesota corporation, giving to each purchaser as a bonus an amount of stock equal to that subscribed and paid for, was invalid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.\*]

## 3. CONTRACTS (§ 138\*)—VALIDITY—PUBLIC POLICY—SALE OF CORPORATE STOCK.

Where a corporation's agreement to transfer 750,000 shares of its stock to plaintiff for promoter's services was invalid for lack of consideration, and defendants, in return for 417,873 shares, contracted to finance the corporation to the extent of \$100,000, to be paid in installments, to be repaid to defendants when \$1,000,000 had been received from the sales of the stock, such agreement was contrary to public policy, and hence an action could not be maintained for defendant's failure to perform.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.\*]

Seldon Bacon, for plaintiff.

Richard A. Irving, for defendants.

HAZEL, District Judge. This is a motion by defendants for judgment on the pleadings under section 547 of the New York Code of Civil Procedure, as added by Laws 1908, p. 462, c. 166. The action was brought to recover damages against the defendants, amounting to \$2,535,346 and interest, for alleged breach of contract. The material allegations of the complaint are substantially as follows: On the 10th of April, 1905, the plaintiff and defendants entered in-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to a written agreement by which the latter agreed to provide \$100,000, in installments of \$10,000 each, to finance a company to be organized by the plaintiff under the laws of Minnesota for refining sugar. The agreement between the plaintiff and the United States Sugar Refining Company, which was the corporation organized by him, entered into on the 16th day of May, 1905, was that the company would issue to the plaintiff absolutely 750,000 shares of its capital stock, of the par value of \$100 each, in consideration of which he would thereafter pay to the company \$10,000,000, less \$1,000,000 commissions, from the proceeds of shares of the capital stock to be sold by him. To secure the money wherewith to make such payment, the plaintiff agreed to sell stock for cash to a large and miscellaneous number of retail grocers, not, however, exceeding 5 shares to each grocer, and to induce the purchase of stock the plaintiff was authorized by the company to give full-paid and nonassessable bonus shares, equal in number to the paid shares of each subscribing grocer. It was also agreed that, when \$1,000,000 had been received from sales of stock, the defendants should be repaid their advances, and the future expenses of exploiting the enterprise, until \$10,000,000 was actually received from such sales, would be paid from the collected funds; that plaintiff would deliver the shares of stock bought by grocers, including bonus shares, out of the \$75,000,000 of shares issued to him; and that \$25,000,000 thereof would be divided equally between the parties to this action. It was further agreed that the plaintiff was entitled to retain and own all shares of stock saved by him on sales made without giving a bonus, or at a bonus less than the 5 shares he was empowered to give.

It is apparent that the corporation was one in form only, and that it was organized with a view of carrying out the scheme of selling stock to grocers in the belief that the parties to this action would eventually make large profits. It appears by the complaint that in the beginning of the promotion of the enterprise the gifts of shares to induce purchasers of stock did not exceed four shares for each five shares sold; but the modified agreement of the parties provided that each grocer was to receive a gift of one share only for each five shares purchased by him. The subscription stock, under the agreement with a grocer, was to have been paid by depositing \$10 per month in a bank chosen by himself, where it was to remain until the company was prepared to carry on business, or until it had acquired refineries, when said deposits were to be withdrawn by the company in payment of the stock. Plaintiff claims that the purpose and object of the corporation was to establish a co-operative combination between it and the retail grocers, by which the latter would become interested in the scheme, not only as shareholders, but as prospective customers or buyers of sugar from the company. Other features of the scheme for enormous emolument and profit to the promoter and his allies, the defendants, are indicated in the complaint and exhibits attached thereto; but before discussing the law thought to apply to the controversy it will only be necessary to advert to the allegation that subscriptions to capital stock of the company were obtained to the amount of about \$148,000, and that



advances were made by the defendants of about \$12,000, when they ceased to comply with plaintiff's demands for more funds, and the project was discontinued, but without loss to the subscribing grocers.

The objections that stock was issued for a grossly inadequate consideration, in violation of the Minnesota statute, and that the scheme was a fraud upon the grocers, may be considered together. Presumably, if the scheme of raising the vast capital and the establishment of the corporation, whose officers were dominated by plaintiff, had succeeded, the assets would approximate \$9,000,000, all of which would have been paid or contributed by the grocers in return for 207,107 shares of stock issued to them, while the plaintiff would receive under his agreement with the corporation 417,873 shares, and the defendants under their agreement with the plaintiff 125,000 shares. Manifestly the grocers buying the stock would own but one-fourth of the total number of shares, while the plaintiff and defendants would own a three-fourth interest—a grossly excessive proportion. It appears that the plaintiff devoted his time toward persuading grocers to buy shares, and, except to originate the scheme or plan, he did nothing more. He transferred no tangible property to the corporation in return for the issuance to him of 750,000 shares of stock, but simply promised to sell a portion of his holding to the amount of \$10,000,000. Neither he nor the corporation possessed any good will, trade, or established business. His agreement to secure customers and business for the corporation was neither property nor its equivalent; for the successful termination of the projected scheme was problematical, and it could not with reasonable certainty be said that any substantial advantage or benefit would inure to the corporation from plaintiff's agitation. It does not follow that the grocers would have traded with the company merely because of their ownership of stock. It is true that good will is a valuable asset in business, and a person who possesses it as a result of unceasing labor and upright business activity may dispose of it in the same manner as though he were transferring any other class of property; but obviously such is not the present case. Here there was no actual exchange of property for stock. If plaintiff's services before and after the incorporation are considered as property, their value was certainly grossly overestimated, and the consideration for the issuance to him of the capital stock was inadequate as a matter of law. When property is transferred or assigned to a corporation for paid-up stock, the asserted fraudulent character of the transaction is ordinarily one of fact; but, where the overvaluation is great, the possibility of honest mistake is excluded. *Hastings v. Iron Range*, 65 Minn. 28, 67 N. W. 652.

Furthermore, under the laws of Minnesota, the sale or gift of full-paid stock to grocers is thought to have been invalid. By section 34-15, Gen. St. Minn. 1894, it is provided:

"Corporations having capital stock divided into shares, unless specially authorized, shall not issue any shares for a less amount to be actually paid in on each share than the par value of the shares first issued."

Under the doctrine of *Rogers v. Gross*, 67 Minn. 225, 69 N. W. 894, in which case this statute was construed, it was held illegal to

give or agree to give additional full-paid stock as a gift; and the court said in substance that by promoting the sale of stock which had been previously obtained for nothing, and which did not actually represent anything of value, an opportunity would be given to defraud the public. In *Wallace v. Carpenter*, 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530, a case where stock was issued at one-third its value, the court said:

"A certificate for paid-up shares in a corporation is simply a written statement in the name of the corporation that the holder thereof is a stockholder, and that the full par value of his shares has been paid to the corporation. If the shares in fact have not been so paid for, the certificate that they have been is a false representation that the assets of the corporation have been increased to the amount of the par value of the stock so issued; and when a corporation represents that it has a paid-up capital of a given amount it represents to the business world that at the time it issued the stock it received money or property to the full par value of its stock. The issuing of the stock of a corporation as paid up when it is not so in fact is a public and a private wrong, a cheat and a fraud, which enables the corporation to obtain credit and property by false pretenses."

The principle of the cases cited aptly applies to the case at bar. It is true that in the *Rogers Case* the contract was executory, and the stock had not been actually issued; but the court nevertheless broadly condemned as a fraud agreements by which full paid stock of a corporation was given as a bonus. See, also, *Cook on Corporations*, § 40. There are Minnesota cases holding that stock issued and sold as full-paid stock, but for less than its par value, are not void, but merely voidable at the instance of creditors; but I think that, where it appears that the company received principally nothing for the issuance of stock, the principle of *Rogers v. Gross*, *Wallace v. Carpenter*, and *Hastings v. Iron Range*, *supra*, and *Hospes v. North Western Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637, may safely be applied. I am therefore of opinion that, in a transaction such as this, payment for the stock could have been avoided because of lack of knowledge of the facts. It is clear that the subscribing grocers did not know of the existing arrangements between the plaintiff and the corporation by which the former was to receive an extortionate secret profit, nor were they informed that by the adopted system of operations the parties promoting the scheme acquired more than two-thirds of the property of the corporation.

The plaintiff cannot be heard to urge that, notwithstanding the invalidity of the issue of full-paid stock, the defendants are liable to him for breach. The contracts which are the subject of this controversy, namely, the contracts between the plaintiff and the corporation and between the parties to this action, were entered into for the express purpose of effectuating the unlawful scheme to dispose of the stock. By their agreement the defendants were to supply finances to carry out the common design. In such a situation it is the universal rule that from motives of public policy a court will not give assistance to either party to promote the unlawful end. *Manterne v. Horwitz*, 101 N. Y. 469, 5 N. E. 331; *Church v. Proctor*, 66 Fed. 240, 13 C. C. A. 426; *Miller v. Ammon*, 145 U. S. 426, 12 Sup. Ct. 884, 36 L. Ed. 759; *Ewell v. Daggs*, 108 U. S. 149, 2 Sup. Ct. 408, 27 L. Ed. 682; *Sirkin v. 14th St. Store*, 124 App. Div. 384, 108 N. Y. Supp. 830.

In deciding the vital questions presented, the court does not ignore the allegation of the complaint that before the agreements in controversy plaintiff had already performed services in the "development and amelioration of plans for financing" the American Co-operative Sugar Company and a large amount of money had been expended, etc.; but, assuming the truth of that allegation, it is not manifest that such services were so substantial in character as to warrant attaching thereto a weighty pecuniary value. There are other grounds presented in the various exhaustive briefs submitted by the defendants for granting this motion to dismiss the complaint; but, in view of what has hereinbefore been stated, they need not specially be considered or passed upon.

The motion to dismiss the complaint on the pleadings is granted.

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NASHVILLE, C. & ST. L. RY. v. RAILROAD COMMISSION OF  
ALABAMA et al.

(Circuit Court, M. D. Alabama, N. D. June 24, 1909.)

**INJUNCTION (§ 244\*)—LIABILITIES ON BOND—ACTIONS—CONDITIONS PRECEDENT.**

A court of equity, on the granting of a preliminary injunction, restraining the enforcement of a state statute fixing railroad rates, exacted a bond from the carriers who were complainants conditioned that in case the injunction should be dissolved, as wrongfully issued, complainants should pay all loss or damage caused by the granting of the same, "including overcharges or excess rates or charges to every person or firm \* \* \* which shall sustain any such loss or damage as aforesaid, or pay any such overcharge, excess rate, or charges." On appeal from the order, the injunction was dissolved as not warranted by the evidence before the court. *Held*, that an action could not be maintained on the bond until final decree in the cause determining whether the rates charged by complainants exceeded the legal or just rates, as contradistinguished from the statutory rates.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 560; Dec. Dig. § 244.\*]

**In Equity.**

The Nashville, Chattanooga & St. Louis Railway, and four other railroad companies, filed their bills in the Circuit Court of the United States against the Railroad Commission of Alabama and others, to enjoin the enforcement of certain statutory rates, and obtained a preliminary injunction. Upon the dissolution of the injunction by the Circuit Court of Appeals, respondents moved for a reference to fix the excess which the carriers had collected above the statutory rates, and to have the same paid out of the bond which the court had exacted for the protection of shippers and passengers. This motion was resisted by the carriers, who made a counter motion that the court order a suspension of any right of action on the bond until final decree, and to so modify the terms of the bond as to show that the liability of the carriers thereon is to be determined only on final decree.

See, also, 157 Fed. 944.

Henry L. Stone, Gregory L. Smith, S. J. Bowie, Geo. W. Jones, and J. Manly Foster, for complainant.

Alex. M. Garber, Atty. Gen., H. C. Selheimer, and S. D. Weakley, for respondents.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

JONES, District Judge (after stating the facts as above). Respondents move for a reference to ascertain the various amounts due passengers and shippers on account of the charges made by the carriers, while the preliminary injunction was in force, in excess of the rates fixed by the several acts of the Legislature, and their payment now that the preliminary injunction has been dissolved. This motion is met by a counter motion to suspend any right of action on the bond on behalf of such shippers and passengers, until the legality of the rate shall be finally determined in this cause, and to modify the terms of the bond so as to clearly show the liability of the carriers thereunder depends upon the final decree in the cause.

Looking alone to the letter of the bond, no liability accrues until the injunction is dissolved or vacated as having been "wrongfully issued," or until it is determined that the rates, whose enforcement was sought by the bill of complaint to be enjoined, "should be or should have been enforced, or should not have been enjoined or suspended." The Circuit Court refused to dissolve the injunction, and upon appeal to the Circuit Court of Appeals the injunction was dissolved, not because it was "wrongfully issued," but because there had been no cross-examination of witnesses, and because, as the majority of that court considered, the matters about which they testified were largely expert opinions, and speculations of interested parties, and because in that state of the case the evidence did not sufficiently overcome; in the absence of actual test, the presumption of the reasonableness of the rates. That court made no decision whatever as to the merits of the litigation. It did not even intimate what the final result should be; that depending upon the final proof, which neither that court nor this court could have before it, when the preliminary injunction was issued and dissolved.

However, had there been a dissolution of the injunction as "wrongfully issued," still the bond then provides that the complainant "shall pay or cause to be paid all loss or damage caused by the granting of the injunction, including overcharges or excess rates or charges to every person or firm, company or corporation, which shall sustain any such loss or damage as aforesaid, or pay any such overcharge, excess rate or charges aforesaid." Until it shall have been determined that the rate charged exceeded the legal or just rate, as contradistinguished from the statutory rates, it cannot be said that the parties have sustained any loss or damage; and so, also, it cannot be determined whether the rates charged exceeded the legal or just rates, as contradistinguished from the statutory rates, until the final determination of the cause. So that by the very terms of the bond no liability can arise until it has been finally determined in the cause that the rates charged by the carrier are unreasonable and unjust. The purpose of the preliminary injunction was to preserve the rights of the parties, as far as possible, without entailing any risk of loss on either, until the final proof determines what is the proper rate, and who is the person to finally bear the loss. The whole purpose of the injunction and of the suit would be defeated, if it now be held that the bond must be enforced without waiting for the final outcome of the litigation.

Besides, it is universally held, in the absence of specific statutes con-

trolling the subject, that the damages recoverable upon an injunction bond are never due until the final decree in the cause, and that a suit before that time is prematurely brought and cannot be maintained. This is conceded by counsel on both sides, as, also, that under the settled doctrine of the Supreme Court of the United States (*Russell v. Farley*, 105 U. S. 433, 26 L. Ed. 1060) the court has the power, and if necessary, should exercise it, to compass the ends of justice in such a situation as this by relaxing or modifying the conditions of an injunction bond, or by suspending the right of action thereon. The situation, in short, is this: It may turn out that the carriers will never owe the shippers and passengers anything. The final decree alone can determine that. Yet, notwithstanding this, and although the right cannot now be determined, and the bond still stands for the protection of passengers and shippers, the court is asked to inflict what would be irreparable injury to the carriers, if they finally succeed in the litigation, by compelling them now to refund any excess collected by them over the statutory rate, although the charge so exacted by them may be adjudged entirely lawful and proper, but, when once refunded, could not be recovered back from passengers and shippers. On the other hand, if the court holds the matter in abeyance until the final decree, and respondents win their case, passengers and shippers will recover the excess paid out by them above reasonable rates, and, in the meanwhile, will be subjected to no loss, and only suffer the inconvenience of delay. When such an alternative is presented to a court of conscience, there is no room to doubt what course it should adopt.

A decree will be entered granting the prayer and motion of complainants, and refusing the motion of the respondents.

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SOUTH & N. A. R. CO. v. RAILROAD COMMISSION OF ALA-  
BAMA et al. LOUISVILLE & N. R. CO. v. SAME. NASH-  
VILLE, C. & ST. L. RY. v. SAME.

(Circuit Court, M. D. Alabama, N. D. June 30, 1909.)

Nos. 263, 264, 266.

**1. EQUITY (§ 151\*)—PLEADING—IMPERTINENCE.**

If an allegation in a bill, when proved, could exercise any proper influence on the decision of the cause, it cannot, in general, be said to be impertinent.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 380-382; Dec. Dig. § 151.\*]

**2. EQUITY (§ 151\*)—PLEADING—IMPERTINENCE.**

In suits to determine the constitutionality of statutes fixing railroad rates, alleged to be confiscatory, in which there are a large number of questions of fact and law to be considered, and which properly have a bearing on the issues, a wide latitude is allowed in pleading, and allegations of facts which may be material will not be held bad for impertinence because they are evidential in character and not issuable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 380-382; Dec. Dig. § 151.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
171 F.—15

## 3. EQUITY (§ 151\*)—PLEADING—IMPERTINENCE.

In a bill to enjoin the enforcement of railroad rates established by a state, allegations of the motive of the officers or legislators of the state in prescribing and enacting the statute complained of are impertinent; but allegations that power conferred by such statute on a railroad commission to alter the rates fixed thereby in its discretion with respect to individual carriers is being so used as to discriminate against complainants, and to favor other carriers as a reward for dismissing suits brought to test the validity of the law, are pertinent as tending to show that the statute, in operation, denies to complainants the equal protection of the laws.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 380-382; Dec. Dig. § 151.\*]

## 4. EQUITY (§ 151\*)—PLEADING—IMPERTINENCE.

Where, in such a suit, a supplemental bill was filed, praying for an injunction to restrain the county solicitors and sheriffs of the state and clerks of the courts from instituting criminal prosecutions and civil suits against officers of complainants for violations of the statute, pending a determination of its validity, and from issuing and serving process in such suits, allegations showing threats by the Governor of the state to cause such suits to be instituted in every case of violation, notwithstanding the issuance of an injunction suspending the enforcement of the law, are pertinent.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 380-382; Dec. Dig. § 151.\*]

In Equity.

These cases are submitted on exceptions for impertinence to the first and second supplemental bills. The nature of the exceptions will readily be gathered from the opinion.

See, also, 157 Fed. 944.

Henry L. Stone, Gregory L. Smith, S. J. Bowie, Geo. W. Jones, and J. Manly Foster, for complainants.

Alex. M. Garber, Atty. Gen., H. C. Selheimer, and S. D. Weakley, for respondents.

JONES, District Judge. The motion of complainants to strike respondents' exceptions to portions of the first and second supplemental bills for impertinence cannot prevail. An examination of the record shows that, at the date of the order suspending further proceedings until the decision of the Circuit Court of Appeals upon the interlocutory injunctions, no rule day had passed after the service of process, at which the exceptions were required to be presented; and, under the circumstances attending the preparation of these cases, the court does not feel at liberty to hold the respondents in default for not taking the exceptions on the next rule day after the decision of the Court of Appeals. The number of these exceptions and the necessity for a prompt ruling upon them, to get the cases speedily at issue, make it impracticable to discuss each exception separately.

Whether an allegation is objectionable for impertinence depends upon the nature and scope of the legitimate issues which can arise under the bill. If an allegation, when proved, could exercise any proper influence in the decision of the cause, it cannot, in general, be said to be impertinent. The supplemental bills open a wide field of inquiry.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the exploration of which the court and parties must trace and consider the significance of hundreds of facts and circumstances, which, scanned separately, may not be of consequence, and yet, when taken as a whole, may furnish valuable aid in shaping a right determination of the causes. So many difficult and intricate questions of law and fact are involved in suits attacking freight and passenger rates upon constitutional grounds that it has become the custom of the pleader in this class of bills not only to state enough of the facts to show that the allegations as to the rates being unreasonable or confiscatory are not mere conclusions of the pleader as distinguished from allegations of fact, but to go quite beyond that, and to allege many facts and circumstances which, strictly speaking, are merely evidential or argumentative, in support of the contentions of the complainant, and to meet what may be offered in opposition to them, such as the facts going to show the value of the property devoted to the public use, the justice of the carrier's methods of transacting business, the fairness of their accounts of expenditures and disbursements, the reasonableness of the rates charged, the gross and net earnings, the volume of domestic and interstate earnings, how they are derived and apportioned respectively, and the like. Frequently the pleader dwells upon particular results and phases of the practical operation of the rate statutes upon the carrier's business, as conducted under existing conditions. Sometimes the pleader sets forth, as illustrative of his claim as to the true interpretation and construction of the statutes, the "purpose" of the legislation, meaning the intent as gathered from the language of the statutes, and the conditions with which they deal. Strictly speaking, all this is objectionable, under the ordinary rule of good pleading, as, in legal effect, it is only setting out in extenso in the bills mere argument or evidence to prove the proper construction of the statutes. Yet such allegations foreshadow the principal contentions of law and fact and the numerous issues which arise on the proof, which must enter into the taking and stating of the accounts, in which all the issues are finally centered. Such methods of outlining the several issues and giving notice of them in advance are promotive of fairness and serve a most useful purpose in lightening the labors of the court and counsel. For these reasons the courts of late have shown a marked tendency to relax the ordinary rules regarding impertinence, and to permit a latitude of allegation in bills of this sort, which is not allowed in other cases, where the material issues are far fewer in number and of a much simpler nature.

Whenever historical facts throw light upon the meaning of a law, or the rights and duties of suitors thereunder, such facts are as proper to be considered in determining the intent of the statute as if set out in the bill itself, and the courts may take judicial notice of them without being specially pleaded. *Taylor v. Barclay*, 2 Sim. 213; *Ashley v. Martin*, 50 Ala. 537; *Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Blake v. U. S.* 103 U. S. 227, 26 L. Ed. 462.

The court can take judicial notice of the proclamation calling the extra session and the contents of the Governor's message, although

the bills failed to mention them. Whether the statutes under review fall within the objects stated in the proclamation is material, since, under the Constitution of Alabama, legislation upon any subject not included in the call would be invalid unless enacted by a two-thirds vote. Besides, if the proclamation and message shed light upon the construction and interpretation of the statutes, inserting them in the bill can have no other effect than to call the attention of the court to sources of information to which it can always resort. It raises no impertinent issue, and merely places the proclamation and message conveniently at hand for the court, if the case be one in which it is proper to consider them.

The respect which each of the great departments of the government owes, and ordinarily accords, to the action of other co-ordinate departments, is founded upon the highest considerations of the public good. The courts have taught it since the days of Marshall. It has become a canon in our jurisprudence. The importance of its observance has been emphasized, with here and there an exception, by the example of a long line of illustrious public servants, who have exercised legislative, executive, or judicial functions, in the state or nation, from the earliest days of the republic down to the present time. The Legislature may listen to whom it pleases as to the necessity or policy of legislation. The Governor is under constitutional duty to recommend measures for its consideration. Neither is accountable to the courts for the motive. Aside from the impracticability of determining the particular motive in a given case, it would be offensive in the extreme for one department of the government, when called upon to deal with the validity or propriety of the action of another department, to challenge and scrutinize its motives. Once this is permitted, harmony and co-operation between the several departments of the government would be at an end, and in time the whole government would be brought into contempt before the people. The motive of the Legislature, or of the Governor, in the passage and approval of laws, as distinguished from the intent of the legislation, is not a fit subject of inquiry in the courts. Whether the Legislature be moved primarily on its own initiative, or at the instance or pressure of others, is not of the slightest consequence. Whatever it does is none the less the exercise of legislative power. Its action must stand, no matter what the motive which led to it, if in the enactment the Legislature has transgressed no provision of the fundamental law, state or federal. The issue is one of power, not of motive. When an enactment is challenged in the courts, the sole inquiry is: What has the Legislature actually enacted, and is it forbidden by the fundamental law? The intent of the Legislature is to be gathered from the language used, the former state of the law, the evil to be remedied, the ordinary and natural effect of the operation of the statute upon the right asserted, and whether, when thus construed and interpreted, the Legislature has transgressed the bounds of its power.

It follows that the several allegations challenged for impertinence concerning the Governor's motive in calling the extra session, or what he sought to accomplish thereby, or expected to result therefrom, his personal whim, caprice, or prejudice in causing certain provisions



to be drafted in the statutes, his employment of attorneys for that purpose, the statements made by him in unofficial utterances (with the single exception hereafter noted), his interviews in the newspapers, or letters to members of the Legislature, his denunciation of the complainants as defiers of the law, and his criticism of them for resisting the legislation in the federal courts, are impertinent and must be expunged. They are of no more importance, and no more to be considered in a court of justice, than like utterances of any other person in the newspapers or upon the hustings.

The other exceptions for impertinence are controlled by different principles. They do not involve inquiry into the "motive" as distinguished from the "intent" of the legislative power in the passage of the laws, but, in the main, relate to the administration of the laws enacted by the Legislature by a subordinate, administrative body, or executive auxiliary. They involve official action and inquiry as to its ordinary and natural effect upon the rights of parties, thereby enabling the court to gauge the reasonableness of such acts and what effect the court should accord to them.

It is alleged in the bills that the power given the commission to change and alter rates and classifications fixed by statute has been administered with an "evil eye and an unequal hand," to the prejudice of the complainants. In support of this contention, the bills aver that his excellency, the Governor, threatened to cause solicitors and sheriffs to indict and arrest officers and servants of the carriers for every charge made or collected by them which did not conform to the statutory rates, notwithstanding this court, by the filing of the bills to contest the reasonableness of the rates, had acquired exclusive jurisdiction to decide the matter and had issued injunctions to prevent interference with the carriers pending final hearing. It is alleged that the purpose of these threats was to impress upon the carriers that such ruinous consequences would result to their business if they attempted to enforce their rights in the courts, that they would be induced to abandon the litigation, and that, as a further inducement to them to do so, the Governor, in behalf of the state, contracted with several of the litigating carriers who, by the statutes complained of, were put on an equal footing in many respects as to rates and classifications with these complainants, if such other carriers would abandon their contests in the courts, the public authorities would give them more favorable rates and classifications than the statutory rates, which are still sought to be enforced against these complainants, though the carriers thus to be favored are, in all practical respects regarding these matters, similarly situated as complainants; and that the Railroad Commission, in the administration of its power, changed the statutory rates and classifications, in favor of the contracting carriers, leaving complainants still bound by the statutory rates, and thus, it is alleged, in the administration of the rate statutes by the state authorities, arbitrary and unjustifiable discrimination in rates and classifications has been made to the prejudice of complainants, who still insist upon their rights in the courts.

The court cannot concur with the view of respondents' counsel that the only permissible inquiry upon this branch of the case is whether

the carriers who contest the statutory rates receive just compensation under them, and, if they do, it is immaterial whether other carriers, under practically the same conditions and equities, are given different and better rates and classifications by means of the changes made by the commission in the statutory rates and classifications, which are still enforced against complainants. The state is powerless, either directly, or indirectly, to accomplish such results. Under the federal Constitution complainants are protected equally against confiscatory rates, and a denial of the equal protection of the laws, and under the Constitution of the state they are protected against unreasonable rates and vicious class legislation. *Covington & Lexington Turnpike Road v. Sanford*, 164 U. S. 578, 598, 17 Sup. Ct. 198, 206, 41 L. Ed. 560, does not hold to the contrary, but, on the other hand, suggests the invalidity of such discrimination. It says:

"If the rates prescribed are manifestly much lower, taking them as whole, than the Legislature has by general laws prescribed for other corporations whose circumstances and locations are not unlike those of the defendant, a different question would be presented."

And in numerous cases since then the Supreme Court has held that, the conditions being substantially the same, favor to one person, and disfavor to another, and the imposition of unequal burdens upon them, effected by the terms of a statute or the manner in which it is enforced, is a denial of the equal protection clause.

The alleged contracts made with the Southern Railway and other carriers, and what was done by the commission in carrying out those contracts, and in giving what are alleged to be better rates and classifications to the carriers who abandoned the protection of the court than those allowed by the statute to those who remained in the court, in the language of *Yick Wo v. Hopkins*, 118 U. S. 373, 6 Sup. Ct. 1073 (30 L. Ed. 220), present the administration of the power given the commission to change rates and classifications "in actual operation." As observed in that case:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by the public authorities with an evil eye and an unequal hand, so as to make unjust and illegal discrimination between persons in the same circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

How else may the suitor show the administration of the law "with an evil eye and an unequal hand," than by showing the instances in which the authorities have executed the law concerning different persons, the relative situation of those different persons, and the ordinary and natural effect of the administration of the law upon their rights, and whether, when as thus administered, invidious burdens are placed upon one person, and favors conferred upon others, who, relatively speaking, are in the same class? The administration "with an evil eye," which the Constitution condemns, is the intent of the authorities, as distinguished from their motive, to bring about the forbidden results. The authorities are conclusively held to intend to accomplish the ordinary, natural, and probable results of their acts. The forbidden intent, and whether it has impelled the action of officials, can be ascertained only by considering what is the ordinary, natural, and direct result of

such administration of the law upon the rights of the parties, as fixed and determined by the conditions and situations which they occupy, with reference to the subject-matter to which such administration of the law relates.

All the circumstances and surroundings connected with the administration of the law may be looked to, to determine whether what has been done was done reasonably and fairly, or arbitrarily, and with disregard of the rights of the various persons, as to whom it has been differently executed. Moreover, it is to be observed, in this connection, it is a well-settled rule that, whenever a power is granted to an executive or administrative body in general terms, the law always requires that the power be exercised in a reasonable manner, and, while the Legislature itself may act arbitrarily in its enactments to any extent which does not offend the state and federal Constitutions, no such principle can be invoked to uphold the acts of subordinate administrative bodies, which must be reasonable in themselves in view of all the circumstances and situations with which they deal, and, failing in that, cannot be upheld in the courts. The alleged contracts made by the Governor, in behalf of the state, with the Southern Railway, and allied lines, and what was subsequently done by the Railroad Commission in changing, in behalf of those carriers, the statutory rates and classifications, which prior to that time had bound them as well as complainants, are facts and circumstances which are proper to be considered in determining whether the discriminations alleged to be thus effected are arbitrary, or based on some just and substantial reason. If the conditions and circumstances surrounding the different carriers justify the discriminations between them in rates and classifications, worked out by the statute in connection with the action of the commission which releases certain other carriers from those statutory rates and classifications, and holds the others to observance of them, the manner in which that result is brought about would be immaterial, and so would the circumstance that the result of the operation of the statutes and the action of the commission combined were to give better rates to the carriers who surrendered their constitutional rights to contest the rates in the courts than to those who still insist upon them. Nevertheless, the history of the circumstances under which these different results were brought about, the contracts which led to them, and the action of the commission thereon, all shed light upon the inquiry whether the commission has executed its powers in this respect "with an evil eye and an unequal hand," or reasonably and justly. They are to be considered along with all the other facts and circumstances, and given such weight, in view of them, as the justice of the cases may demand. The allegations regarding these contracts, the circumstances under which they were made, and the action of the commission in reference to them, are therefore proper to be considered, and cannot be stricken for impertinence.

The alleged threats of his excellency to use his power as chief executive to compel the sheriffs and solicitors to arrest and indict the officers and servants of the carriers, notwithstanding the orders of the court, are not impertinent. It was necessary to allege a reason why the injunctions should issue against these prosecutions for the protection

of the property rights of the complainants and the preservation of the jurisdiction of the court to try and determine the reasonableness of the rates. If the jurisdiction of the court was ever a matter of doubt, the doubt has been removed by the decision in *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, and that of the Court of Appeals on this branch of the case. See, also, *L. & N. R. R. Co. et al. v. Railroad Commission et al.* (C. C.) 157 Fed. 944.

In the case of the Louisville & Nashville Railroad Company, the exceptions numbered 3, 5, 8, 9, 12, 17, and 18 are sustained; and exceptions, 1, 2, 4, 6, 7, 10, 11, 13, 14, 15, 16, 19, 20, 21, and 22 are overruled; and exception 23 is sustained in part, and disallowed in part, as set forth in the order entered. In the case of the South & North Alabama Railroad Company, exceptions numbered 3, 5, 8, 9, 12, 17, and 18 are sustained; and exceptions 1, 2, 4, 6, 7, 10, 11, 13, 14, 15, 16, 19, 20, 21, 22, and 23 are overruled; and exception 24 is sustained in part and overruled in part as set forth in the order made herein. In the case of the Nashville, Chattanooga & St. Louis Railway, exceptions numbered 1, 3, 5, 8, 9, 12, 20, 21, 22, and 23 are sustained; and exceptions numbered 2, 4, 6, 7, 10, 11, 13, 14, 15, 16, 17, 18, and 19 are overruled.

The court has duly considered the report of Special Master Stratton in the cases of the South & North Alabama Railroad, and the Louisville & Nashville Railroad Company, as to certain exceptions taken by those companies for impertinence, to certain portions of the answer of respondents in those cases to the original bills, and the report of the special master is confirmed. If it be thought, under this ruling as to the seventh exception in the case of the South & North Alabama Railroad and the first exception in the case of the Louisville & Nashville Railroad Company, the master may be required to take evidence and report, not only whether the rates complained of, as applied in this state, are fair and just, but also to take proof of and enter into a minute inquiry of all the conditions existing in North Carolina, Virginia, Mississippi, and Louisiana, and the justice of each of the particular rates charged therein as applicable to such states, and thus, in the trial of the rates in this state, to enter upon an inquiry as to the justice of the rates in each of the states named, as well as in Alabama, and whether or not particular rates are confiscatory or not, the master may be guarded against the labor and delay thus entailed by the parties asking proper instructions from the court as to how far the testimony should go in these matters.

The cost of these several motions are taxed equally against the parties, one-half in each case against the respondents, and one-half against the complainants.

THEBIDEAU et al. v. CAIRNS et al. (D. W. CLARK ICE CO., Garnishee).

(District Court, D. Maine. July 8, 1909.)

No. 57.

1. SHIPPING (§ 43\*)—CHARTER—READINESS AND DISPATCH.

Where a charter of a vessel contains no stipulation as to the day on which she shall load, she is required only to sail for the port of loading within a reasonable time and proceed with reasonable dispatch, and unavoidable delays due to perils of the seas do not release the charterer from his contract.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 165-168; Dec. Dig. § 43.\*]

2. SHIPPING (§ 52\*)—CHARTER—BREACH BY CHARTERER.

Where a schooner chartered to carry a cargo of ice from Boothbay, Me., was then in the harbor at Salem, Mass., where she was detained some days by ice, but left as soon as practicable and reported for loading two days thereafter, the refusal of the charterer to load her on account of the delay was not justified and was a breach of the contract.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 211; Dec. Dig. § 52.\*]

3. SHIPPING (§ 58\*)—CHARTER—ACTION FOR BREACH—DAMAGES.

Where a charterer refused, without legal excuse, to load a schooner with a cargo of ice, and after some delay she obtained a part of a cargo for the same voyage at an advanced freight, the measure of her damages recoverable for breach of the first charter was the difference between what she would have earned thereunder and what she did earn under the second, plus damages for the additional time required to complete the second voyage after she would have completed the first; her expenses being practically the same while in port as on a voyage.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 58.\*]

4. GARNISHMENT (§ 130\*)—LIABILITY OF GARNISHEE—SET-OFF.

A garnishee, which at the time of the service of process upon it had in its hands a sum of money belonging to respondents, but also had a contract with them to protect it against a claim of a third party which it paid, *held* entitled to set off such amount against the sum in its hands and to be discharged on paying the remainder to the libellant.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 255; Dec. Dig. § 130.\*]

In Admiralty. Suit for breach of charter.

Benj. Thompson, for libellant and garnishee.

James R. Parsons, for respondents.

HALE, District Judge. Thomas M. Thebideau, master and agent of the three-masted schooner W. R. Huston, brings this libel in personam, in behalf of the owners of the schooner, against the respondents, Cairns and Moore, residents of New York, to recover damages alleged to have been sustained by the libellants in consequence of the respondents' refusal to load said schooner at Boothbay Harbor in February, 1907. The D. W. Clark Ice Company is summoned as garnishee.

1. What was the contract? And what were the relations between the three parties, the libellants, respondents, and garnishee, at the time the contract was made?

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The libel alleges that on January 26, 1907, the libelant, as master and agent of the schooner *W. R. Huston*, entered into an oral charter of that schooner to the respondents, by which the respondents agreed to load ice at Boothbay for New York at the freight of 90 cents, 12 days to load and discharge. The respondents' answer admits the above allegation with reference to the charter party. While the pleadings are decisive as to what the contract was, it is necessary to briefly consider the testimony before the court, in order to find the precise relation between the three parties to the controversy.

The testimony shows that on the 26th day of January, 1907, the respondents, Cairns and Moore, made an agreement in writing with the *D. W. Clark Ice Company* of the following tenor:

"We will accept your offer for one cargo of ice at \$.60 per ton, net, f. o. b. bill of lading weight, sight draft with bill of lading, or cash upon receiving the same properly signed. We also hereby authorize you to charter vessels on our account to load ice, you to secure as low a rate as possible."

On the same day *D. W. Clark Ice Company* chartered for the respondents, through *J. S. Winslow & Co.*, Portland, "the schooner *W. R. Huston*, to load ice at Boothbay to New York, freight \$.90, twelve days to load and discharge"; and the master was ordered to report to *Luther Maddocks*, Boothbay Harbor, Me. On January 31, 1907, Cairns and Moore directed *D. W. Clark Ice Company* to:

"Consign schooner *W. R. Huston* to Cairns and Moore at Hewes street, Walabout creek, Brooklyn, New York, free wharfage and sufficient water at dock guaranteed, freight \$.90, 12 days to load and discharge. Ask captain to report to *Grill Ice Company*, office foot of Hewes street, or phone 530 East New York."

At the time of making the contract between the ice company and the respondents, as well as at the time of the charter of the schooner, the ice company had made a verbal contract with the said *Maddocks* for the purchase of water ice. In consequence of this contract with *Maddocks*, two cargoes of ice had been shipped. As soon as the ice company had made its contract with the respondents, it notified *Maddocks* that the *Huston* had been chartered, and requested him to load her on arrival.

2. Has there been a breach of the charter?

The libel alleges that, as soon after the making of the charter as the weather would permit, the schooner proceeded to Boothbay and reported to *Luther Maddocks*, who was to load her, and that thereafter she was at all times ready to receive cargo. The respondents in their answer admit that the schooner was properly equipped for the voyage, and that the respondents refused to load her. They allege: That, although the libelants had entered into a maritime contract in the nature of a charter party, their schooner did not proceed to the place of loading within such time as the weather conditions allowed; that her arrival at Boothbay Harbor was long after the time agreed for her to be there, ready to load; that in consequence of such delay the respondents refused to load her on her arrival; and that whatever damage the libelants have suffered was by reason of their own acts in unreasonably delaying the performance of the contract.

On this question of the readiness of the schooner to receive her

load within the proper time, the testimony is not extended nor contradictory. On Friday, January 25, 1907, Capt. Thebideau learned of the proposed charter of the Huston; that vessel then being at the wharf in Salem Harbor, with her sails bent. On the following Monday he received an order through Samuel R. Crowell, his broker, in Boston, directing him to report to Maddocks at Boothbay Harbor, for a cargo of ice. On the same day he went to Salem to get his vessel in readiness. Before doing so he arranged for the stores to be sent on board. He opened shipping articles for a crew, and made arrangements for them to be sent at a moment's notice. It appears that about two hours' time are required to get a crew from Boston to Salem. At the time in question, Salem Harbor was frozen over, and the weather was such that the Huston did not sail from that port until about 7 o'clock in the morning of February 11th. Capt. Thebideau testifies: That he began his voyage at the earliest possible moment; that no other vessel in Salem Harbor, bound east, had sailed earlier than the Huston; that at one time she started out and proceeded as far east as Cape Ann, when the wind breezed up and hauled ahead, so that she was compelled to return to Salem for a harbor; that one of the heaviest gales of the winter occurred that night; that on February 11th, the wind being west northwest, she got under way at 7 a. m. and proceeded on her voyage; that at 8 p. m. she anchored inside the Cuckolds just outside of Boothbay Harbor; that she anchored there because of a head wind and head tide, and because she could go no further; that on February 12th she did not get under way until 2:30, as it was blowing too hard for a light vessel to beat; that on that evening she came to anchor, and on the 13th, at about 1 o'clock p. m., was towed to the wharf; that the captain reported to Maddocks as directed, and at that time his vessel was ready to receive cargo. There is nothing to contradict the testimony of the master of the schooner. The libelants offer further testimony tending to show that the failure of the schooner to arrive was not the real reason of the respondents' attempt to cancel the charter party; but that such attempt was due to the fact that there had been a sudden decline of the price of ice in the market. They show: That on February 4th Cairns and Moore wired the agent of the ice company:

"Market very low. Ice on Huston would not pay freight. Do not load under any conditions."

That upon receipt of this telegram the ice company wired:

"Vessel is now under charter to load. Impossible to cancel order."

That on February 5th the respondents wired Mr. Clark of the ice company:

"Captain has not lived up to agreement. Will not accept cargo."

That on February 6th the ice company wrote the respondents, acknowledging receipt of their two telegrams of February 4th and 5th, and stating that they were greatly surprised at the contents of the telegrams, and further stating that they could not understand why the decline of the market should in any way affect the trade and charter of the schooner. On February 8th the respondents wrote Mr.

Clark of the ice company that the *Huston* was to have started loading ice a week from last Tuesday, and at that time they had a market for it; but at the present time they had not a market for it. The letter of the respondents to Mr. Clark concluded by saying:

"We positively refuse to accept the cargo and beg you to advise her brokers."

On February 9th the ice company wrote the respondents acknowledging the receipt of their favor, and saying that they note that:

"You positively refuse to accept the cargo of ice which we have sold you, and that you desire us to advise the vessel's brokers. \* \* \* We are, as you know, not only able to comply with our part of the contract in every particular, but are anxious to do so, and avoid the annoyance growing out of doing business in this way."

This letter also states:

"We are notifying both the broker and master of the *Huston* of your position, and they will doubtless have a claim against you for damages which must be arranged in some way. This matter can probably be very much better adjusted now than it can after legal proceedings have been commenced by the vessel owners."

The whole testimony upon this point induces the belief that the delay caused by the schooner's failure to arrive at her loading port was due to head winds and heavy weather and in general to perils of the seas, and that therefore the charterers were not relieved from the obligations of the charter party. It is a well-settled rule of maritime law that all contracts under which vessels are to proceed on a voyage, for the receipt of cargo, are contingent upon the perils of navigation. *Huron Barge Company v. Turney et al.* (D. C.) 71 Fed. 972, 977; *The Hiram* (D. C.) 101 Fed. 138.

In *Hall v. Hurlbut*, Fed. Cas. No. 5936, a Circuit Court case in 1858, Mr. Chief Justice Taney of the Supreme Court said:

"The written contract contains no stipulation on their part that the vessel shall arrive at or before a particular day. The law implies no other condition than that reasonable and proper exertions shall be made, to perform the voyages contemplated by the charter party, as speedily as practicable; and the shipper takes the risk of delay or detention, by any superior force which the vessel could not resist or overcome, whether it be an embargo by the government, or a storm on the ocean."

In *Fearing v. Cheeseman*, 3 Cliff. 91, Fed. Cas. No. 4710, a Circuit Court case arising in this district, in speaking for the Circuit Court, Mr. Justice Clifford held:

"Where in a charter party no stipulation is made as to the day the vessel should sail, or the time she was to be allowed for the trip, the rule of construction is that she is to sail within a reasonable time, and to proceed with reasonable dispatch, and without unnecessary deviation, to the place of loading, unless delayed by the public enemy or perils of the seas."

The court said:

"Performance of that implied covenant was as much required by the charter party as that notice of readiness of the vessel to receive cargo should be given on her arrival at the place of loading. Such notice could not properly be given before the vessel actually arrived, and the implied requirement was that she should proceed there with reasonable dispatch, the dangers of the seas and navigation excepted. Unavoidable delay arising from these causes would not discharge the charterers from their covenant to load the vessel, un-



less the delay was so great as to frustrate the voyage or deprive the freighter of the benefit of his contract."

The evidence in the case at bar compels me to decide that there was no unnecessary delay on the part of the schooner; that reasonable and proper exertions were made to arrive at the port of shipment; that the libelants have not waived the provisions of the charter party; but that there has been a breach of the charter by the respondents.

3. What damages, then, are the libelants entitled to recover? The law on this subject is to be determined by the courts of admiralty, on well-defined principles.

Scrutton on Charter Parties, pp. 271, 272, states the English rule:

"In an action against charterer for not loading a cargo, the measure of damage is the amount of freight which would have been earned under the charter, after deducting the expenses of earning it, and also any net profit the ship may have earned during the period of the charter. It is probable that any freight the ship might have earned by reasonable diligence after the final breach is to be deducted also."

In *Jordan v. Eaton*, Fed. Cas. No. 7520, Judge Fox of this district defines the correct rule in this country:

"The damages, for breach of a charter by the shipper, is the difference between the price stipulated and the freight that could be obtained for the same voyage by reasonable diligence."

In *Watts v. J. B. Camors & Co.* (C. C.) 10 Fed. 145, Judge Pardee states the rule of damages in cases of delay and in cases of loss of earnings:

"The libelants can recover only the actual damages suffered by the default of the charterers. These actual damages are for: (1) The expenses incurred in fitting the *Highbury* to receive a cargo of grain; (2) the delay, after the expiration of the lay days stipulated in the charter party, in obtaining and loading another cargo, to be allowed at the rate fixed in the contract; (3) the loss, if any, of freight on the cargo obtained, as against that contracted to be furnished by the defendants."

This case was affirmed by the Supreme Court in 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406.

In *Dalbeattie Steamship Co., Limited, v. Card* (D. C.) 59 Fed. 159, it was held by Judge Simonton:

"In awarding damages against a charterer for refusing a vessel, the net freight earned by obtaining another—less valuable—cargo is to be deducted from the sum which would have been earned under the charter."

In *Leblond v. McNear* (D. C.) 104 Fed. 826, the District Court of California held:

"Where, on the refusal of a charterer to accept the vessel, she was at once advertised for charter, and rechartered to the same person, for the same voyage, at a lower rate, which voyage she made, the difference between the freights to be paid under the two charters, plus the demurrage fixed by the original charter for the delay in obtaining the second, does not furnish the measure of damages; but the measure is the difference between the freight which would have been received under the first charter and the amount actually earned under the second, up to the time when the voyage under the first would have been completed, the expenses of the two voyages being presumably the same; and, where the one actually made was under ordinary conditions, it furnishes relevant evidence of the time which would have been required under the first charter."

And the case was affirmed in *McNear v. Leblond*, 123 Fed. 384, 61 C. C. A. 564, where the Circuit Court of Appeals said:

"Where, on the refusal of a charterer, without legal cause, to accept the vessel, she was at once advertised for charter and rechartered to the same person, for the same voyage, at a lower rate, which voyage she made, the measure of damages for breach of the first charter is the difference between the freight she would have received under such charter and the amount actually earned under the second up to the time when the voyage under the first would have been completed, the expenses of the two voyages being presumably the same; and where the one actually made was under ordinary conditions, it furnishes relevant evidence of the time which would have been required under the first charter." *Cornwall v. J. J. Moore & Co. (D. C.)* 125 Fed. 646; *Id.*, 132 Fed. 868; *Id.*, 144 Fed. 22, 32, 75 C. C. A. 180.

In *The Gazelle and Cargo*, 128 U. S. 474, 487, 9 Sup. Ct. 139, 142, 32 L. Ed. 496, in speaking for the Supreme Court, Mr. Justice Gray said:

"The Circuit Court has found simply that the time required to perform such a voyage as that stated in the charter would have been about the same time as elapsed before the vessel procured another charter; that another charter was procured as soon as could have been done; and that the expenses of the vessel in port were not less than on the voyage.

"Nothing, therefore, is shown to take the case out of the general rule, that a shipowner, who is prevented from performing the voyage by a wrongful act of the charterer, is *prima facie* entitled to the freight that he would have earned, less what it would have cost him to earn it."

In the case at bar, the schooner, at the time of the refusal to load, was in a port away from the center of trade, and where opportunities for charter were limited, in a great measure, to the ice trade. The evidence relating to this point is found in the uncontradicted testimony of the master of the schooner. He says: That, when the respondents refused to load under the charter, he immediately sought to obtain other employment; that he did not succeed until March 3d, when he contracted by charter for about a half a cargo of ice, but at a freight of \$1.25; that on March 5th the *Huston* began to load under the latter charter, and completed her loading the same day, having on board 536 tons of ice.

The court is requested by all parties to the controversy to itself award the damages, in order to save the expense of reference to an assessor. It is not altogether easy to make this award, upon the testimony before me. The substantial facts relating to the award of damages are these: On January 28th Capt. Thebideau began to prepare his schooner for the voyage. He arrived at Boothbay Harbor on February 13th, and would have been loaded on the 15th; but he did not succeed in getting a new charter until March 3d. On the new charter he began loading March 5th, and finished March 6th, having on board 536 tons. If the respondents had loaded the *Huston* immediately upon her reporting on February 13th, I may fairly assume that she might have been able to perform her voyage in 10 days, and would have reached New York by February 25th, and would have made delivery of her cargo 9 days later, or March 7th. This would have given the charterers the full 12 days for loading and discharging, and would have allowed 10 days to make the run to New York. *Leblond v. McNear*,

supra, was decided upon somewhat similar facts. In that case the court held:

"The measure is the difference between the freight which would have been received under the first charter and the amount actually earned under the second, up to the time when the voyage under the first would have been completed; the expenses of the two voyages being presumably the same."

The court must deal with the facts before it in a reasonable manner, with the view of obtaining substantial justice; and, in case of uncertainties and difficulties in determining the exact loss, the court should see that the loss falls, as far as possible, upon the respondents, when they are found to be at fault. There are many cases, where courts have dealt with this question upon records showing difficulties somewhat like those in the case at bar. *Venus Shipping Co. v. Wilson*, 152 Fed. 170, 81 C. C. A. 368; *The Gazelle*, 2 Rob. Adm. 279; *Tabor v. Dexler*, Fed. Cas. No. 13,723; *Stepanovitch v. Gillibrand*, Fed. Cas. No. 13,360; *Roehm v. Horst*, 91 Fed. 345, 349, 33 C. C. A. 550; *Taylor Manufacturing Co. v. Hatcher Manufacturing Co.* (C. C.) 39 Fed. 440, 3 L. R. A. 587.

Upon careful examination of the evidence relating to damages, I think it fair to assume that the second charter would require substantially the same length of time to perform as the first charter required. It would take slightly less time to discharge the 536 tons of ice than it would have taken to discharge the full cargo of 950 tons. If the schooner had carried the same amount of cargo on the second voyage which she carried on the first voyage, the damages would have been simply the delay in obtaining the second cargo; but she carried less under the second charter than she would have carried under the first, and so we have the element of dead freight to be taken into consideration, making allowance, of course, for the increased rate of freight that the vessel received under the second charter of \$1.25 for a small cargo, over the 90 cents which she was entitled to receive on the first cargo. We may accept 950 tons as the carrying capacity of the vessel. At a freight of 90 cents per ton on the 950 tons, we have \$855. From this deduct freight on 536 tons at \$1.25 per ton, \$670, leaving \$185. To this must be added damages for such further delay as the vessel sustained by detention over and above the time which was required to perform the voyage. It is difficult to find exactly what this time should be. I allow 10 days, at the rate of \$55 per day, or \$550. Adding this to the \$185, we have \$735, to which should be added interest from April 1, 1907, \$115, making a total of \$850.

4. For what amount should the garnishee, the D. W. Clark Ice Company, be charged? Its answer states that, at the time of the service of the process of this court, it had in its hands the sum of \$400. It seeks to set off against this sum the damages which it has sustained by the respondents' failure to carry out their contract. In addition to this the garnishee seeks to set off such amount as it has been obliged to pay Luther Maddocks for damages sustained by him, in consequence of the failure of the garnishee to carry out its contract for the purchase of a cargo of ice; the garnishee claiming that its obligation to pay Maddocks arises from a contract made between it and the respondents. The testimony shows that at the time of making the origi-

nal contract between the garnishee and the respondents, for the sale of the cargo of ice, Cairns and Moore, the respondents, paid the ice company \$600. The ice company held the \$600 until February 19th, when Mr. Clark met one of the representatives of Cairns and Moore at the Knickerbocker Hotel in New York. At this interview Mr. Luther Maddocks of Boothbay Harbor was also present, and then claimed damages for the failure to load the Huston. On the following morning Mr. Clark met Mr. Cairns at the same hotel, and, after some negotiations respecting an adjustment of the matter, the latter prepared and gave Mr. Clark a writing of the following tenor:

"We hereby agree to protect the D. W. Clark Ice Company of Portland, Maine, from any and all claims or damages for delays or refusals to load said schooner W. R. Huston chartered by us to load ice at Boothbay, Maine."

Later the Maddocks claim was adjusted by the ice company paying him the sum of \$150. The ice company now claims that it should be permitted to offset that amount against the fund of \$400 in its hands at the time of the service of the process.

The court must give some weight to this agreement, based as it was upon a valid consideration, and it appearing that the Maddocks claim must not only have been in the minds of the parties at the time of making this agreement, but clearly was the one intended to be covered by it. The claim of the garnishee is therefore sustained. The sum of \$150 paid to Luther Maddocks may be set off against the funds in the garnishee's hands. In addition thereto, the ice company should be allowed the difference between the contract price for the purchase of the ice at 45 cents per ton, and the selling price, 60 cents per ton. The loss of profits on 950 tons at 15 cents per ton is \$135; amount paid Luther Maddocks, \$150—making a total of \$285. This sum should be allowed to the ice company as a set-off against the money in its hands at the time of service of the process. This leaves a balance of \$115 in the hands of the garnishee, and for this it should be charged. No interest should be charged the garnishee for the funds while in its hands, as no interest was received by the garnishee.

5. A decree may be entered for the libelants for the sum of \$850, with costs.

The garnishee is to be charged for the sum of \$115, less its costs.

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Ex parte ROCK.

(Circuit Court, N. D. Ohio, E. D. February 17, 1909.)

No. 7,709.

**HABEAS CORPUS (§ 16\*)—ARMY AND NAVY (§ 44\*)—DETENTION UNDER MILITARY AUTHORITY—UNLAWFUL ENLISTMENT OF MINOR.**

The fact that a person was enlisted in the navy before reaching the required age and in violation of the statute does not render his enlistment void, and he is subject to arrest and punishment for desertion or other infraction of the rules and regulations of the navy, and cannot be dis-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charged on writ of habeas corpus pending proceedings against him therefor.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 16; Dec. Dig. § 16;\* Army and Navy, Cent. Dig. § 92; Dec. Dig. § 44.\*]

Application for Writ of Habeas Corpus.

Lawrence, Russell & Eichelberger, for plaintiff.

William L. Day, U. S. Dist. Atty., for defendant.

TAYLER, District Judge. This is an application by Charles J. Rock, father of Ralph J. Rock, to obtain a discharge of the son by means of a writ of habeas corpus.

Ralph J. Rock has been arrested by the United States naval authorities on a charge of desertion, and has been confined for safe-keeping with the sheriff of Cuyahoga county, pending removal to a naval station. The ground upon which the claim is made that the son should be discharged is that his enlistment in the United States navy as an apprentice seaman April 30, 1907, was void; he being then under the age of 18 years, and no certificate of birth, or written evidence other than his own statement, satisfactory to the recruiting officer, showing the applicant to be of age required by naval regulations, having been presented with the application for enlistment, and his parents or guardian not having consented to his enlistment.

The act making appropriations for the naval service for the fiscal year ending June 30, 1907, passed June 29, 1906, provides:

"That no part of this appropriation shall be expended in recruiting seamen, ordinary seamen or apprentice seamen, unless a certificate of birth or written evidence other than his own statement, satisfactory to the recruiting officer, showing the applicant to be of age required by naval regulations, shall be presented with the application for enlistment." Act June 29, 1906, c. 3590, 34 Stat. 555.

This was the first time such a provision appeared in an appropriation bill. Prior to that, the Revised Statutes authorized the enlistment of boys between the ages of 16 and 18 years with the consent of their parents or guardians. Young Rock enlisted about two months before he became 16 years of age, having stated under oath that he was 18 years and 11 months old, and thereafter served in the navy, receiving the usual rate of pay, until about the 28th day of September, 1907, when, being 16 years and 3 months old, he deserted. The claim is made that, under these circumstances, his enlistment was void, and that, therefore, the military authorities have no jurisdiction to try or punish him for an offense committed during the period that he was supposed to be an enlisted man.

No case has yet arisen, so far as the reports show, construing the particular provision of the statute to which reference has just been made as being in effect at the time that Rock enlisted; but it seems to me that, on principle as well as authority, it is impossible to escape the conclusion laid down in *Dillingham v. Booker et al.* (C. C. A.) 163 Fed. 696. The act of 1906 undoubtedly had the effect of justifying the accounting officer in refusing to pass the account of the re-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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cruiting officer who recruited Rock, in the absence of the certificate or other written evidence referred to in the provision of the appropriation bill. As said in *Dillingham v. Booker*, *supra*:

"It may be admitted that he fraudulently enlisted. Still he was both *de facto* and *de jure* in the navy, until discharged therefrom by operation of law, and while he was so a seaman, he was subject to the rules and regulations of the navy, and liable to be tried and punished for any infraction of the laws relating thereto. To hold otherwise will make enlistment a farce, will destroy discipline, and offer a premium for desertion. It will not do to hold that he cannot be punished by court-martial for crimes committed when he was in the naval service, simply because his parents did not consent to his enlistment."

It is quite true that his service might at any time be ended upon the application of his parents, but for acts committed by him while thus in the service undoubtedly military discipline would require that the rules customarily applicable to such a case should be enforced. If his enlistment was void, then there was no right to discipline him at any period of his service, even though he was not undertaking to escape it. If his enlistment was void (which means that he was never in the service), then any act by any person claiming to be in authority over him, whereby any of the natural rights of the alleged enlisted man were denied to him, as, for instance, if he had been imprisoned for an hour, or a day, or a week, because of some infraction of the rules, a civil action for damages would lie in his favor, or in favor of his parents, against the particular individuals who were responsible for such punishment.

No rule of law, it seems to me, can be cited that will ever protect a public officer from the consequences of any act which he may imagine he is performing as a public officer, but which involves an exercise of authority by him as to some person over whom he is absolutely without authority. To hold that this young man cannot be held to respond to the disciplinary rules of the navy under the circumstances of this case is, as it seems to me, to deny all authority in the military arm over persons who may appear or seem to be in the public service.

The act of Congress does not declare that such an enlistment as we have in this case is void, but only seeks to protect against the enlistment of persons who are not of the age which the law requires by a provision limiting the expenditure of money to cases in which it does appear that the person thus enlisted is of the required age.

The application will, therefore, be denied, and an order made turning Ralph J. Rock over to the naval officer authorized to receive him.

## VILLAGE S. S. CO., Limited, v. STANDARD OIL CO. OF NEW YORK.

(District Court, S. D. New York. April 20, 1909.)

## SHIPPING (§ 153\*)—CARRIAGE OF GOODS—LIABILITY OF VESSEL FOR SHORT DELIVERY.

Libelant steamship company brought suit to recover a balance of freight money for the carriage of a cargo of oil in cases, which was withheld by the charterer to cover a shortage in delivery. The cargo was discharged at Whampoa, China, into lighters provided by the charterer, in which it was taken 14 miles up the river to Canton, where it was stored in warehouses. The tally on the ship was kept by Chinese tallymen employed by the captain, and showed a shortage, as did the tally at the warehouses. Libelant claimed that the whole number of cases was in fact delivered to the lighters, and the missing cases were stolen between the ship and warehouses, an incorrect and fraudulent tally having been made through collusion between the Chinese tallymen and lightermen. *Held*, that the burden rested upon it to prove such fact, and that, while the evidence established its probability, it was not sufficient to entitle libelant to recover, in view of the fact that the captain failed in his duty to have the tally taken or supervised by white men, as he could have done and was advised to do.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 153.\*]

## In Admiralty.

Libel by the owner of the steamship *Drumgeith* to recover \$753.36, deducted by the charterer from freight money for an alleged shortage of 415 cases of oil upon delivery of the cargo. The vessel was chartered to carry a full cargo of case oil from New York to Whampoa, China. At Whampoa the cargo was discharged into lighters provided by the charterer, under the direction of a Chinese stevedore and tally clerks engaged by the captain of the steamship. The tally kept by them showed a shortage of 541 cases, but this afterwards, by various additions and deductions, was reduced to 415 cases. The cargo was transported in the lighters 14 miles up the river to Canton, where it was discharged into the warehouses.

Convers & Kirlin (Charles R. Hickox, of counsel), for libelant.

Wing, Putnam & Burlingham (Charles C. Burlingham, of counsel), for respondent.

HOLT, District Judge (after stating the facts as above). I think that probably the missing cases of oil were stolen after the ship arrived at Whampoa, either before or during the process of unloading, or from the lighters during their passage between the ship and the warehouse. If they were originally got off the ship into the lighters, with the intent of stealing them, pursuant to a scheme of false tallying, it may perhaps be claimed that they were stolen from the ship, although they were delivered from the ship into the lighters, and were then taken from the lighters during their passage to the warehouse. I think the probability is that the Chinese tallymen were in collusion with the Chinamen on the lighters, and intentionally made a false tally, less than the actual number of cases delivered into the lighters, and that the surplus cases were stolen on the passage to the warehouse. By this scheme the ship tally on each lot would correspond with the warehouse tally, and the loss would not appear until the entire cargo was landed. But this is a mere probability, which can-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not be determined, on the evidence, with any certainty. The libelant's counsel states, in his brief, that there is no certainty that the number of cases named in the bill of lading was actually put on board, and it is undoubtedly the law that, while the number stated in the bill of lading is prima facie evidence of the amount shipped, in case of fraud or mistake the actual facts may be proved. But I think that the evidence is clear that the number of cases stated in the bill of lading, 149,160, was in fact taken on board the ship. The bill of lading says so without qualification. The libel alleges it to be so. Capt. Fairweather, in his testimony, admits it. The cases were tallied, before being taken on board, by what is called the "block system" of tallying, under which a number of cases were arranged so as to make a cube. By this method the number of cases in the cube can be accurately computed, and there is less danger of any mistake than where cases put on board are tallied one by one. I am satisfied, therefore, that the vessel took on board the exact number of 149,160 cases.

By the terms of the charter party, the respondent agreed to pay the libelant 20½ cents "on each and every case delivered, whether full, part full, or empty, payable upon correct delivery of cargo at the port of discharge." This suit is brought to recover the amount due for freight on the entire 149,160. The libelant, therefore, has the burden of proof to establish that it delivered that number. When the delivery was finished, the tally kept on the ship showed a shortage of over 500 cases. The libelant has given satisfactory testimony that when the delivery was completed all the cases which had been put on board were out of the ship, and has given testimony strongly tending to show that there could have been no abstraction of any cases from the ship before her arrival at Whampoa. The libelant's claim is, substantially, that the tally kept on the ship was incorrect, that all the cases were delivered, and that the cases that were actually missing on the arrival of the lighters at the warehouse were taken from the lighters on their voyage from the ship to the warehouse. But the question is, was the tally kept on shipboard in fact erroneous? The captain employed Chinese tallymen and stevedores to unload the ship. He consulted with the agent of the Standard Oil Company, and says he was recommended to take the tallymen and stevedores who had just been engaged in unloading another vessel, the Lawhill. The respondent's agent states that he simply suggested that the captain could employ the men who had just been working on the Lawhill. He expressly warned him, however, of the untrustworthiness of the Chinese, and advised him to have Europeans supervise his tally, and the captain repeatedly, in letters, announced his entire lack of confidence in the honesty of the Chinese. But the captain, admittedly, did not have the tallying done under the supervision of any European. The evidence shows that the unloading, during much of the time, went on at four or five hatches at once. There is no evidence that the captain or any of his officers kept or supervised the keeping of the tally, or exercised any efficient supervision over the work at each hatch during the unloading. The captain says, in explanation of this omission, that he had but two officers. But he had enough able seamen on board. The ship was at anchor. The men had nothing



to do, and there could have been no difficulty in his having the accuracy of the tally at each hatch supervised by trustworthy Europeans. If that had been done, I think that probably the entire 149,160 cases would have been tallied as coming out of the ship. But obviously, if a tally correctly taken had showed the shortage which appeared on the tally actually taken, the ship would be liable for it, and would not be entitled to freight except on the actual number of cases delivered. Upon the whole case, I think that the libelant, in order to maintain this action, had the burden of proving that it delivered 149,160 cases. As the tally which was taken shows a less amount, and as the claim of the libelant is that that tally was fraudulently erroneous, and as, if there were errors in that tally, either through a mistake or fraud, such errors could have been prevented by the captain, if he had attended to his fundamental duty of having an accurate and trustworthy tally kept, I do not think that the libelant has sustained the burden of proof necessary to be sustained by it in order to recover in this case.

The libel should be dismissed, with costs.

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E. J. LAVINO & CO. v. UNITED STATES. O. G. HEMPSTEAD & SON v. SAME. J. H. HAMPTON, JR., & CO. v. SAME.

(Circuit Court, E. D. Pennsylvania. May 11, 1909.)

Nos. 160, 162, 182 (2,020-2,022).

CUSTOMS DUTIES (§ 44\*)—CLASSIFICATION—FERRO ALLOYS—"UNWROUGHT METALS."

Proof that the alloys ferro-chrome, ferro-tungsten, and ferro-vanadium have been experimentally wrought does not sufficiently show them to be capable of being wrought to enable them to be classified as "unwrought metals" under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 183, 30 Stat. 166 (U. S. Comp. St. 1901, p. 1645). Those alloys are dutiable by similitude as ferro-manganese under paragraph 122, 30 Stat. 159 (U. S. Comp. St. 1901, p. 1636).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.\*

For other definitions, see Words and Phrases, vol. 8, p. 7221.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below is reported as G. A. 6,755 (T. D. 28,948).

Thomas Leaming and William M. Stewart, Jr. (George J. Harding, on the brief), for Lavino & Co. and Hempstead & Son.

Walter Evans Hampton, for Hampton & Co.

Everit Brown and Charles Fuller, Sp. Asst. U. S. Attys. (J. Whitaker Thompson, U. S. Atty., and Jasper Yeates Brinton, Asst. U. S. Atty., on the brief).

HOLLAND, District Judge. Between July 19, 1906, and June 19, 1907, the appellants imported through the port of Philadelphia certain merchandise known as "ferro-tungsten," "ferro-chrome," and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"ferro-vanadium," upon which the collector assessed a duty at the rate of 20 per cent. ad valorem under the provisions of paragraph 183 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645]), which reads as follows:

"183. Metallic mineral substances in a crude state, and metals unwrought, not specially provided for in this act, twenty per centum ad valorem; mozanite sand and thorite six cents per pound."

Protests were duly filed against this classification and assessment by the importers, and claim was made by them that the merchandise, in each case, because of its similitude to ferro-manganese and ferro-silicon, was properly dutiable at \$4 per ton under paragraph 122, by virtue of the similitude clause of section 7 of the tariff act of 1897.

Paragraph 122 is as follows:

"Iron in pigs, iron kentledge, spiegeleisen, ferro-manganese, ferro-silicon, wrought and cast scrap iron and scrap steel four dollars per ton."

Section 7 of the tariff act containing the similitude clause reads as follows:

"That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned."

This identical question has been passed upon by the courts in the Second circuit. These same three ferros were before the courts there, and the Circuit Court of Appeals in the case of Roessler & Hasslacher Chemical Co. v. Peterson, 134 Fed. 789, 67 C. C. A. 295, held that ferro-tungsten, ferro-chrome, and ferro-vanadium, like ferro-manganese, are employed as alloys in making steel, which so resembles ferro-manganese that even experts are unable to tell them apart, and which are similar in quality and use to ferro-manganese, though they produce different results, and are not applied at the same stage in the process of making steel, and are, by virtue of the similitude clause in section 7 of the tariff act of July 24, 1897, dutiable at the rate applicable to the ferro-manganese under paragraph 122 of the said act.

It was urged in that case that these ferros should be classified as metals unwrought under paragraph 183, but the court held that "unwrought" implies a metal which is capable of being wrought, and not a substance fit only to be used with other ingredients to produce an entirely different and distinct product, and that ferro-chrome, ferro-tungsten, and ferro-vanadium, used only in imparting certain qualities to steel and incapable of being themselves wrought into any useful article, are not within said provision.

It is now contended that in the case at bar the facts are entirely different from those upon which the Roessler Case was decided, in that it is now shown by the proofs that these ferros are capable of being themselves wrought. The testimony of two witnesses was offered to show that these ferros are "malleable," and can be "changed" in "shape by forging." One of the expert witnesses, however,

stated that his experiments were a failure with ferro-tungsten, but after he had cast ferro-chrome in a furnace in the shape of a slab, a piece of which had been planed by a planing machine, he had given the same to a blacksmith, "who forged it up in \* \* \* shape by hammering." The other witness, who was also an expert, testified that he had some success in his experiments with ferro-tungsten, although neither of these articles made by them are manufactured for commercial purposes, but were only produced as an experiment for the government in this case.

We do not think the proof of these experiments is sufficient to warrant a different classification, nor should the other reasons urged prevail in view of the decision of the Circuit Court of Appeals in the Second circuit in the Roessler Case, *supra*. These articles of importation were not before the court in the Third circuit in the case of Cramp v. U. S. (C. C.) 139 Fed. 303, and we cannot agree with the Board of General Appraisers that the decision in the latter case is controlling in the classification of these three ferros, when it is remembered that they were specifically passed on in the Roessler Case, and for the sake of uniformity the decision in the latter should be followed. The practical result of a different conclusion in this regard would require importers through the port of Philadelphia to pay as much as \$850 a ton on vanadium, \$450 a ton on tungsten, and \$160 a ton on chrome. The same articles could be imported through the port of New York at \$4 a ton. This should not be permitted, unless it clearly appears there was an error in the classification of these articles in the Second circuit, and we are not convinced there was. For the reasons stated in the Roessler Case, we think that ferro-vanadium, ferro-tungsten, and ferro-chrome should have been classified and assessed under paragraph 122 of the tariff act of 1897 at \$4 a ton.

The decision of the Board of General Appraisers is therefore reversed.

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UNITED STATES. to Use of WILLIAMSON BROS. CO., v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court, E. D. Pennsylvania. June 28, 1909.)

No. 596.

**UNITED STATES (§ 67\*)—CONTRACTS FOR PUBLIC WORKS—ACTION AGAINST SURETY ON CONTRACTOR'S BOND.**

Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), amendatory of Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), and relating to the right of persons furnishing labor or materials for the construction of public works to enforce payment therefor against the bonds of the contractors, is not retroactive, and the limitation therein does not apply to a cause of action which accrued before its passage by the default of the contractor, which gave the labor or materialman a right of action at once under the old statute, without reference to the time when he applied for and obtained from the department certified copies of the contract and bond.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Frederick J. Geiger, for plaintiff.

R. Stuart Smith, for defendant.

LANNING, Circuit Judge. The contention of the plaintiff in this case is that the affidavit of defense is insufficient and that judgment should be entered over it in favor of the plaintiff. The action is on the joint and several bond of the defendant and the Neafy & Levy Ship & Engine Building Company to the United States, in the penal sum of \$100,000, dated June 26, 1903, conditioned to secure the performance by the defendant's co-obligor of a contract dated June 24, 1903, by which the defendant's co-obligor agreed to construct and equip for the United States four twin-screw steel steamers for submarine mine service. One of the conditions of the bond was that the defendant's co-obligor should "promptly make full payments to all persons supplying labor or materials in the prosecution of the work provided for in said contract." Williamson Bros. Company, the party to whose use this action is brought, furnished certain machinery for the four steamers on the orders of the defendant's co-obligor. The machinery has not been paid for. Hence this suit.

The bond was given pursuant to the provisions of Act Aug. 13, 1894, c. 280, 28 Stat. 278, 6 Fed. St. Ann. 125 (U. S. Comp. St. 1901, p. 2523). Williamson Bros. Company furnished the machinery in June and July, 1904. On October 31, 1904, the steamers having been completed, the United States paid to the defendant's co-obligor the amount due on the contract. On February 24, 1905, the act of 1894 was amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811, 10 Fed. St. Ann. 343 (U. S. Comp. St. Supp. 1907, p. 709). The act of 1894 prescribes no limitation of time within which action may be commenced on the bond. The amendatory act of 1905 gives to the United States the exclusive right to commence action on the bond for the period of six months from the completion and final settlement of the contract; materialmen and laborers, however, having the right to intervene and become parties to such action. After the expiration of the six months, if the United States has within that period commenced no action, and within one year from such completion and final settlement, any materialman or laborer may, by furnishing to the proper executive department an affidavit showing his claim, obtain certified copies of the contract and bond, and himself commence an action on the bond, to which other materialmen and laborers having unsettled claims may be admitted as parties. This limitation in the amendatory act, the defendant contends, is applicable to the present action. No other defense is presented. The simple question, therefore, is: Is the plaintiff's action barred by this limitation?

The act of 1905 amends the act of 1894 in several very important particulars. The amendments relate both to procedure and to substantive rights. To hold the act of 1905 retrospective as to the amendments that relate to procedure and prospective as to the amendments that affect substantive rights requires a construction expressly repudiated by the Supreme Court in *United States Fidelity Co. v. Struthers Wells Co.*, 209 U. S. 306, 28 Sup. Ct. 537, 52 L. Ed. 804. The bond now sued on was executed, the materials of Williamson Bros. Compa-

ny were furnished, the work under the contract was completed, and final settlement with the contractor was made by the United States, before November 1, 1904. It was nearly four months afterwards that Congress passed the amendatory act, and it then expressly provided that the amendatory legislation should relate only to contracts thereafter made. By the act of 1894 a cause of action accrued to Williamson Bros. Company immediately upon default in payment of the amount due for the machinery furnished. It is true that certified copies of the contract and bond were not obtained by Williamson Bros. Company until January 7, 1908. But the provision of the act of 1894 for obtaining such certified copies is merely designed to aid a materialman or a laborer in preparing his pleadings and proving his case. It does not relate to the cause or right of action. The language is:

"Any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action," etc.

The word "which," where it is here last used, has, as its antecedent, the words "contract and bond," and not the words "certified copy." The argument of the defendant that the action is upon the "certified copy," and that the receipt of the "certified copy" is a condition precedent to the accrual of the right of action, is therefore unsound. For months before the act of 1905 was passed Williamson Bros. Company had the right to commence an action on the bond, in the name of the United States, without previous leave obtained from any department of the government, and to control the action in the same manner as it might control an action brought in its own name. *United States v. National Surety Co.*, 92 Fed. 551, 34 C. C. A. 526; *Title G. & T. Co. v. Puget Sound Engine Works*, 163 Fed. 178, 89 C. C. A. 618.

It will be observed, then, that if the act of 1905 be construed to apply to the present cause, the right of Williamson Bros. Company to commence suit, which accrued in 1904, was suspended on February 24, 1905, upon the passage on that date of the amendatory act, until April 30, 1905, which was six months after October 31, 1904, when final settlement of the contract was made by the United States. Even if such a suspension should be held to relate to procedure only, and not to substantive right, such a construction would be a plain departure from the rule established by the opinion of Mr. Justice Peckham in *United States Fidelity Co. v. Struthers Wells Co.*, *supra*.

My conclusion is that the affidavit of defense is fatally defective, and that the plaintiff is entitled to have judgment entered against the defendant for the amount claimed in its statement.

Ex parte CROWDER.

(Circuit Court, W. D. Washington, N. D. June 29, 1909.)

No. 1,785.

**1. HABEAS CORPUS (§ 45\*)—JURISDICTION OF FEDERAL COURTS—PERSONS DETAINED BY STATE AUTHORITY.**

Where an act made the basis of a criminal prosecution under a state law is not alleged to have been done as an agent of the national government, nor pursuant to authority conferred by it, nor in the exercise of a right given by it, the federal courts cannot properly acquire jurisdiction by the writ of habeas corpus to adjudicate the question whether the accused is guilty or not guilty, whether the disputed question is one of fact or law.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 45.\*

Jurisdiction of federal courts. see note to *In re Huse*. 25 C. C. A. 4.]

**2. CONSTITUTIONAL LAW (§§ 230, 287\*)—COMMERCE (§ 68\*)—LICENSES—PEDDLERS.**

The statute of Washington (Laws 1909, p. 737, c. 214, § 3) requiring peddlers, with certain exceptions, to procure a license in each county where they do business, except in cities and towns which have ordinances regulating the business, to pay a license fee of from \$100 to \$250 per year, and to make a special deposit of \$500, to remain until after the year's term of the license shall have expired, is a valid police regulation and revenue statute, within the power of the state, and is not in violation of the Constitution of the United States, as depriving persons of equal protection of the laws, or as depriving them of their property without due process of law; nor does it create an invidious burden on interstate commerce.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 687, 831, 905; Dec. Dig. §§ 230, 287; \* Commerce, Cent. Dig. §§ 107-109; Dec. Dig. § 68.\*]

Habeas Corpus. Hearing on the merits. Writ discharged, and petitioner remanded.

A. C. Lyon and Weter & Roberts, for petitioner.

Geo. F. Vanderveer and R. W. Prigmore, for the State of Washington.

HANFORD, District Judge. In this case a writ of habeas corpus was issued for the purpose of testing the constitutionality of a statute of this state, recently enacted, providing for the licensing of peddlers; and it has been argued and submitted upon an agreed statement of facts, by which it appears that the petitioner, as agent for the Spaulding Manufacturing Company, of Grinnell, Iowa, solicited and received an order for a buggy to be subsequently delivered from Grinnell. The sale having been consummated by delivery of the buggy from a stock kept by the manufacturer in a warehouse within this state, and the solicitor having failed to obtain a license, he was accused of violating the statute, and will be arraigned and prosecuted on that charge, unless the power of this court, which he invokes, shall be exerted to shield him on the alleged ground that such a proceeding is violative of his right to carry on a lawful business in a lawful manner.

The petitioner asserts that the statute is not applicable to the transaction set forth in the agreed statement of facts and that he is not guilty of the offense charged. If right in this contention, he will be acquitted on a fair trial, or, if he should be wrongfully convicted, he can have

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

redress by an appeal to the courts having appellate jurisdiction. Where an act, made the basis of a criminal charge under a state law, is not alleged to have been done as an agent of the national government, nor pursuant to authority conferred by it, nor in the exercise of a right by it given, the federal courts cannot properly acquire jurisdiction by the writ of habeas corpus to adjudicate the question whether the accused is guilty or not guilty. This is so, whether the disputed question to be decided is one of fact or law. If the highest court of the state denies a right or immunity guaranteed by the federal Constitution or laws, the Supreme Court may be applied to for relief. *In re Friedrich* (C. C.) 51 Fed. 747; *Id.*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; *Baker v. Grice*, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748; *Urquhart v. Brown*, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760. Therefore the court declines to express any opinion as to the question first suggested.

This statute is wise and salutary, and in the opinion of the court it is not unconstitutional. For the general welfare the business of peddling ought to be restrained and regulated. Peddlers as a class are objectionable, because their visitations are annoying to the majority of people, who dislike to be ungente in their treatment of strangers, but find no way, while patience endures, of silencing the importunity of peddlers, who are mostly wanderers and irresponsible. Many of them are professional swindlers. Such atrocious crimes as burglary, rape, robbery, and murder are frequently planned by villains who have spied upon their victims in the guise of peddlers. On the other hand, purveyors of necessities, who go round a circuit with regularity, are welcomed by their patrons and deserve encouragement. In view of these well-known conditions, it is within the police power of the state to enact a discriminating law, to prevent as far as possible the evils incident to peddling, which will not unnecessarily interfere with legitimate business.

The statute under consideration (see *Laws Wash.* 1909, p. 737, c. 214, § 3) requires every peddler, before commencing business in any county, to make a written application under oath, in which he must state the names and residences of the owners or parties in whose interest the business is to be conducted, the number of horses and vehicles to be used, the quantity and value of the stock of goods, wares, or merchandise to be kept or exposed for sale in said county, and to make a special deposit with the county treasurer of \$500, and pay a license fee of \$100 for a peddler on foot, \$150 for a peddler with one horse and a wagon, \$250 for a peddler with two horses and a wagon, and \$300 for a peddler with any other conveyance. Upon compliance with the law, the statute authorizes a license to be issued for a period of one year, which is to be returned and canceled. The special deposit of \$500 is made subject to taxes, to attachment and execution on behalf of creditors of the licensee whose claims arise in connection with the business done under the license, it may be garnisheed in any civil action, in contract or tort brought against the licensee, it is made subject to the payment of fines incurred by the licensee through violations of the statute, and is to be held by the county treasurer for a period of 90 days from the date of cancellation of the license, and then, after satisfying any and all claims which may be legally made against it, the whole or

any unused part thereof is to be returned to the licensee. The statute exempts all peddlers of agricultural or farm products, books, periodicals, or newspapers, and all peddlers within the limits of any city or town which by city ordinances regulate the sales of goods, wares, or merchandise by peddlers.

If enforced with rigor, this statute will make the business of peddling in country districts respectable. By prescribing a means for their identification and requiring security for honesty and good behavior, the statute provides the best possible means for overcoming suspicion and prejudice against the holders of licenses and will have a strong tendency to promote their success. The exemptions are manifestly designed to avoid unreasonable interference with business of a class of peddlers who are the least objectionable, or with peddling in cities, where local regulations obviate the necessity for legislation by the state. Otherwise the statute is general in its application, it bears evenly upon all peddlers, without discriminating against persons, whether residents or nonresidents of the state, nor against commodities, whether produced within the state or imported from other states or countries. Therefore it is not a statute which will deprive any person or class of persons of equal protection of the laws, nor create an invidious burden upon interstate or foreign commerce. It is strictly a police regulation and revenue statute, applicable to business to be transacted wholly within the state, and not obnoxious to the national Constitution or laws. *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451.

It is insisted that the amounts of the license fee and the special deposit required are so excessive as to prohibit the business of peddling altogether, and therefore it deprives persons of the valuable right to carry on business in that manner, and amounts to a deprivation of property without due process of the law, contrary to the Constitution of the United States. If the burden imposed by the statute were so excessive as to be plainly intended to prohibit, rather than to tax and regulate, the business, the court would be constrained to follow the decision of the Supreme Court of the United States in *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, in holding that a state cannot arbitrarily deprive individuals or corporations of the right to pursue a lawful avocation. After deliberation, however, I have reached the conclusion that the exactions of the statute are not, in comparison with the amount of dead capital necessarily invested in store fixtures and furniture, and the expenses for rent, heat, light, and incidentals for carrying on retail trade at a fixed location, excessive, and will not necessarily, nor probably, prohibit peddling. I believe that the statute leaves a margin of advantage in favor of peddlers in competition with storekeepers.

I direct that an order be entered discharging the writ and remanding the petitioner.



## MILLER v. CHICAGO &amp; A. R. CO.

(Circuit Court, S. D. New York. May 5, 1909.)

**RAILROADS (§ 144\*)—CONSOLIDATION—ORIGINAL STOCKHOLDERS—RIGHTS.**

Where a railroad consolidation agreement provided for an exchange of the stock of a consolidated company for the stock of one of the constituent companies at the rate of two for one, and provided that any stockholder declining to exchange should continue to have the right to share proportionately in the earnings and assets of the party of the first part (the consolidated corporation), a stockholder declining to exchange was entitled to have the books of the consolidated company so kept as to show at all times the earnings of that part of the consolidated property which represented the portion contributed by such stockholder's company, and to have money paid out of surplus earnings of such company to the benefit of other property either returned to such surplus or his share thereof distributed to him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 451-455; Dec. Dig. § 144.\*]

Rights and liabilities of stockholders of railroads on consolidation, see note to *Bonner v. Terre Haute & I. R. Co.*, 81 C. C. A. 480.]

In Equity. On demurrer to a stockholder's bill. Overruled with leave to answer.

Philbin, Buhman & Menhen, for complainant.

Joine, Larkin & Rathbone, for defendant.

LACOMBE, Circuit Judge. The original Chicago & Alton Railroad Company, called "the old Alton Railroad," was in 1906 consolidated with the Chicago & Alton Railway Company, called "the Alton Railway," thus forming the defendant, the Chicago & Alton Railroad Company. Complainant is the owner of 500 shares of stock of the old Alton Railroad. He brings this suit as such stockholder, asking for an injunction and for other relief, including a discovery and an accounting.

The argument dealt with matters which it is not necessary to rehearse and with authorities which there is no need to apply. The suit is not brought to set aside the consolidation, nor to set aside the proceedings which led up to the consolidation. The details of the ingenious scheme by which, in conformity with the provisions of law and statute, results peculiarly beneficial to the schemers were brought about, are not material. They are not even of importance as giving "atmosphere" to the cause. Complainant's rights need not be worked out by the careful application of equitable principles enunciated for the purposes of protecting unfortunate shareholders who were not otherwise protected. His rights are secured by a written document (the articles of consolidation) which expresses just what he shall have in language too plain to be misunderstood, and which it is the duty of the defendant to carry out. Suffice it to say that at the time of consolidation the Alton Railway was complainant's fellow stockholder, owning 183,164 out of 187,511 shares of common stock of the old Alton road, which last-named road operated over 800 miles of railroad

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the state of Illinois and was highly prosperous, making net earnings of many millions of dollars during the six years prior to consolidation. The Alton Railway owned a short line of road, made net earnings of a few hundred thousand dollars during the same period, and was heavily in debt on bonds then outstanding. Presumably with the intention of securing minority stockholders in the prosperous company against loss through the consolidation, that agreement provided that they might exchange their shares in the old road for double the amount of shares in a stock issue of the new company known as "4 per cent. prior lien and participating," which had certain preferences in the distribution of profits. In the event, however, of any stockholder declining to avail of this option, it was further provided that:

"Every holder of any such unexchanged share of stock of the party of the first part [the old road] shall continue to have the right to share proportionately in the earnings and assets of the party of the first part."

It is to obtain the rights secured by this provision that this bill is filed. In view of the specific and unambiguous language above quoted, it seems manifest that complainant is entitled to have the books of the new company so kept as to show at all times what are the earnings of that part of the consolidated property which represents the portion contributed by the old company. In the net earnings of that portion the complainant is entitled, proportionately to his holding, to participate. Ordinarily courts will not interfere to require dividends to be declared out of net earnings; but complainant contends that this case can be differentiated by reason of the circumstance that the consolidated road has expended surplus earnings of the old road's property on property of the Alton Railway and on new property of the consolidated railroad, and in discharging obligations which the "party of the first part" was under no obligation to pay. How much of this complainant may be able to prove is a matter to be hereafter determined; but, if such proof can be made, it will certainly entitle the complainant either to require the trustee under this agreement (the consolidated road) to get back the moneys thus diverted and restore them to the surplus profits, or to distribute to complainant his share of the surplus profits of the "party of the first part" in proper proportion.

I do not think there is any estoppel arising out of the receipt of the two sums of \$2,000. The averments of the bill show that no one was misled thereby. Nor do the facts and circumstances as set forth in the bill sustain any defense on the ground of laches.

The demurrer is overruled, with leave to answer in 20 days.

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In re A. O. BROWN & CO.

Ex parte GIBBONS-HOVERMANN.

(District Court, S. D. New York. July 6, 1909.)

**1. BROKERS (§ 26\*)—PROPERTY HELD IN TRUST—SHARES OF STOCK—EARMARKS.**

There is no earmark to shares of corporate stock purchased in the market and held by a broker for the benefit of his customer.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 26.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. BANKRUPTCY (§ 140\*)—BROKERS—STOCK IN BROKER'S POSSESSION—PRESUMPTION.**

Where a bankrupt firm of brokers converted stock purchased for a customer and at the time of failure had on hand other stock of the same character, it would be presumed, in the absence of evidence to the contrary, that they properly used their own money to purchase the stock in their possession and intended to apply the same to make good their misappropriation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

**3. BANKRUPTCY (§ 140\*)—BROKERS—STOCKS—RIGHTS OF CLAIMANTS.**

Where stockbrokers prior to bankruptcy had converted certain corporate stock belonging to a customer, and at the time of bankruptcy had 100 shares of the same stock in their possession, the owners of the converted stock of that character, if more than one, were entitled to the stock on hand as tenants in common, and if only one, he was entitled to have such stock delivered to him, as against the bankrupt's general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

**In Bankruptcy.**

The question involved in this case is whether, if upon the bankruptcy of a broker he has in his possession a number of shares of stock which is less in amount than that which he is bound to deliver to his customers, such shares are to be regarded as a common fund to which, in equity, all such customers are entitled. In this case the claimant had purchased 100 shares of Bay State Gas stock through the bankrupt firm. The certificate, which had been purchased by the broker with the customer's money and had been delivered to the broker, was subsequently sold by him and was never transferred to the name of the customer. The purchase price had been in full. Into the hands of the receiver there came but one certificate for Bay State Gas stock, that one for 100 shares, not purchased with the customer's money, nor in his name, and it does not yet appear whether or not there are other customers of the broker who had purchased Bay State Gas stock. There was no appropriation of the certificate in question to the claimant, or to any other customer.

Dix W. Noel, for bankrupt.

Fred L. Gross, for claimants.

Ralph Wolf, for receiver and trustee.

HAND, District Judge (after stating the facts as above). The question in this case turns, I think, entirely upon a question of fact, namely, whether the broker intended, when he purchased the shares of stock in question, to apportion them as the property of those persons to whom he was under obligation to deliver stock of a similar kind in the place of the stock which he had formerly converted. We have it on the highest authority that there is no earmark to shares of this sort. *Richardson v. Shaw*, 209 U. S. 365 at page 379, 28 Sup. Ct. 512, 52 L. Ed. 835. There are two possible cases: First, that there are no customers entitled to stock of a similar character, except the claimant, and that his claim is exactly covered by the number of shares found in the receiver's possession; second, that the claimant or claimants would require for their satisfaction more shares than those on hand. I presuppose that there cannot be found any shares actually purchased with the customer's money, and that either the money was not so used at all, or

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that, having been once used, the stock so bought by the broker for the customer he has sold afterwards. The question is whether we should not assume that the broker, in taking from other funds enough to buy an equal number of shares of stock, did not intend pro tanto to attribute that much of his own funds to making good his default. By way of analogy, suppose that an agent depletes a bank deposit made in his name as agent. Subsequent deposits in that fund would go to make good the former conversion, and the general creditors could not complain. *Baker v. Bank*, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150. He may make good his default out of his own property, and all that is necessary is some unequivocal appropriation of the property to that effect. Of course, in that case the appropriation was unambiguous, and here we must adopt a presumption; but the question is whether such a presumption is not usually borne out in fact. I think it is. I believe that brokers do usually mean their stocks on hand in the first instance to belong to their customers until they have enough to answer their obligations. If the bankrupts in this case in fact had no such intention, the receiver must show it. A manifest intention being enough, however, I shall adopt the presumption that the purchase of similar stock to that converted is the manifestation of such an intention.

A more difficult question of fact arises in case the stock on hand turns out not to be enough to meet all the obligations to customers. Still in that case I think I must likewise assume in the absence of contradictory evidence, that the broker's intention was to contribute so much of the assets as he invested in this stock in general toward the fulfillment of such obligations. Each share being of equal value and unidentified, he cannot be said to have favored one customer rather than another; nor can I say that, because all the obligations are not fulfilled by the stock which is left, therefore I must assume that he had no intention whatever of fulfilling any part of them. Of course, he did not complete his intention; but so far as he went I think I must assume that he intended to replace the stock which he should have, but did not have, on hand. To adopt the analogy suggested by Mr. Justice Holmes in his opinion in *Richardson v. Shaw*, *supra*, suppose an elevator man has depleted the elevator below the amount due to all depositors; when he subsequently puts back into the elevator enough, or part of enough, wheat to answer his obligations to all, the claimants become co-owners of it. Could the elevator man's general creditors claim that they were entitled to the subsequent accretions? Or suppose it could be shown that he had entirely emptied the grain elevator; is there any doubt that his subsequent filling of it, or partial filling of it, must be assumed to be an appropriation by him of so much of his property to make good his conversion? The analogy in law seems to me to be complete in spite of the diversity of the subject-matter.

In this case, therefore, the 100 shares of Bay State Gas are to be regarded as the property of all customers who held such stock. If there are no such customers except the claimant, he is entitled to a delivery of the certificate. If there are, they are tenants in common.

I do not think it necessary for the receiver to go to the expense of sending notice to all creditors, and I direct him not to do this. Let him examine the books of the bankrupt, and see whether there are any other customers to whom the bankrupts were obligated to deliver Bay State Gas. If there are any such, they should be brought into this proceeding, and if there is any dispute of facts another reference must be ordered. If the facts may be agreed on, the matter can be brought up upon motion day and disposed of by the court.

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In re KOELLE.

(District Court, E. D. Pennsylvania. June 29, 1909.)

No. 2,877.

**BANKRUPTCY (§ 409\*)—DISCHARGE—FAILURE TO KEEP BOOKS.**

A bankrupt's indebtedness amounted to \$21,000, of which \$8,000 was due merchandise creditors, whose names appeared on his books, and \$13,000 was due to relatives and friends for money loaned, none of which appeared on the books. The bankrupt's only explanation of the absence of such claims was that he knew the lenders would not push him, and he thought it was not necessary for his creditors to know he had money from his wife. *Held* to establish an exception to the bankrupt's discharge for failure to keep books from which his financial condition might be ascertained, with intent to conceal the same.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.\*]

**In Bankruptcy.**

Wessel & Aarons, for bankrupt.

Harris S. Sparhawk, for objecting creditor.

J. B. McPHERSON, District Judge. Two specifications of objection were filed to the bankrupt's discharge, but only one need be noticed, namely:

"That with intent to conceal his financial condition the said bankrupt has \* \* \* failed to keep books of account or records from which such condition might be ascertained."

Upon this objection the referee (Theodore M. Etting, Esq.) has reported as follows:

"The bankrupt's indebtedness amounts to \$21,000. Of the above sum \$8,000 is due to merchandise creditors whose names appear upon his books, and \$13,000 is due to various persons who at sundry times loaned him money, and none of whose names appear on his books. Amongst the persons referred to are his wife, brother, and other near relatives. The amount due them is somewhat in excess of \$10,000. Somewhat less than \$3,000 is due to various friends. The books of the bankrupt contain no entry whatever of the existence of any of the above loans, nor is there any record of the original notes given for said loans, or of the renewal notes made from time to time thereafter; the original notes having been destroyed. The allegation that the bankrupt has failed to keep books of account or records from which his true financial condition might be ascertained is fully and clearly proven. He has not destroyed any of his books. The notes upon which the existing claims are

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

predicated were, for the most part, given during the year 1907. This was the year during which the petition in bankruptcy was filed against him. The destruction of the original notes, whilst natural enough under ordinary circumstances, is not without significance under present conditions. It is contended on behalf of the bankrupt, and with his contention I agree, that the burden is on the objecting creditor to show, not only that the books, as kept, concealed the financial condition of the bankrupt, but also in so keeping them evil intent must be shown. Proof of such intent must, it is true, be convincing; but the intent with which an act is done is not, ordinarily, a matter of direct evidence, but an inference from the act and surrounding circumstances. Every one is presumed to contemplate the ordinary and natural consequences of his own acts. It would be difficult to devise a more effectual method of concealing one's true financial condition than to continually omit from the books of account any entry of borrowed money or any record of notes given therefor. The suppression of indebtedness for borrowed money is the omission of something which is always present to the mind of the debtor. It cannot be inadvertent. It must be deliberate. *In re Brener* (D. C., 20 Am. Bankr. Rep. 644, 166 Fed. 930).

"Such a suppression at once induces suspicion, especially when, as in the case at bar, the indebtedness is largely due to near relatives. It is impossible to attribute this omission to bad bookkeeping, and no satisfactory explanation has been given. The books were kept by the bankrupt himself. A not infrequent test of intent is whether or not the books, as kept, tended to subserve the bankrupt's interest. *In re Garrison*, 17 Am. Bankr. Rep. 834, 149 Fed. 178, 79 C. C. A. 126.

"The bankrupt understood his books as he kept them. If examined by another person, his financial condition could not have been ascertained therefrom. He could, by reason of this method of concealment, make representations to creditors which his books, if examined, would not disprove. He was not a skilled bookkeeper, but he had kept his own books for over 20 years. He was not a small trader. He was doing a business which varied from \$15,000 to \$20,000 annually. He was a man of upwards of 50 years of age, an upholsterer by trade. He appears always to have kept the books in the same manner; but I cannot see that this circumstance tends to his advantage. *Re Feldstein* (D. C.) 6 Am. Bankr. Rep. 461, 108 Fed. 794, affirmed 8 Am. Bankr. Rep. 160, 115 Fed. 259, 53 C. C. A. 479.

"I am constrained, therefore, to recommend that his discharge should be refused."

It is conceded that there are no entries concerning these loans of money from relatives and friends, and it is therefore beyond dispute that the bankrupt's financial condition could not have been ascertained by an inspection of his books. The sole remaining question is: What was his intent in failing to make the proper entries? The referee has found that the intent was to conceal his financial condition, and after a review of the testimony I agree with this finding. The bankrupt's business experience had been prolonged and reasonably extensive. He is a man of intelligence, as his testimony sufficiently indicates; and it is not credible that he could have failed to know that his books omitted material items of his indebtedness, and were therefore defective. His only explanation is that:

"I never counted those notes. I thought that, because I knew they would not push me, you know; and I thought it was not necessary for these people to know I had money from my wife."

Prima facie, at least, a man must be held to intend the natural and probable consequence of his acts, and the inevitable consequence of this omission was to conceal his financial condition. The presumption of such an intent may not be conclusive, but it has not been met by the

testimony that was offered before the referee. A similar case is *Re Pomerantz & Hopkins* (D. C.) 168 Fed. 444, recently decided in this district.

The recommendation of the referee is approved, and the clerk is directed to enter an order that the discharge is refused.

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In re MacKESSIC.

(District Court, E. D. Pennsylvania. July 2, 1909.)

No. 3,216.

1. **BANKRUPTCY (§ 228\*)—REFEREE'S FINDING—CONFLICTING EVIDENCE.**

A referee's finding, based on conflicting evidence, that certain collateral was pledged for specific debts, and not for all the bankrupt's indebtedness to the pledgee, will not be set aside by the District Judge on certificate of the referee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 228.\*]

2. **BANKRUPTCY (§ 400\*)—EXEMPTION—JURISDICTION.**

A court of bankruptcy has no jurisdiction over a debtor's exemption, except to set it aside.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.\*]

3. **BANKRUPTCY (§ 147\*)—JUDGMENT—JUDGMENT LIEN—EXEMPTIONS—JURISDICTION.**

Two judgments against a bankrupt contained waivers of the debtor's exemption, and were liens on real estate which was sold for enough to pay the exemption and also the full amount due the judgment creditors. The bankrupt elected to take out of the real estate, and was entitled to \$300 out of the proceeds of a sale thereof, and this amount, coming into the hands of a trustee, was attached by the judgment creditor in the state court to satisfy in part the uncollected balance due thereon. *Held*, that the trustee held the amount of such exemption as an individual, and not as a trustee, the fund being subject to the exclusive jurisdiction of the state court, independent of the bankruptcy proceeding; and hence its attachment did not justify the trustee in deducting that amount from the sum which would otherwise have been paid to the holder of the judgments in a bankruptcy proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 147.\*]

4. **BANKRUPTCY (§ 399\*)—WAIVER OF EXEMPTIONS.**

Where a bankrupt elected to take his exemption out of the proceeds of a sale of real estate, the amount thereof while in the hands of the trustee was subject to seizure under a judgment containing a waiver of exemption.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 399.\*]

In Bankruptcy.

Thomas K. Leidy and William P. Young, for claimant.

Christian H. Ruhl and Stephen M. Meredith, for trustee.

J. B. McPHERSON, District Judge. In this estate there are two certificates from the referee, and each may properly call for a few words in explanation of the court's decision. The first certificate has to do with the amount to which a creditor was entitled as a secured debt, and may be briefly disposed of by saying that the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sum due was to be determined from conflicting evidence, and that no sufficient reason appears for rejecting the referee's finding. The claimant, Jacob H. Brendlinger, had two valid judgments aggregating \$1,400. But they were admittedly given as collateral security, and the only question was what class or classes of debts they were intended to cover. The claimant's position was that they were intended to be collateral for all the bankrupt's indebtedness to him, past, present, and future, while the bankrupt testified that they were only to secure specific debts that were in existence at the time when the judgments were confessed. The referee accepted the bankrupt's testimony as correct, and upon that assumption the amount awarded to the claimant as a secured debt should not be disturbed.

The order of February 19, 1909, is therefore affirmed.

The second certificate raises a different question. Both these judgments contain waivers of the debtor's exemption, and were liens upon real estate that was sold for enough money to pay the exemption and also the full amount due to the judgment creditor. If, therefore, the District Court had complete jurisdiction over the bankrupt's exemption, it would have been necessary to disregard the exemption in making distribution (since the bankrupt had waived his privilege in favor of Brendlinger) and to apply the whole of the exemption fund, if necessary, to the payment of the two liens. But, as is well known, the bankruptcy court has no jurisdiction over a debtor's exemption, except to set it aside, and nothing else was done in the present case. The bankrupt elected to take out of the real estate, and under the Pennsylvania practice he was entitled to \$300 out of the proceeds of sale, as the realty could not be divided so as to satisfy his claim in kind. This amount came into the hands of the trustee, and was thereupon attached by Brendlinger as the holder of the two judgments above referred to, in order to satisfy in part the uncollected balance due upon these debts. The attachment execution was issued out of the court of common pleas of Berks county, where the two judgments had been entered of record. For some reason that does not clearly appear the referee regarded this attachment execution as at least likely to result in collecting \$300 of the balance due upon the judgments, and deducted that sum from the amount that he would otherwise have awarded to Brendlinger, directing the trustee, however, to hold it until the result of the attachment should be known. Upon what theory this order was made I have not been informed, but I do not see how it can be sustained. The principles that govern the marshaling of assets do not apply. Only one fund was before the referee for distribution, namely, the net proceeds of the real estate after the exemption had been deducted, and the claimant was clearly entitled to a definite sum out of those proceeds. The fact that the trustee was in possession of another fund, in which the bankrupt had an interest, had no bearing on the claimant's right to recover the full amount of his award. The referee had no jurisdiction to distribute this second fund, and no right to determine who was entitled to receive it. The fact that it also was in the hands of the trustee was a mere accident. He did not hold it as trustee, but



as an individual, and the money was as clearly liable to attachment in his hands as the land would have been liable to seizure under execution issued upon the claimant's judgments, if the exemption had been set apart in kind. In the latter event it would scarcely have been asserted that the claimant would have been obliged to give up his claim upon the land thus set apart, unless he would deduct its value from the sum awarded to him out of the remaining portion of the debtor's realty. The fund of \$300 was subject to the exclusive jurisdiction of the state court, and, if the bankrupt's creditors think that they have a claim to subrogation upon that fund growing out of the fact that Brendlinger has been paid in part out of the fund distributed by the referee, they should make their contention before the common pleas. Certainly the referee had no authority to determine what should become of the \$300, or to decide that if Brendlinger had successfully attached it he must give up a like amount out of the fund before the referee.

The order of February 20, 1909, is therefore modified, so as to require the trustee to pay over to the claimant, Jacob Brendlinger, the full amount awarded to him out of the proceeds of the bankrupt's real estate.

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In re COMER & CO.

(District Court, E. D. Pennsylvania. June 28, 1909.)

No. 3,245.

**BANKRUPTCY (§ 266\*)—ASSETS—LIQUOR LICENSE—SALE.**

The terms on which a bankrupt's liquor license was sold required a cash deposit, and provided that the balance should be deposited with the receiver or trustee on or before a day set for the hearing of an application for transfer, and that the whole amount would be refunded to the purchaser unless the license was transferred, provided the license was not transferred because of purchaser's disability, in which case the money should be forfeited. *Held*, that a transfer having been refused, specifically because the purchaser was not a proper person to hold a license, he was not entitled to a return of the earnest money paid.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 266.\*]

In Bankruptcy.

Clinton O. Mayer, for receiver.

Julius C. Levi, for Louis Gordon.

J. B. McPHERSON, District Judge. The nature of this controversy will appear by the following extract from the report of the referee (Joseph Mellors, Esq.):

"On the 8th day of October, 1908, under the authority of your honorable court, a receiver's sale in bankruptcy was had of the wholesale license, stock, and fixtures of a liquor store at No. 616 South Seventh street. At said sale it was announced by the auctioneer that the deposit money would not be returned if the license court refused to transfer the same on account of the character of the person, nor would it be returned if the person who purchased the same was unable to comply with the terms of the sale. This statement

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was made orally by the auctioneer, and was also part of the conditions of the sale as set forth in the catalogue, which was read before the sale, and the catalogue was distributed to intended purchasers and to those present at the sale. Said catalogue is hereto annexed and made part of this report.

"After reading the terms of the sale and during the sale the auctioneer announced that if there was any bidder who knew why the license should not be transferred to him he should not bid.

"There were other bidders present at the sale, from 40 to 50.

"The license was knocked down to one Louis Gordon of 203 South Eighth street, Philadelphia, for the sum of \$3,075, and \$500 was paid by him on account of the sale. The said sale was confirmed by your honorable court on the 9th day of October, 1908, and upon a hearing of the application by the said Louis Gordon for a transfer of the license of the said bankrupts to him, to sell liquors at wholesale at No. 616 South Seventh street, the court of quarter sessions refused his application; Gordon having admitted before the court that at the time he bought the said license he was not able to comply with the terms of the sale, and that he was not then even able to comply with said terms.

"He also admitted that the money he deposited was not his money, but money he had borrowed from a relative of his. The court upon these grounds refused to transfer the license to him, as not being a proper person.

"On a resale of the assets of said bankrupt on November 13, 1908, the highest price realized therefor was \$1,800, so that by reason of the action of the said Louis Gordon the estate of the said bankrupts not only lost the difference between said sales, but also the additional expense of maintaining and keeping the property from the 8th day of October, 1908, until December, at which time the next license court met.

"From the foregoing facts it is very apparent to the mind of the referee that the said sum of \$500 deposited by the said Gordon with the receiver at the time of the sale of the assets of the bankrupts is rightfully held by the receiver (now trustee) for the benefit of creditors, and the referee has no hesitancy in recommending that the petition filed in your honorable court by the said Gordon for the return of the same should be dismissed."

The argument in behalf of Louis Gordon, the petitioner, is based on a misunderstanding of the court's order of September 25th, under which the sale to Gordon on October 8th was made. The order appointed a receiver and authorized him "to take possession of all the assets of said bankrupts and to expose the same at public sale or vendue upon ten days' notice to all known creditors." This included the liquor license of the bankrupts; but it imposed no conditions upon the sale, leaving these details to the receiver's discretion—subject, of course, to review by the court if they should prove to be improper or unreasonable. The terms proposed by the receiver and published at the sale were, I think, reasonable, and Gordon made his bid with full knowledge of the risks of the enterprise upon which he was entering. The refusal of the court of quarter sessions of Philadelphia county to permit the transfer was put upon the ground that he was not a proper person to hold a license, and it also appears that he was not able to comply with the terms of sale. These terms were as follows:

"The sale of the license subject to the transfer of the court of quarter sessions.

"\$500 to be paid in cash as deposit on the license at the time of sale.

"The balance of the purchase money of the license in cash to be deposited with the receiver or trustee on or before 10 a. m. of the day set by the court of quarter sessions for hearing the application for the transfer, the whole amount to be refunded to the purchaser unless the license be transferred to him, provided the transfer is not refused on account of any disability on the part of the purchaser.

"(6) Upon failure to comply with the above terms, the money deposited in part payment shall be forfeited."

It is evident, I think, that Gordon's bid was made in view of, and in compliance with, these unequivocal conditions, and I see no ground upon which he is now entitled to ask that they should in effect be set aside. He made his contract with reference to these conditions, and he is bound by their terms. If the transfer had been refused on other grounds than his personal disability, or if it did not appear at all upon what ground the refusal rested, a different question might be presented.

It should be added that the terms of the resale were identical with the terms under which Gordon's bid was made, as appears from the receiver's return that was confirmed by the court on November 16th.

The order of the referee is affirmed.

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In re MILLER.

(District Court, E. D. Pennsylvania. June 28, 1909.)

No. 2,927.

1. BANKRUPTCY (§ 270\*)—LIQUOR LICENSE—SALE—TRANSFER—REFUSAL BY STATE COURT.

Where a bankrupt's liquor license was sold subject to transfer, an inquiry by the bankruptcy court to ascertain the grounds on which the state court refused to transfer the license to the purchaser was not a collateral attack on the state court's order.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 270.\*]

2. BANKRUPTCY (§ 303\*)—SALE OF ASSETS—LIQUOR LICENSE—CONDITIONS—FRAUD—BURDEN OF PROOF.

Where a bankrupt's liquor license was sold subject to transfer, and transfer was refused, the burden of proof that such refusal was brought about by the purchaser's fraud was on those asserting fraud as a defense to the purchaser's right to recover the amount paid.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.\*]

3. BANKRUPTCY (§ 266\*)—ASSETS—SALE—CONDITIONS—EARNST MONEY—RETURN.

Where a bankrupt's liquor license was sold by the trustee subject to transfer by the court of quarter sessions, and the court refused a transfer without giving a reason for the refusal, the purchaser was entitled to a refund of the earnest money paid.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 266.\*]

In Bankruptcy.

Wessel & Aarons, for trustee.

Monaghan & Phillips, for claimant.

J. B. McPHERSON, District Judge. This case differs in an important particular from *In re Comer & Co.*, 171 Fed. 261, in which a similar application has just been refused. There the conditions of sale were such as to make it necessary to inquire into the reasons that moved the court of quarter sessions to refuse the transfer of the license,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for one of these conditions was that the purchase money would not be refunded if the transfer was refused by reason of the purchaser's personal disability. Of course, such an inquiry is not in any sense a collateral attack upon the order of the court of quarter sessions. It is a mere effort to learn upon what ground the refusal is put; and, if the effort should not be successful, the order must be regarded as based upon some ground that might legally move the discretion of the county court. If the reason for the refusal does not appear, certainly this court cannot assign one ground rather than another for the action of the quarter sessions; it is bound to accept the naked fact of refusal and give it proper effect. But, where it appears clearly and affirmatively that the refusal was put by the quarter sessions upon the ground of the applicant's personal disability, and upon that alone, there seems to be no reason why the actual fact should not be taken into account in its bearing upon the purchaser's claim to have his money refunded.

In the present case the conditions of sale were essentially different from those that governed the decision in *Re Comer & Co.* Only one condition need be noticed—"Sale subject to the transfer of license by court of quarter sessions." Clearly, under this explicit condition, refusal by the court for any reason within its discretion would entitle the purchaser to a return of his money; and that is the situation now presented. The court first marked the application "withdrawn," but afterwards, upon further consideration, marked it "refused," giving no reason for this final order. As the conditions of sale did not call for any inquiry into the reasons for the refusal, such action of the quarter sessions is conclusive, except perhaps in the single case where it is charged that its refusal was brought about by the purchaser's fraudulent procurement. In that event it may be doubtful whether he could be allowed to take advantage of his own fraud, and to shield himself behind what under all other circumstances would be the conclusiveness of the order. For the purposes of this case, I shall assume that the question of his fraud may be looked into, and I have therefore considered the dispute from that point of view. The referee does not in terms find that the purchaser's conduct was fraudulent; but, if his report is understood to be a substantial finding to that effect, I can only say that I am unable to agree with the conclusion. Fraud is not to be presumed. It must be proved, and the burden is on those who assert it. Bearing these well-known rules in mind, I think it will be found that there is uncertainty enough about the proper inferences to be drawn from the testimony to require the court to decide that the necessary proof has not been forthcoming. Some of the circumstances are, no doubt, suspicious; but most of them are ambiguous in meaning and are capable of supporting either theory of the purchaser's conduct. On the whole, and without discussing the details of the testimony, it seems clear to me that the proper amount and quality of proof are not present, and that the referee's order cannot be sustained.

It is therefore set aside, and the court now directs that the trustee pay to the petitioner, William Lindig, the sum of \$1,000 that was deposited as hand money at the sale held on January 11, 1908.

## In re McCANN BROS. ICE CO.

(District Court, E. D. Pennsylvania. June 26, 1909.)

No. 3,190.

**1. BANKRUPTCY (§ 228\*)—DECISION OF REFEREE—REVIEW—OBJECTIONS TO EVIDENCE.**

An objection to certain evidence, not made before the referee in bankruptcy, could not be considered on review of the decision on certificate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 228.\*]

**2. BANKRUPTCY (§ 228\*)—REFEREE'S DECISION—REVIEW.**

Decision of a referee in bankruptcy on a question of fact on conflicting evidence will not be disturbed on a certificate to the District Judge, except for plain mistake.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 228.\*]

**In Bankruptcy.**

Robert J. Byron, for executors of estate of Joseph McCann.  
G. Von Phil Jones, for trustee.

J. B. McPHERSON, District Judge. As the testimony clearly disclosed, the affairs of the partnership known as McCann Bros. (which is also in bankruptcy) and of the corporation known as McCann Bros. Ice Company were so confused that it is by no means easy to decide with confidence whether the money that was lent by the estate of Joseph McCann was borrowed by the partnership or by the corporation. A large fraction of it was undoubtedly used by the corporation; but this fact does not of itself decide the question: Which was the borrower? The referee's conclusion that the money was lent to the partnership, and not to the corporation, and therefore that the claim of Joseph McCann's executors against the ice company cannot be sustained, is based in part upon the entries in the books of the ice company and in the books of the partnership; and objection is now made that these books were not competent evidence against the decedent's estate, in the absence of proof that he had knowledge of the entries that were offered to affect the executors' claim. The objection cannot be considered, however, for the plain reason that it was not made before the referee. The books of both concerns were treated by all parties as important and competent evidence, and a large part of the testimony that was taken is occupied with the entries therein; no objection whatever having been made by any person to their admission or their relevancy. Moreover, the most significant books—the respective cashbooks of the partnership and of the corporation—were formally offered in evidence (Notes, page 67) by the attorney for the executors who is now objecting to their competency. Obviously, these inconsistent attitudes cannot be successfully maintained.

Apart from this question, the case presents the familiar situation of a conflict of evidence—much of it from the mouths of witnesses who appeared before the referee—which has been settled by the findings of fact. The courts have often said that such a finding should not be

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

disturbed, except for plain mistake; and in following that rule upon the present occasion I need only add that I have examined all the evidence that was before the referee, without being able to determine that he has come to the wrong conclusion.

The two orders of the referee (David W. Amram, Esq.), dated June 3, 1909, are affirmed.

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In re McCANN BROS.

(District Court, E. D. Pennsylvania. June 26, 1909.)

No. 3,202.

In Bankruptcy. Exceptions to specifications of objection to discharge and motion to amend.

Robert J. Byron, for bankrupts.

G. Von Phul Jones, for objecting creditors.

J. B. McPHERSON, District Judge. The motion filed May 3, 1909, to amend the specifications of objection to the bankrupts' discharge is hereby allowed.

The specifications thus amended are, I think, sufficient in form to require consideration. Whether they are all, or any of them, sufficient in fact, depends, of course, on the testimony that may be produced at the hearing. The effect of the four-months limitation is, I think, a matter for determination then. The objecting creditor charges that the bankrupts concealed property from the trustee, under section 29b (1), and made false oaths, under section 29b (2); but there is no charge that they transferred property with intent to defraud, under section 14b (4). See Act July 1, 1898, c. 541, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433). It is true that the concealment is said to have been accomplished by the transfer of property at a time beyond the four months limit; but the specifications are evidently drawn to raise the question whether the offense is continuing, so that the limitation is not to be applied. This dispute should be determined, I think, after an examination and discovery of all the facts, rather than upon a summary hearing concerning the sufficiency of the specifications in detail.

The motion to dismiss the specifications is refused, and the clerk is directed to instruct the referee to hear the petition for discharge and the objections thereto, and to report thereon as speedily as may be convenient.

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In re LEE.

(District Court, E. D. Pennsylvania. July 1, 1909.)

No. 2,770.

**BANKRUPTCY (§ 328\*)—CLAIMS—FILING—TIME—"CONFIRMED."**

Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), provides that claims shall not be proved subsequent to one year after the adjudication. "Adjudication" is defined by section 1, subsec. 2, as the date of the entry of a decree that the defendant in a bankruptcy proceeding is a bankrupt, or, if such decree is appealed from, then the date when such decree is finally confirmed. *Held*, that the word "confirmed" is not synonymous with "affirmed," but includes the termination of an appeal from a bankruptcy adjudication by dismissal, so that where an adjudication was appealed from, and the appeal dismissed, cred-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

itors were entitled to prove their claims within a year from the date of such dismissal.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 328.\*

For other definitions, see Words and Phrases, vol. 2, pp. 1425-1427.]

In Bankruptcy. On certificate of referee.

J. Aubrey Anderson and J. Howard Reber, for trustee.

William A. Carr, for claimants.

J. B. McPHERSON, District Judge. This controversy presents a narrow question for determination. Its nature appears in the following extract from the report of the referee (Theodore M. Etting, Esq.):

"Section 57n of the present act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]) provides that 'claims shall not be proved subsequent to one year after the adjudication.' The definition of the word 'adjudication' (section 1, subsec. 2) is as follows: 'Adjudication shall mean the date of the entry of a decree that the defendant in a bankruptcy proceeding is a bankrupt; or, if such decree is appealed from, then the date when such decree is finally confirmed.' The following facts are relevant to the question certified:

"On July 6, 1907, a decree was entered in the District Court adjudging Preston B. Lee a bankrupt, and on the same day the matter was referred to the undersigned as one of the referees in bankruptcy.

"On July 13, 1907, the bankrupt presented a petition for a writ of error to the United States Circuit Court of Appeals, and on this application an order was entered allowing the appeal and suspending all further proceedings in the District Court until the determination of said writ of error.

"On September 17, 1907, the appeal not having been perfected, a stipulation was filed of record, signed by the attorney for the bankrupt and by the attorney for the petitioning creditors, agreeing that the appeal taken by Preston B. Lee from the adjudication entered in the District Court should be dismissed, pursuant to rule 16 of the Circuit Court of Appeals (150 Fed. xxix, 79 C. C. A. xxix). The following order was entered by the Circuit Court of Appeals:

"And now, September 17, 1907, it is ordered that the appeal taken by Preston B. Lee be docketed and dismissed under the rule of court."

"On September 24, 1907, the above certificate of dismissal of appeal was returned to the District Court. The claims referred to in the order made by the referee, and which are certified as above, were offered for proof as follows:

Jennie K. Lee, August 24, 1908.

Elizabeth M. Lee, September 2, 1908.

Building & Loan Association, September 11, 1908.

"The contention of counsel for the trustee is that, as the year began to run on July 6th, the date of adjudication in the District Court, consequently it had expired before any of the claims above referred to were offered for proof, and in this connection it is argued that the only decree of record in the case is that of July 6, 1907, the date of the original adjudication. I am unable to see that the rights of creditors can in any wise be changed by the fact that the order made on the 17th of September was one of dismissal instead of final confirmation. The intention of Congress clearly was to give claimants a full year in which to prove their claims. Between July 13, 1907, and September 17, 1907, all proceedings in the District Court were suspended, by order of that court, and the referee was, consequently, without authority to pass upon the claims, had they been offered for proof during that interval. The statute of limitations does not run when, by an order of court or any other paramount power, the remedy given is not available. *Braun v. Sauerwein*, 10 Wall. 218, 19 L. Ed. 895; *Cavanaugh v. Britt*, 90 Ky. 273, 13 S. W. 922; *Clark v. Green*, 62 Mich. 355, 28 N. W. 894.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"It is not supposable that such a solecism can exist in the law as to say that one must exercise a right within a certain period or be debarred from doing so, when during the same period the exercise of such right is forbidden. If, prior to the dismissal of the appeal, 11 months and 29 days had run since the decree of the District Court, the time given creditors for proving claims under the trustee's contention would have been 1 day, or, if the proceedings on appeal had taken more than a year, creditors would never have had the opportunity of proving their claims at all."

It will be seen, I think, that the question has to do with the meaning of the word "confirmed," as it is used in section 1 of the act. In this section Congress is defining certain words and phrases, and it is evident that in dealing with the word "adjudication" the decree itself was not the matter chiefly in mind, but the day when the decree became effective—"adjudication shall mean the date," etc. This is the most important event in the bankruptcy proceedings. It is frequently referred to throughout the act, and the day when it occurs is repeatedly made a point of departure from which time is to be reckoned, either backward or forward, or a point at which rights are to accrue. It was, therefore, most desirable that there should be precision about the time when the decree should take effect, and this was attained in the first instance by fixing upon the date when the decree should be entered. But it was immediately apparent that the decree might not be acquiesced in. The bankrupt, or other person entitled, was allowed to appeal (section 25a [1]), and necessarily there would be some delay before the appellate tribunal could determine the validity of the decree. Meanwhile the administration of the estate would inevitably be suspended (except in rare contingencies) until the fundamental question could be decided whether a bankrupt estate was before the District Court at all. Therefore, as the administration of the estate was to be suspended, and as it was uncertain how soon its administration could be resumed, it was obviously necessary to determine how the delay should affect such rights as depended upon the "adjudication." This problem was solved in a simple and appropriate way, by moving the date of the decree—and therefore the "adjudication"—forward to the date when the obstacle of the appeal should be removed. By this decree a new starting point is furnished from which periods of time are to be computed—an arrangement that is evidently fair to all interests. Of course, if the appeal should succeed, the decree of adjudication disappears, and there is no bankrupt estate to administer; but, if the appeal does not succeed, the estate becomes again fully subject to the court's control. Evidently, an appeal may fail in either of two ways. It may be heard on the merits of such questions as are raised by the appellant, and the decree may be affirmed, or it may be dismissed without a hearing. Clearly, also, a dismissal may be brought about either by consent of the parties or by the action of the appellate tribunal; and (however brought about) it may take place either before a hearing or at the hearing. But in either of these contingencies—affirmance or dismissal—the result is the same. The obstacle to enforcing the decree is removed, and this, I think, is what is meant by "confirming" the decree. In my opinion, the meaning is not confined to a technical affirmance—the failure to use that well-known word may be significant—but is broad enough to include whatever other



action is taken that results in "confirming" the decree; that is, in leaving it to stand in full force and effect. It is no doubt true, as was decided in *United States v. Gomez*, 23 How. 326, 16 L. Ed. 552, that:

"A motion to docket and dismiss a cause from the failure of the appellant to file the record within the time required by the rule of this court, when granted, is not an affirmance of the judgment of the court below. It only remits the case to the court below to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it."

But that, I think, is not the point here. Undoubtedly there was no "affirmance" of the decree under consideration; but the dismissal of the appeal may have been a "confirmance" within the meaning of that word as it is used in the bankruptcy act, and to this opinion I decidedly incline.

The decisions concerning the power of the courts to allow a claim to be filed after a year have no application. If the year is to be computed from July 6th, the claims are out of time; but, if the act provides that the computation shall not begin until September, they are within the year. In either event the question is decided by the statute, and the court simply applies the legislative rule. Neither are the decisions helpful that have discussed the periods of limitation prescribed by law, and the causes that may in effect prolong these periods; for the precise question here is simply, when did the limitation begin to run? And if it be true that the answer is to be looked for in section 1 (2), and is to be found in the meaning of the word "confirmed," it is evident, I think, that the controversy is ended as soon as the scope of that word has been determined to be wide enough to include dismissal of an appeal. It may be that, even if the year's limitation began to run on July 6th, it was suspended until the appeal was dismissed (*Braun v. Sauerwein*, 10 Wall. 218, 19 L. Ed. 895); but, while this position may be sound, I prefer to put the decision on the other ground. In brief, as I regard it, "confirmed" either has the technical meaning of "affirmed," and in that event the claim should have been rejected, or its meaning includes "dismissal," and, if this be correct, the claims were properly allowed.

The order of the referee is affirmed.

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### McLAUGHLIN v. HEBRON MFG. CO.

(Circuit Court, D. Rhode Island. July 1, 1909.)

No. 2,888.

#### 1. ABATEMENT AND REVIVAL (§ 54\*)—ACTIONS THAT SURVIVE—ACTION FOR INJURIES—DEATH.

Where death does not ensue from the injuries complained of, but from other causes, an action for the injuries survives.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 255-278; Dec. Dig. § 54.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. DEATH (§§ 82, 83\*)—ELEMENTS OF LIABILITY—PAIN AND SUFFERING—EARNING CAPACITY DURING LIFETIME.

In an action for wrongful death, alleged to have ensued in consequence of decedent's injuries, allegations of pain and suffering, and incapacity to earn wages during life, were irrelevant.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 106, 107; Dec. Dig. §§ 82, 83.\*]

Mental suffering as element of damages, see note to Chicago, R. I. & P. Ry. Co. v. Caulfield, 11 C. C. A. 563.]

3. ACTION (§ 48\*)—JOINDER—ACTION FOR INJURIES AND DEATH.

Counts for injuries received by plaintiff's intestate, from which death did not ensue, were properly joined with counts for wrongful death, alleging that the death resulted from the injuries.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 48.\*]

A. B. Crafts, for plaintiff.  
Herbert Almy, for defendant.

BROWN, District Judge. This is a demurrer to a declaration for negligence. The first and second counts allege that as a consequence of injuries received the plaintiff's intestate was incapacitated to labor, was rendered insane, and put to great expense for medical attendance, etc. Neither the first nor second count alleges that death ensued in consequence of the injuries. Where death does not ensue from the injuries complained of, but from other causes, an action survives, but of different character from that which is given by the statute in case of death. *Lubrano v. Atlantic Mills*, 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797. The statute providing for survival of actions embraces actions for injuries to the person other than those which result in death. The first ground of demurrer, that the causes of action in the first and second counts do not survive the death of the intestate in this state, is not well taken.

The third and fourth counts allege that death ensued in consequence of the injuries. They also allege pain and suffering, incapacity to earn wages during lifetime, etc. Each of these counts is, in my opinion, subject to the objection that it contains allegations of pain and suffering, etc., which are irrelevant in view of the allegation that the injuries resulted in death.

The question of the right of the plaintiff to join in a single declaration counts which allege that the injury resulted in death and counts which do not allege that death ensued is not properly raised by the demurrers. The plaintiff's counsel at the argument stated that, in view of the uncertainty of the question of fact whether the death of plaintiff's intestate more than two years after the date of the injury was due to the injury or to other causes, he has declared in the first and second counts on the theory that death did not ensue and in the third and fourth counts on the theory that death did ensue as a direct consequence of the defendant's negligence. While these are distinct causes of action (*Union Pacific R. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983), I see no reason why counts of this character may not be joined in a single action (Gould's

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Pleading, c. 4, §§ 79-83, inclusive). There will be some difference in the rule of damages and some practical inconvenience in the trial as the result of such joinder. If the plaintiff should succeed in establishing negligence, the jury would have to be instructed to find whether or not death ensued as a consequence, and if so to find damages according to one rule, and if not to find damages according to another rule. This is no greater practical difficulty than arises in many trials, and is a difficulty arising, not from any fault of the pleader, but from uncertainty as to the subject-matter. No mere rule of pleading should be so applied as to require the plaintiff to decide at his peril in advance of the trial a question upon which medical men may disagree.

The third and fourth counts should be amended by striking out all matters which are relevant only in an action where death does not ensue.

The demurrer is sustained as to the third and fourth counts; defendant to amend within two weeks.

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#### THACKER COAL & COKE CO. v. NORFOLK & WESTERN RY. CO.

(Circuit Court, S. D. West Virginia. May, 1909.)

##### REMOVAL OF CAUSES (§ 102\*)—GROUNDS FOR REMAND—WANT OF JURISDICTION.

No cause is removable unless it is concurrently cognizable by the state and federal courts, and if a defendant, having removed a cause, thereafter moves to dismiss because of lack of jurisdiction of the state court over the subject-matter, it is the duty of the federal court, at least where the question is in doubt, on seasonable motion therefor to remand the cause, that the state court may for itself determine the question of its jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 220; Dec. Dig. § 102.\*]

In Equity. On motion by plaintiff to remand to the state court.

Z. T. Vinson, for the motion.

Holt & Duncan and Jos. I. Doran, opposed.

KELLER, District Judge. The Thacker Coal & Coke Company, a corporation organized under the laws of West Virginia, presented its bill to the judge of the circuit court of Mingo county against the Norfolk & Western Railway Company, a corporation organized under the laws of the state of Virginia praying for an injunction to prevent said railway company from filing before the Interstate Commerce Commission a new and increased schedule of joint rates governing the shipment of coal from certain points in West Virginia to certain ports on the Great Lakes. The judge of said court, upon motion of plaintiff and without notice to the defendant, granted a temporary restraining order or injunction restraining the defendant from filing the said schedule of proposed rates with the Interstate Commerce Commission pending the further order of the court.

At this stage of the proceedings the defendant appeared specially be-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fore the judge of said court and tendered a petition to him in vacation of the court (all the foregoing proceedings having been had in vacation and at chambers) praying that the court proceed no further in the matter, except to direct the removal of the cause to the United States court for the Southern district of West Virginia, and tendering a proper bond conditioned as provided in the act of Congress governing removals. The judge of said state court accordingly issued his order for the removal of said cause, and the defendant caused the record to be docketed in open court at Huntington (the court being then in session), and entered its special appearance to the bill for the purpose of moving to dismiss the bill for lack of jurisdiction of the state court, and at the same time the plaintiff appeared specially for the purpose of moving the court to remand the cause to the state court on the ground that the same was improperly removed to this court.

Several questions in regard to removal cases are well settled and are fundamental, and I will briefly state and call attention to those that have influenced me in the decision of the matter now before me.

No case is removable except such as is concurrently cognizable by the state and federal courts. This is made perfectly clear by Act March 3, 1875, c. 137, § 2, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, and corrected by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 509). That section, so far as it is material to this question, reads as follows:

"That any suit of a civil nature at law or in equity arising under the Constitution or laws of the United States or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. \* \* \*

It will thus be seen that removals are only authorized of suits of a civil nature of which the Circuit Courts are given jurisdiction by the preceding section, and by reference to section 1 of Act March 3, 1875 (whether as originally passed or as amended and corrected by acts of 1887 and 1888), it will be found that the only civil jurisdiction conferred by that section is concurrent with that of the courts of the several states. Hence it follows that a petition for removal (if the removal be sustainable) admits that the state court whence the suit was removed had jurisdiction of the subject-matter of the suit, and it follows that, if it is contended by the removing party either that the state court did not have jurisdiction of the subject-matter or that the suit could not have originally been brought in the United States court for the district to which it was removed, on motion, seasonably made, to remand the case, it should be remanded to the state court.

Manifestly, if the state court had not jurisdiction of the subject-matter of the suit, there can be no jurisdiction in this court upon removal, and if that court is without jurisdiction of a cause of action

it is to be supposed that it will so declare when its jurisdiction is properly challenged. If it should decline to recognize the proper limitations upon its civil jurisdiction, the manifestly appropriate remedy is by appeal or writ of error to the state appellate tribunals, and eventually, if necessary, to the Supreme Court of the United States. Certainly the removal act was never designed to permit questions of the extent of the subjects of jurisdiction in the state courts to be determined by the federal Circuit Courts; for no civil case is removable unless the state court had jurisdiction of the subject-matter.

On the other hand, it would be manifestly improper to say to one who had filed a petition for removal and had it granted by a state tribunal, or otherwise lodged the transcript of the record:

"You have no title to contest the question of jurisdiction over the subject-matter, because the filing of your petitioner for removal admits that jurisdiction, both as to the state court and as to this court."

Because waiver cannot confer jurisdiction over the subject-matter, and hence the only appropriate action in such a case is to remand the case and allow the state court to pass upon the question of its jurisdiction, as it is entitled to do.

In the case at bar I express no opinion upon that point. I have similar cases before me, brought directly in my court, and will have to pass upon the question of this court's jurisdiction; but I may say that the only case under which I could retain such a suit in the face of a motion to remand would be one in which I was fully convinced both of the existence of jurisdiction in the state court and in this court over the subject-matter of the suit. The authorities are abundant to the effect that if the jurisdiction is doubtful the case should be remanded, and I may add that, if I were fully and absolutely convinced that the state court never had any jurisdiction over the subject-matter of this suit, it would be my absolute duty to remand the case to that court, because the only authority for the exercise of jurisdiction upon removal rests upon the absolute assumption that the state court had full jurisdiction of the subject-matter.

Remanded.

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NEUBAUER v. AMERICAN SEATING CO.

(Circuit Court, W. D. New York. January 8, 1909.)

No. 243.

1. PLEADING (§§ 358, 359\*)—FRIVOLOUSNESS—SHAM.

Under Code Civ. Proc. N. Y. § 500, subd. 1, providing that an answer must contain a general or specific denial of each material allegation of the complaint controverted by defendant, or of any knowledge or information thereof sufficient to form a belief, a general denial of any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the complaint presents an issue which may

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1507 to date, & Rep'r Indexes

not be stricken as frivolous or sham, though the answer may contain separate independent defenses which are inconsistent therewith.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1096-1128; Dec. Dig. §§ 358, 359.\*]

**2. PLEADING (§ 378\*)—ISSUES AND PROOF—DENIAL OF KNOWLEDGE.**

Where an answer contained a general denial of any knowledge or information sufficient to form a belief as to the truth of the allegations of the complaint and separate independent defenses of new matter, plaintiff was bound to prove the material nonadmitted facts alleged in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1232-1234; Dec. Dig. § 378.\*]

**3. PLEADING (§ 121\*)—INFORMATION AND BELIEF.**

A defendant, who has no information or knowledge of the appointment of a guardian ad litem, is not required to examine the records to ascertain the fact, but may plead denial of information sufficient to form a belief, and rely on plaintiff to prove such appointment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 245-248; Dec. Dig. § 121.\*]

**4. TAXATION (§ 593\*)—ASSESSMENT—BURDEN OF PROOF.**

In a suit to recover an unpaid tax, the burden of attacking the assessment is on the defendant, he being presumed to have had notice of all proceedings, to establish it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1215; Dec. Dig. § 593.\*]

**5. PLEADING (§ 359\*)—SHAM.**

Where there is no allegation in an answer that could be stricken, the denials thereof could not be treated as sham, though they were palpably untrue in relation to some of the material matters alleged in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1120-1128; Dec. Dig. § 359.\*]

Leroy Andrus and Frank Westphal, for plaintiff.  
Harold Sturges Rankine, for defendant.

HAZEL, District Judge. This is a motion by the plaintiff for judgment on the grounds that the amended answer is frivolous and sham. The amended answer contains a general denial of any knowledge or information sufficient to form a belief as to the truth of each and every allegation in said complaint contained, and it also contains separate and independent defenses, which the plaintiff claims to be inconsistent with the general denials. The cases cited in the briefs relating to sham and frivolous answers are not harmonious, though the subject has frequently been discussed by the appellate tribunals of this state. The decided weight of authority, however, favors the view that under section 500, subd. 1, of the Code of Civil Procedure of New York, an allegation such as is objected to by the plaintiff presents an issue which may not be struck out as frivolous or sham. Under such a denial the plaintiff is called upon to prove the material facts (except admitted facts) alleged in the complaint. This I conceive to be the correct rule where the answer contains new matter independent of the general denials, and which are separately pleaded. See *Wayland v. Tysen*, 45 N. Y. 281; *Bank v. Inman*, 51 Hun, 97, 5 N. Y. Supp. 457; *Grocers'*

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Bank v. O'Rorke, 6 Hun, 18; Tracy v. Baker, 38 Hun, 263; Schlesinger v. McDonald, 106 App. Div. 570, 94 N. Y. Supp. 721.

The plaintiff lays particular stress upon the case of Rochkind v. Perlman, 123 App. Div. 810, 108 N. Y. Supp. 224, 1151, where the Appellate Division, Second Department, broadly held that a defendant cannot be permitted to deny material allegations of the complaint which are presumptively within his own knowledge; that he cannot adopt a position of ignorance as to the facts, when manifestly it is his duty to know them. But in that case the denials, which stood alone, were not in the words prescribed by the Code. Here the amended answer, in addition to the general denials, which were correct in form, contains separate defenses which concededly go to the merits of the litigation. The case of City of New York v. Matthews, 180 N. Y. 41, 72 N. E. 629, is also clearly distinguishable, for there it was held that the burden was not on the city of showing jurisdiction in a case where a tax had been imposed; the defendant having failed to review the assessment. It was the same as if the action were upon a judgment, and hence a mere denial that the defendant has any knowledge or information sufficient to form a belief as to the truth of allegations which relate to matters of public record was properly held frivolous.

But an allegation of the appointment comes within this rule. The defendant, who has no information or knowledge of the appointment of a guardian ad litem, is not required to examine the records of the court to ascertain the fact. He may rely upon the plaintiff to make proof of such appointment, for the burden rests upon him; while in a case for the recovery of an unpaid tax the burden of attacking the assessment is upon the defendant, and justly so, for he is presumed to have had notice of all proceedings to establish the assessment.

It is accordingly held by me that the insufficiency of the amended answer on mere inspection is not so clear as to warrant holding it frivolous and giving judgment to the plaintiff. *Youngs v. Kent*, 46 N. Y. 672. As to whether the answer is sham would, I think, depend upon the presence of an allegation which could be struck out. There being no such allegation in the amended answer, the denials cannot be treated as sham, even though they are palpably untrue in relation to some of the material matters alleged in the complaint. *Schlesinger v. McDonald*, *supra*.

The motion for judgment on the pleadings is denied.

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#### DALOZ v. UNITED STATES.

(Circuit Court, D. Massachusetts. May 7, 1909.)

No. 495 (2,038).

#### 1. CUSTOMS DUTIES (§ 75\*)—DUTIABLE VALUE—EXCESSIVE ADDITION ON ENTRY.

On entry an importer added to the invoice value an amount that he considered necessary to equal actual market value, as permitted by Customs Administrative Act June 10, 1890, c. 407, § 7, 26 Stat. 134, as amended by Tariff Act July 24, 1897, c. 11, § 32, 30 Stat. 211 (U. S. Comp. St.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1901, p. 1892). It was decided on reappraisalment that this addition had been unnecessary and that the invoice value was correct. *Held*, that the provision in said section that "duty shall not, however, be assessed in any case upon an amount less than the \* \* \* entered value," indicates an intention to bind the importer to the market value as fixed by him, regardless of the value found by the appraisers or of the general rule of the conclusiveness of such finding, and that therefore duty could not be assessed on a less amount than that on which entry was made.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 75.\*]

2. CUSTOMS DUTIES (§ 75\*)—ADDITION OF INVOICE ITEMS.

Where an invoice specifies certain items distinctly from the per se value of the article invoiced, and the importer in entering the importation states that such items are added to make market value, they constitute a part of the entered value, just as though they had been included in the per se value.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 75.\*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Searle & Pillsbury (Charles P. Searle, of counsel), for importer.  
William H. Garland, Asst. U. S. Atty.

COLT, Circuit Judge. This petition for review relates to the dutiable value of 24 packages of machinery entered at the port of Boston June 27, 1907.

Before entry of the merchandise the importer added 10,000 francs to the invoice value of 34,400 francs by attaching the following memorandum to the invoice:

"Add, to make market value, royalty, 4,000 francs; specifications, drawings, and instructions necessary to put the within machinery into operation, 6,000 francs. Total 10,000 francs."

This addition made the entered value 44,400 francs.

Upon the subsequent appraisal of the merchandise, the Board of General Appraisers decided that the items of 4,000 francs for royalty and 6,000 francs for specifications and drawings, which the importer had added to the invoice value "to make market value," were nondutiable, and that the value of the merchandise was 34,400 francs, the amount stated in the invoice.

Notwithstanding this decision on the question of the appraised value of the merchandise, the collector liquidated the duties at the entered value of 44,400 francs, and the Board of General Appraisers approved the action of the collector and overruled the petitioner's protest. The board in its decision says:

"The protest in this case alleges: (1) That the collector erred in assessing duty upon certain machinery at its entered value, for the reason that it had been appraised by a board of general appraisers and a lower and different value found; and (2) that the entered value was placed upon the merchandise under duress and through clerical error. The first contention could not be seriously maintained, as the collector under the provisions of section 32 of the tariff act of 1897 had no alternative than to assess duty on the entered value. No testimony was submitted to show duress, and in our judgment the testimony offered to sustain the allegation of clerical error falls far short of doing so."



Section 7 of the customs administrative act of 1890 (Act June 10, 1890, c. 407, 26 Stat. 134), as amended by Act July 24, 1897, c. 11, § 32, 30 Stat. 211 (U. S. Comp. St. 1901, p. 1892) permits the importer, before entry, to make such additions to the invoice value of the merchandise "as in his opinion may raise the same to the actual market value." It also imposes certain penalties for the undervaluation of merchandise, and then follows this provision:

"The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value."

When Congress in 1846 first enacted the provision allowing the importer to make additions to the invoice value of the merchandise, it enacted the further provision that the duty shall in no case be assessed at less than the invoice or entered value. Act July 30, 1846, c. 74, § 8, 9 Stat. 43.

This shows clearly that it was the intention of Congress to bind the importer to the market value as fixed by him in the invoice or entry, regardless of the value as found by the appraisers, or of the general rule of the conclusiveness of such finding.

If, therefore, the entered value of the merchandise in the case at bar is 44,400 francs, the collector was bound to liquidate the duties at this value, provided such value was greater than the appraised value.

It is contended by the petitioner that the entered value of the merchandise is only 34,400 francs, by reason of the fact that the Board of General Appraisers have found that the items of 4,000 francs for royalties and 6,000 francs for specifications and drawings were not dutiable, and that the appraised value was 34,400 francs. The answer to this contention is that this finding of the Board of General Appraisers is entirely immaterial, for the reason that in the opinion of the petitioner the actual market value of the merchandise included these items that he therefore added these items to the invoice "to make market value," and that consequently the entered value as fixed by the petitioner was 44,400 francs.

It is further contended by the petitioner that, where the items which are added to make market value are not dutiable and the invoice distinctly states the cost of these items, in such a case they do not constitute a part of the entered value. In other words, the proposition is this: If the petitioner had included these items in the value of the machinery per se, they would have constituted a part of the entered value, although it was found that these items were not dutiable; but, the petitioner having distinctly stated in the invoice the cost of these items, they do not become a part of the entered value.

Upon the state of facts presented in this case, I am unable to see any sound principle upon which any such distinction can rest. If the petitioner had simply added these items to the invoice and stopped there the case would present a different question; but, where he supplements this addition with the words "Add to make market value," he makes these items a part of the market value, with the result that the entered value of the merchandise per se includes these items. Such being the case, it becomes of no consequence whether these items

are specifically set out in the invoice or whether the amount stated in the invoice includes these items.

The petitioner relies upon the case of *Oberteuffer v. Robertson*, 116 U. S., 499, 516, 517, 6 Sup. Ct. 462, 29 L. Ed. 706. In *Oberteuffer v. Robertson* the facts were not the same, and the point involved in the case at bar was neither raised nor passed upon. The language of the court at page 516 cannot be considered as applicable to the facts of the present case, or as a binding authority upon the point now under consideration.

On the other hand, the decision of the Board of General Appraisers is in harmony with all the cases where this specific question has been considered and passed upon. In *re Irwin*, G. A. 5,845 (T. D. 25,764); In *re Isler & Guye*, G. A. 6,234 (T. D. 26,920); *Kimball v. The Collector*, 10 Wall. 436, 450, 19 L. Ed. 964; *Roebbling v. United States (C. C.)* 77 Fed. 601; *Vantine v. United States (C. C.)* 91 Fed. 519; *Haas v. Arthur*, 14 Blatchf. 346, Fed. Cas. No. 5,885.

No question of duress or clerical error was argued at the present hearing and since the evidence is the same as was before the Board of General Appraisers the consideration of this point becomes unnecessary.

The decision of the Board of General Appraisers is affirmed.

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LONDON GUARANTEE & ACCIDENT CO., Limited, v. BELL TELEPHONE  
CO. OF BUFFALO.

(Circuit Court, W. D. New York. June 21, 1909.)

No. 303.

1. COURTS (§ 262\*)—FEDERAL COURTS—JURISDICTION.

The jurisdiction in equity in the federal courts is concurrent with that of law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.\*]

2. ACCOUNT (§ 6\*)—PROCEEDINGS IN RELIEF—EQUITABLE JURISDICTION.

Where a bill for an account to ascertain the wages paid by defendant to its various employes to determine the correct basis of premium charge for employers' liability insurance was open to the inference that the accounting was involved in complication, and that an examination of a large number of employes, and books and pay rolls, was necessary, equity had jurisdiction thereof.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 17, 18; Dec. Dig. § 6.\*]

3. EQUITY (§ 148\*)—BILL—MULTIFARIOUSNESS.

Under the rule that a bill is not multifarious because of the joinder of two different matters which would prevent a multiplicity of suits and does not inconvenience the defendant or cause additional expenses, a bill by an employer's liability company for an accounting to ascertain the wages paid by defendant, insured, to its various employes to determine the premium payable on certain liability policies, was not multifarious because it included causes of action of the same sort arising under different policies.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. EQUITY (§ 219\*)—LACHES—DEMURRER.

An objection that complainant's right to relief was barred by laches need not be considered on demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 498; Dec. Dig. 219.\*]

5. LIMITATION OF ACTIONS (§ 180\*)—OBJECTIONS—DEMURRER.

Where, in a suit for an accounting to compel a disclosure of defendant's pay rolls as a basis of computation of premiums on employer's liability policies, complainant alleged that defendant had persistently declined to permit an examination of its books, to which complainant was entitled under the policy contract, a claim that a part of complainant's claims was barred by limitations would not be considered on demurrer.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675; Dec. Dig. § 180.\*]

6. EQUITY (§ 223\*)—BILL—DEMURRER.

In a suit for an accounting to determine the premium chargeable on certain employer's liability policies, complainant being entitled to the relief demanded with reference to certain of the policies described in its bill, it was no objection thereto on demurrer that some of the policies disclosed that no additional premium was ascertainable.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 223.\*]

On Demurrer to Bill of Complaint.

Love & Keating, for complainant.

Norton, Penney & Sears, for defendant.

HAZEL, District Judge. The bill seeks to recover the amount due complainant as premiums under several policies of insurance issued to indemnify the defendant for damages sustained by reason of personal injuries suffered by employes or other persons through the negligent operation of the business of the assured. Under the agreements the premiums were estimated upon the pay roll of the employes of defendant, and the bill asks that the defendant be decreed to account in equity as to its acts, dealings, and transactions in respect to the amount of pay roll for the years 1897 to 1902, inclusive. The policies of insurance give the insurer the right to examine the books of the defendant to ascertain the wages paid to the various employes, so that a correct basis of the premium charge may be had. The defendant has demurred to the bill on several grounds—that sufficient facts are not alleged to state a cause of action for accounting in equity, that complainant has an adequate remedy at law, multifariousness, that the action is barred by laches, and the policies disclose that no additional premium is ascertainable from certain enumerated policies.

The demand herein is not exclusively a legal one. The jurisdiction in equity in the federal courts is concurrent with that of law, and in matters requiring an accounting, which would be difficult or impracticable for a jury to make, a court of equity will entertain jurisdiction. 6 Pomeroy, § 930; Balfour et al. v. San Joaquin Valley Bank (C. C.) 156 Fed. 500. The bill is open to the inference that the accounting prayed for is involved in complication, and that an examination of a large number of employes, and the books and pay rolls of the defendant from 1897 to 1902, is necessary to ascertain the amount

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of wages paid while the policies of insurance were in force. Upon demurrer the truthfulness of such allegations of the bill as are well pleaded is admitted. Hence, notwithstanding a debtor and creditor relationship between the parties, the issues are thought to indicate the necessity of an accounting by a master, rather than by a jury. It is probably true, as contended by the defendant, that there will be no serious difficulty in ascertaining the amount of the defendant's annual pay roll, to enable the complainant to charge additional premiums as provided by the policies; but, as the contracts expressly give the insurer the right to inspect and examine at all reasonable times the books of the defendant, and also require the defendant to give to complainant written statements of the amount of compensation paid as a basis for premiums charged, I am inclined, as the case stands, to give weight to the assertion that the amount of pay roll as stated in the policies was much less than the amount actually paid, and that during the trial there may arise such a complication of figures as to make it inadvisable that the account be submitted to a jury for disposition.

It is objected that the bill is bad for multifariousness, because it includes causes of action arising from various insurance policies. It appears that there were different transactions; but all seem to relate to the payment of premiums under similar policies of insurance, and each cause of action for accounting is based upon similar grounds. It is not unlikely that the proofs as to each transaction may have some mutual bearing, and in any event the relief obtainable as to all is similar. The rule is that:

"A bill does not come within the evil of multifariousness when the joinder of two different matters prevents a needless multiplicity of suits and neither inconveniences the defendant nor causes additional expense." *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 7 Sup. Ct. 841, 30 L. Ed. 905; *U. S. v. American Bell Telephone Co.*, 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450.

The ground of demurrer stated is overruled.

The objection of laches in bringing suit need not, of necessity, be considered on demurrer. The bill substantially states that the defendant, in violation of the existing contract, persistently declined to permit the complainant to examine its books, and in the circumstances the objection that a part of the claims was barred by the statute of limitations may safely and properly be reserved to the answer and the evidence in support thereof.

The last ground of demurrer evidently relates to the merits, and, even assuming that the policies are before the court, it should not be called upon to decide these questions in limine, where certain of the policies, though not all, entitle the complainant to the relief demanded in the bill.

The demurrer is overruled, with costs.

## In re ALBERT O. BROWN &amp; CO.

Ex parte OLMSTED.

(District Court, S. D. New York. June 14, 1909.)

**BANKRUPTCY (§ 348\*) — CLAIMS — PRIORITY — WAGES — "WORKMAN, CLERK, OR SERVANT."**

The manager of a branch office of a broker in another city is not a "workman, clerk, or servant," within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), and his claim for wages is not entitled to priority on the bankruptcy of his employer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. § 348.\*]

In Bankruptcy. On petition to review referee's denial of priority to claim for wages.

Thorndike Saunders, for petitioner.

Ralph Wolf, for receiver.

HAND, District Judge. Act March 2, 1867, c. 176, § 27, 14 Stat. 517, provided that priority should not be given, "except that wages due from him [the bankrupt] to any operative or clerk or house servant" shall be preferred. In the present act (Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) the words are "workman, clerk, or servant." "Workman" is possibly a wider phrase than "operative," and "servant" is undoubtedly wider than "house servant"; but the section is obviously copied after the law of 1867.

It is quite clear that Olmsted is not a "workman" for the bankrupt. Nor is he a "servant," because the term does not include all instances of the formal relation of master and servant. In so far as *In re Caldwell* (D. C.) 164 Fed. 515, decides to the contrary, I cannot agree with it. This seems to me to follow from the previous form of the section which I have cited, and it has been decided. In *re Grubbs-Wiley Grocery Co.* (D. C.) 96 Fed. 183; In *re Smith*, 11 Am. Bankr. Rep. 646. In the more limited sense, it is quite clear that Olmsted is not a "servant."

The only thing left that he could be, therefore, is a "clerk." No one would think of calling the manager in charge of the Chicago branch of a broker's office a "clerk"—he himself least of all. Whether or not he is employed for "wages," he is much distinguished from a clerk.

The petition will be denied, and the order of the referee affirmed, with costs of the proceeding to complainant.

## In re MARKS.

(District Court, E. D. Pennsylvania. June 24, 1909.)

No. 2,152.

**BANKRUPTCY (§ 228\*)—REFEREE—REVIEW OF ORDERS.**

The mode of reviewing an order of a referee in bankruptcy provided by general order 27 (32 C. C. A. xxvii, 89 Fed. xi), by petition to the District Court, is exclusive, and a referee has no power to review or

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

revoke his own orders after the time for filing a petition for review under the rules of the court has expired.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 228.\*]

In Bankruptcy. On certificate of referee.

Joseph L. Greenwald, for bankrupt.  
George Wentworth Carr, for trustee.

J. B. McPHERSON, District Judge. The facts under which the pending question arises appear from the following certificate of the referee:

"Jacob M. Marks was adjudicated bankrupt on March 8, 1905, upon petition filed against him January 17, 1905. At several adjourned first meetings of creditors he was examined at length, and thereafter on June 26, 1905, Joseph Tomkinson, trustee in bankruptcy, filed a petition for an order on the bankrupt to show cause why he should not pay \$9,321.67 to his said trustee. Further testimony was taken under said petition, and by agreement of counsel the bankrupt's answer was filed subsequently, to wit, on October 10, 1905. The testimony taken under said petition and answer was concluded on April 27, 1906, and argument of counsel heard by me on May 25, 1906.

"On September 19, 1906, I filed an opinion and entered an order directing the bankrupt to pay to his trustee the sum of \$8,022.45. On September 28, 1906, the bankrupt filed exceptions to my said opinion and findings, and also filed an affidavit in support of a motion to revoke the said order. After further hearing I filed a supplemental opinion, dismissing the said exceptions, on January 23, 1907. On February 26, 1907, the bankrupt filed a petition to revoke my said order, and on March 12, 1907, the trustee filed his answer to the said petition. Further testimony was taken, and on February 24, 1908, I filed an opinion and order reducing the sum of the original order of \$8,022.45 by \$4,875, and revoking the said order as to the balance of \$3,147.45. On February 26, 1908, the trustee, by his attorney, filed exceptions to my said order, together with a request to certify the same, together with the record, to the District Court."

The trustee objects that the referee had no power to reduce the amount of the original order to \$3,147.45 and then to revoke the order as to such balance. In the light of the opinion of this court in *Re Greek Mfg. Co.*, 21 Am. Bankr. Rep. 111, 164 Fed. 211—of which the referee could have had no knowledge in February, 1908, since the opinion was not delivered until the following September—it must be declared that the order of revocation was erroneous. In the case just cited it was held that under general order 27 (32 C. C. A. xxvii, 89 Fed. xi), and a rule of this court that was made in December, 1904, an order of a referee may only be reviewed by petition presented to the referee within 10 days (unless the petition be afterwards allowed by a judge of the District Court), and therefore that a referee might not review his own order upon exceptions thereto. If this decision is correct, it follows that as the order of September 19, 1906, was never properly brought up to the District Court for review, it became final after September 29th. But, even if the bankrupt's exceptions to that order operated to suspend its effect, the suspension was removed at the latest on January 23, 1907, when the exceptions were dismissed, and a certificate of review could only have been granted by the referee within 10 days thereafter. It was more than a month afterwards, how-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ever, before the petition to revoke was filed and entertained, and it is the order made upon this petition that is now complained of. Upon the hearing of the petition to revoke, the bankrupt accounted for \$4,875 of the amount with which the referee had originally charged him on September 19, 1906, and as no objection is made to this credit it may stand (irregular as the credit is), in order to avoid the necessity of proving it a second time before the District Court. As to the balance of \$3,147.45, however, the action of the referee cannot be sustained; and it is therefore directed that his revocation be set aside, and that the original order of September 19, 1906, be affirmed as to \$3,147.45 thereof.

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In re J. J. REISLER AMUSEMENT CO.

(District Court, S. D. New York. June 22, 1909.)

**BANKRUPTCY (§ 72\*)—CORPORATIONS WHICH MAY BE ADJUDGED BANKRUPT—THEATRICAL COMPANY.**

A corporation organized "to lease, produce, and exploit plays and other theatrical and dramatic productions, to produce and sell theatrical costumes and properties," and which, up to the time a petition in bankruptcy was filed against it, had actually engaged only in the business of producing a play, is not one "engaged principally in manufacturing, trading, \* \* \* or mercantile pursuits," within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), and is not subject to bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.\*

For other definitions, see Words and Phrases, vol. 8, pp. 7650-7651.

What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

**In Bankruptcy.**

This is a proceeding for the involuntary adjudication of the corporation. The certificate of incorporation read as follows: "The purpose for which it is to be formed is to lease, produce, and exploit plays and other theatrical and dramatic productions; to produce and sell theatrical costumes and properties." The company had started with the production of a play called "The Cash Girl," but became insolvent, and one of the creditors levied an attachment in Boston. The company had done nothing beyond the production of the play in question. The referee dismissed the petition, upon the authority of *In re Oriental Society* (D. C.) 5 Am. Bankr. Rep. 219, 104 Fed. 975.

Newman & Butler, for receiver and petitioning creditors.

Samuel Blumberg, for certain creditors.

HAND, District Judge. I have no doubt of the correctness of the learned referee's disposition of this case. The effort to distinguish *In re Oriental Society* is upon the theory that the petitioner should have been allowed to show what the purposes of the company were. Under the statute, it is of no consequence what their purposes were, except in so far as they had bearing upon the business in which the bankrupt is actually engaged. Cases like *White Mountain Paper Company v. Morse & Co.*, 127 Fed. 643, 62 C. C. A. 369, and *In re Troy*

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Steam Laundry Co. (D. C.) 132 Fed. 266, are quite different. It does not follow that a company is not engaged in an occupation because it has not had time to do all those acts which constitute the whole of the business. If it has already begun upon the execution of part of the work laid out, it is engaged in that business, although it has not yet got far enough to do all the things which together make up the business. Thus, to buy woodland is a part of the business of making paper from pulp, even if not a pound of paper has been made. In this case, if there were proof that the company was laying in its store of trade costumes and property for the purpose of trading, I might hold that it was already engaged in trading, although it had not sold a costume or a stage property. There is no such proof here. The only complaint of the petitioner is that he was not permitted to show what the purposes of the company were, other than those under which it was already engaged. Such proof is irrelevant.

The petitioners likewise complain of the right to object on intervention by a secured creditor, and rely upon a citation from Collier, p. 229, and upon the case of *In re Burlington Malting Co.* (D. C.) 6 Am. Bankr. Rep. 369, 109 Fed. 777. The point raised need not be determined, because no consent can confer jurisdiction, and even without the objection of the attachment creditor no adjudication could be made by this court.

The report is affirmed, and the petition dismissed, with costs.

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#### GRUBNAU v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. May 13, 1909.)

No. 79.

#### CUSTOMS DUTIES (§ 80\*)—REAPPRAISEMENT—INVALIDITY.

Where it is not shown that the original appraisement by a local appraiser was incorrect, it is immaterial that a reappraisement held on appeal from such appraisement was invalid, if the value found was the same in each proceeding; because in such event the original appraised value would be taken as the dutiable value.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 196; Dec. Dig. § 80.\*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importer.

J. Whitaker Thompson, U. S. Atty. (Jasper Yeates Brinton, Asst. U. S. Atty., of counsel).

J. B. McPHERSON, District Judge. For the purposes of the present decision it is only necessary to call attention to the facts set forth in the following stipulation of counsel that was filed with the board:

"It is hereby agreed that the merchandise covered by the above protest consists of washed Smyrna wool, embraced in two invoices. That these in-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



voices cover certain bales of white wool, other bales of black wool, and other bales of gray wool, all invoiced at a round price. That, on appraisement before the local appraiser at Philadelphia, the appraiser found a separate value for the white wool, and made certain additions to make the foreign market value of such white wool, which made it worth over 12 cents per pound; and he appraised the black and gray wool as valued at under 12 cents per pound. That thereafter the importer called for reappraisement of said white wool by a single United States general appraiser, pursuant to section 13 of the act of June 10, 1890, c. 407, 26 Stat. 136 (U. S. Comp. St. 1901, p. 1932), and said general appraiser affirmed the appraisement as made by the local appraiser. That said importer called for further reappraisement of said white wool by a board of three general appraisers, pursuant to section 13 of the act of June 10, 1890, and said board of three general appraisers affirmed the values already found for said white wool."

There was other evidence before the board and additional testimony was taken upon the pending petition, but none of it need now be referred to, as the decision of the board was put upon the single ground that the importers' protest did not challenge the correctness of the valuation made by the local appraiser, and that, upon the authority of *United States v. Curnen & Stiner*, 146 Fed. 46, 76 C. C. A. 503, such a valuation is therefore to be taken as the dutiable value of the merchandise, even if the correctness of the reappraisements should be disapproved. The opinion of the board is as follows:

"This protest challenges the legality of a reappraisement of washed Smyrna wool, contending that the importation in question consisted of wools chiefly white, but some part colored, and that the general appraisers illegally and arbitrarily appraised the importation as though the white and colored wools had been separately imported, advancing the value of the whole importation to the value which the white wool might or would have had if the same had been separately imported.

"The testimony is voluminous, much of it not at all pertinent to the issue. It shows, however, that the white and colored wool in question was packed separately and invoiced at a round price. The record shows that the appraiser of the port, the general appraiser, and the board of three general appraisers all found the same value for the white wool, which is all that is covered by the appeal. The action of the local appraiser is not challenged by the protest. Under the decision of the United States Circuit Court of Appeals in *United States v. Curnen & Stiner*, 146 Fed. 46, 76 C. C. A. 503 (T. D. 27,262), it matters not whether the reappraisement by the general appraiser or by the board of general appraisers is valid or invalid so far as the proper liquidation of this entry is concerned, for there it was held that the last valid appraisement should be taken as the dutiable value of the merchandise. As all three appraisements are the same, the action of the collector must be sustained, regardless of the validity or the invalidity of the reappraisement. The protest is therefore overruled."

Upon this opinion the order of the board is affirmed.

## BAYERSDORFER &amp; CO. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. May 12, 1909.)

No. 59.

## 1. CUSTOMS DUTIES (§ 37\*)—CLASSIFICATION—"ORNAMENTAL LEAVES"—WREATHS, ETC.

Florists' ornamental supplies, consisting of leaves of various plants arranged in the form of wreaths, crosses, etc., are dutiable as "ornamental leaves" under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.\*]

## 2. CUSTOMS DUTIES (§ 30\*)—CLASSIFICATION—STATICE WREATHS—"NATURAL FLOWERS, PRESERVED."

Statice wreaths, which have all the appearance of "natural flowers \* \* \* preserved," are dutiable under the enumeration of such articles in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 251, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1650).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 30.\*]

## 3. CUSTOMS DUTIES (§ 37\*)—CLASSIFICATION—GRASSES.

Certain grasses are *held* to be more specifically provided for as manufactures of grass under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 449, 30 Stat. 193 (U. S. Comp. St. 1901, p. 1678), than as "artificial grains, leaves, or flowers," under paragraph 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.\*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Comstock & Washburn (George J. Puckhafer, of counsel), for importers.

J. Whitaker Thompson, U. S. Atty., and Jasper Yeates Brinton, Asst. U. S. Atty.

HOLLAND, District Judge. This is an appeal by the importers from a decision of the Board of General Appraisers affirming the classification of the collector in respect to a large and varied assortment of imported ornamental florists' supplies, as follows: "Ruscus grun," "Areca blatter," "Cycas leaves," "Magnolia wreath," "Ilex wreath," "Ruscus cross," "Tull leaf," "Adiantum fern," "Ruscus wreath," "Phoenix leaves," "Leaves in form of cross," "Palm leaf wreath."

The appraiser at this port returned these importations as "ornamental leaves," and the collector classified them as such, and assessed a duty on each one of 50 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), following the decision of Judge Hazel in *Kreshower v. U. S.* (C. C.) 152 Fed. 485, and this classification and assessment was affirmed by the Board of General Appraisers. For the reasons stated by the latter, the decision of the board is affirmed.

The same importer has appealed from the decision of the Board of General Appraisers in its affirmance of the collector in classifying

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Stative wreaths" under paragraph 251 of the tariff act as "natural flowers \* \* \* preserved or fresh," and assessing a duty of 25 per cent. ad valorem in accordance with the provision of this paragraph. This exhibit has all the appearance of "natural flowers \* \* \* preserved," and we think that the classification and assessment of the board should be affirmed; and it is so ordered.

The classification of the grasses (Exhibit 13 of the same importer) under paragraph 425 of the tariff act, and an assessment of 50 per cent. ad valorem thereunder by the collector, which was affirmed by the Board of General Appraisers, we have concluded is erroneous. An inspection of this importation convinces us that they are more properly classified as "manufactures of grasses," dutiable at 30 per cent. ad valorem under paragraph 449. The language in paragraph 425 levying a duty on "artificial grains, leaves or flowers" does not as specifically describe this article as the terms referred to in paragraph 449. The assessment should therefore be 30 per cent. ad valorem under this paragraph.

The decision of the board as to the classification and assessment of this importation is reversed.

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In re GOODMAN.

(District Court, E. D. Pennsylvania. June 24, 1909.)

No. 2,996.

**BANKRUPTCY (§ 408\*)—RIGHT OF DISCHARGE—CONCEALMENT OF PROPERTY.**

A bankrupt *held* not entitled to a discharge on the ground that he concealed property from his trustee and made false oaths in the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 408.\*]

In Bankruptcy. On application for discharge.

Howard E. Heckler, for bankrupt.

George Wentworth Carr, for objecting creditors.

J. B. McPHERSON, District Judge. The conclusion of the special referee (David W. Amram, Esq.) appears by the following quotation from his report:

"From the testimony I find and conclude that the bankrupt, at some time prior to his bankruptcy and within four months immediately preceding the filing of the petition in bankruptcy against him, concealed merchandise to the value of at least \$1,000, or its equivalent in cash, with intent to hinder, delay, and defraud his creditors; that subsequent to his bankruptcy, and after the appointment of his trustee, he concealed the same from his said trustee; that in filing his schedules in bankruptcy, and failing to state therein that he had such merchandise or cash, he was guilty of making a false oath in these bankruptcy proceedings; and that in testifying under oath before me at the first meeting of creditors that he had no goods secreted or money in his pocket he was again guilty of making a false oath in these bankruptcy proceedings; and for these reasons his discharge should be refused."

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

No exceptions have been filed to this report, and no sufficient reason has been shown why it should not be confirmed.

The recommendation of the referee is approved, and the clerk is directed to enter an order that the discharge is refused.

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In re DAREVSKI.

(District Court, E. D. Pennsylvania. June 24, 1909.)

No. 2,739.

**BANKRUPTCY (§ 408\*)—DISCHARGE—GROUNDS FOR REFUSAL—OBTAINING PROPERTY BY FALSE STATEMENTS.**

Where it is clearly shown that a bankrupt obtained goods on credit by means of a statement in writing made for the purpose, and which contained one or more material statements which were false, and known by him to be so, it is the plain duty of the court to refuse him a discharge, under Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427) as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-734; Dec. Dig. § 408.\*]

In Bankruptcy. On application for discharge.

Jacob Weinstein and Samuel W. Salus, for bankrupt.

George Wentworth Carr, for objecting creditors.

J. B. McPHERSON, District Judge. The report of the special referee (Theodore M. Etting, Esq.) shows satisfactorily that the bankrupt obtained goods on credit from one of the objectors by means of a statement in writing made for such purpose, that the creditor relied upon the correctness of the items in such statement, that several of these items were materially false, and that the bankrupt knew of their falsity when he made the statement. This satisfies the most exacting construction of section 14, cl. b (3), of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1026]), and requires the court to refuse the discharge. It is sufficient if one of the statements is shown to be materially false, and of this fact there is no reasonable doubt. Indeed, the referee has found that four of the items were false, and I must not be understood as disagreeing with his conclusions in this respect, although I see no need to pass upon the correctness of his report, except as to two of the items, namely, the value of the stock and the amount of the annual sales. Both these items were materially false, and their falsity fully justified the referee in sustaining the objections.

His recommendation is therefore approved, and the clerk is directed to enter an order that the discharge is refused.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## In re MITCHELL.

(District Court, S. D. New York. June 30, 1909.)

**EXTRADITION (§ 13\*)—BAIL—POWER OF COURT.**

A Circuit Court of the United States has power independently of statute to admit to bail in a case of foreign extradition pending examination, but such power should be exercised only under the most pressing circumstances. However, where the plaintiff in an action in New York involving his whole fortune was arrested on an extradition warrant from Canada the day before the trial of his case was to begin, at the instance of the adverse party, the hardship is such that the court is justified in enlarging him on bail until the trial of his case can be completed.

[Ed. Note.—For other cases, see Extradition, Dec. Dig. § 13.\*]

On Application for Admission to Bail Pending Extradition Proceedings.

Littlefield & Littlefield, for petitioner.

Charles Fox, for the Canadian Government.

HAND, District Judge. In this case the petitioner applies for bail under special circumstances. He has been arrested on extradition papers which have been issued from Canada and under which he is charged with what, in the state of New York, would be larceny. A warrant has been issued by Commissioner Alexander, and he is at present in the Tombs prison awaiting the final determination upon his extradition. The warrant was issued against him Thursday, June 24th, which was just upon the eve of a trial in the Supreme Court of the state of New York, in this county, in which he is the plaintiff and the moving parties in the extradition proceedings are the defendants. The trial commenced on the 25th, and I then issued a habeas corpus ad testificandum, upon which he appeared in court on the 25th and testified. The suit involves a very large sum of money; indeed, from the papers, I understand that it involves all the fortune of the prisoner. The application is made to enlarge him upon bail for the reason that at present he is entirely unable to consult with his counsel and prepare for the remainder of the trial, which will consume, probably, the 28th, 29th, and 30th days of June. The application is opposed by the Canadian agent with much vigor, who contends that I have not the power to grant bail in such cases. My understanding of *Wright v. Henkel*, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948, is that the existence of the power was distinctly affirmed by the Supreme Court. The court at the same time clearly indicates its judgment that the power should be exercised only in the most pressing circumstances, and when the requirements of justice are absolutely peremptory; but still I cannot read that opinion without recognizing that the court understood the power to exist.

The petitioner also relies upon *Pettit v. Walshe*, 194 U. S. 205, 24 Sup. Ct. 657, 48 L. Ed. 938, which construed the proviso of the sundry civil act of 1894 (Act Aug. 18, 1894, c. 301, 28 Stat. 416

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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[U. S. Comp. St. 1901, p. 717]) as applying to extradition cases. I do not, however, interpret that proviso or the opinion as indicating that the Supreme Court in any sense meant to do more than say that section 5270 of the Revised Statutes (U. S. Comp. St. 1901, p. 3591) was modified pro tanto by the sundry civil act, and only to the extent of providing that the extradited person must be brought before the nearest commissioner. We should not interpret that opinion as independently recognizing the right to take bail, but that right must depend entirely upon *Wright v. Henkel*, supra. In several cases in this district commissioners and judges have issued bail under similar circumstances, and while I quite agree with the learned counsel for His Majesty's government that the right is a dangerous one, and ought to be exercised with great circumspection, it seems to me that the hardship here upon the imprisoned person is so great as to make peremptory some kind of enlargement at the present time, for the purpose only of free consultation in the conduct of the civil suit upon which his whole fortune depends. Those special circumstances alone move me to allow him to bail, and his enlargement is to be limited strictly to the period of that suit. As soon as that is terminated he must be returned to the Tombs prison to await the determination of the commissioner upon the extradition proceedings. Until, however, that suit is terminated, I will order him released upon bail in the sum of \$3,000. I am also moved to this disposition from the fact that he has long known of these proposed proceedings and has made no effort to avoid them or to escape.

Let an order be entered to that effect.

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Ex parte O'HARE et al.

(District Court, W. D. New York. June 18, 1909.)

CRIMINAL LAW (§ 97\*)—JURISDICTION—LOCALITY OF OFFENSE—"HIGH SEAS."

The government breakwater in Lake Erie at the port of Buffalo, two miles from shore, but not connected therewith, does not so inclose the waters between that and the shore as to constitute a haven or harbor, or take such waters out of the designation of "high seas," as used in Rev. St. 5346 (U. S. Comp. St. 1901, p. 3630); and under such section an assault with a dangerous weapon committed on a vessel in such waters is within the jurisdiction of the United States courts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 184; Dec. Dig. § 97.\*

For other definitions, see Words and Phrases, vol. 4, pp. 3287-3289.]

Habeas Corpus.

George H. Kennedy, for petitioners.

John Lord O'Brian, U. S. Atty.

HAZEL, District Judge. This is the return of writs of habeas corpus granted on application of the petitioners, who are charged with having committed an offense on the high seas, in violation of Rev. St. §§ 5346, 5361, and 5362 (U. S. Comp. St. 1901, pp. 3630,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3640), and Act Sept. 4, 1890, c. 874, 26 Stat. 424 (U. S. Comp. St. 1901, p. 3627). The petitioners contend that this court has no jurisdiction of the offense, in that the waters upon which the alleged crime was committed are not within the designation of "high seas" as provided in said statutes, and that the vessel at the time of the assault was not bound on a voyage. In *United States v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071, it was definitely decided that under the designation of "high seas" Congress intended to include "the open, uninclosed waters of the Great Lakes."

The question presented on this application is whether the maintenance of the government breakwater, which is parallel with the shore at the port of Buffalo and within a two-mile belt thereof, so inclosed the waters of Lake Erie that a haven or harbor, as that term is ordinarily understood, was created, and accordingly that this court is without jurisdiction of the offense prohibited by section 5346 of the Revised Statutes of the United States. By said section it is substantially provided that United States courts have jurisdiction of assaults committed on board vessels upon the high seas, even though committed within the jurisdiction of a particular state; but if the offense was committed in any arm of the sea, or in any river, haven, creek, basin, or bay within the jurisdiction of a particular state, then the United States courts have not the power or authority to try the offender. As Lake Erie is conceded a high sea, and a continuous highway over which the largest commerce-carrying vessels are navigated between different states and nations, I have no difficulty in reaching the conclusion that the lake is not separated by the construction of the breakwater parallel with the shore; nor does such construction, even though the waters between it and the land are used as a haven or harbor for the anchorage of vessels, deprive this court of jurisdiction. The breakwater is not connected with the mainland, but is entirely surrounded by water and attached to the bottom of a navigable portion of the lake. It has no connection whatever with the shore land, and the water between the breakwater and the shore is not in any sense landlocked, and therefore, in my judgment, such waters remain within the designation of high seas.

Having reached this conclusion, it is unnecessary to examine the amendatory act of September 4, 1890, which extended the jurisdiction of the federal courts to vessels upon a voyage upon the waters of the Great Lakes.

The writs of habeas corpus are dismissed.

## In re LUDEKE.

(District Court, E. D. New York. June 29, 1909.)

**BANKRUPTCY (§ 433\*)—DISCHARGE—EFFECT ON GARNISHMENT OF BANKRUPT'S SALARY.**

Where a percentage of the salary of an employé of the city of New York was retained by the city to apply on an execution against him, pursuant to an order of a state court made under Code Civ. Proc. N. Y. § 1391, the discharge of such employé in bankruptcy releases the lien of the execution upon such fund, so far as relates to salary earned after the adjudication in bankruptcy, where the judgment was a provable debt upon which the discharge operated.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 433.\*]

In Bankruptcy.

Francis K. Pendleton, Corp. Counsel.  
Eugene Conran, for bankrupt.

CHATFIELD, District Judge. The bankrupt is in the employment of the city of New York, receiving a monthly salary as attendance officer of the board of education. His petition was filed in this court on the 10th day of February, 1909, and he was adjudicated upon that day. Upon the 30th day of April of this year, upon a hearing properly noticed, the bankrupt was discharged of his provable debts. A certified copy of the order of discharge has been served upon the comptroller of the city of New York. One John T. Gallagher obtained a judgment for \$2,111.11, which was docketed in the clerk's office of the county of Kings upon the 17th day of May, 1898, and upon the 27th day of January, 1909, under section 1391, Code Civ. Proc. N. Y., an execution was served upon the comptroller, pursuant to an order of the Supreme Court of the state of New York, directing the city of New York to pay to the sheriff of Kings county the sum of 10 per cent. of the bankrupt's salary, for each week as the bankrupt's salary might accrue, until the said execution should be satisfied. In pursuance thereof the comptroller of the city of New York has applied 10 per cent. of the bankrupt's salary for the purposes of this execution, and up to the present time has refused to pay over to the bankrupt the total amount of his salary accruing since the date of his discharge. Upon this motion, served upon the comptroller, the judgment creditor, and the trustee in bankruptcy, the application is now made to this court to dissolve the lien of the said execution and garnishee order.

The bankrupt was relieved by his discharge in bankruptcy from all provable debts. The judgment in question was apparently such a debt, and the lien against his salary, it is believed, would not continue with respect to any sum not already earned, and to which lien had not specifically attached under the levy of the execution, at the date of his adjudication in bankruptcy, inasmuch as the discharge was granted. Under Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), any amount of money so levied upon within four months prior to the filing of the petition passed to the trustee as a part of the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



estate of the bankrupt, unless it had been paid over and had passed to the hands of an innocent party. But as to any funds retained by the city, in pursuance of the order of the Supreme Court, subsequent to the adjudication in bankruptcy, the trustee can have no claim, inasmuch as the discharge has been granted. A discharge is ordinarily a matter of defense, and can only be enforced by the federal court where there seems to be contempt of that court's order, and when the parties are properly brought within its jurisdiction. But in the present instance the title of the trustee is involved, and the comptroller of the city of New York, having been made a party to this proceeding, having appeared and not objected to a determination of the rights of the parties to this fund, except in so far as it may be necessary to protect the city of New York, and inasmuch as the judgment creditor has also been made a party hereto, it must be held that all the funds now in the possession of the city of New York, or any of its officers, and held under the levy of the execution served January 27, 1909, so far as these funds have been attached or made subject to said execution since the 10th day of February, the date of adjudication, will be ordered to be paid over to the bankrupt. The discharge in bankruptcy must be held to have freed the bankrupt's salary from the effect of said execution, in so far as payments subsequent to the date of adjudication are concerned, inasmuch as the judgment under which the execution was levied has been discharged, and inasmuch as the levy cannot be considered to have actually attached until the salary accrued.

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UNITED STATES V. STONE & DOWNER CO.

(Circuit Court, D. Massachusetts. May 11, 1909.)

No. 150 (1,833).

CUSTOMS DUTIES (§ 41\*)—CLASSIFICATION—HERBS IN ALCOHOL—"ALCOHOLIC COMPOUNDS."

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 2, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1627), for "alcoholic compounds," does not include herbs immersed in alcohol. Such merchandise is dutiable under section 6 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), relating to unenumerated unmanufactured articles.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 41.\*

For other definitions, see Words and Phrases, vol. 1, pp. 295-296; vol. 8, p. 7570.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The question involved in this case is whether a certain importation at the port of Boston was properly subjected to the duty imposed by the collector of customs under the provision for "chemical compounds" in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 2, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1627). The Board of General Appraisers sustained the importers' contention that it should have been assessed under the provision for unenumerated unmanufactured articles in

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

section 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693). The material in controversy was described as follows in the opinion of the Board:

"Upon the evidence taken it appears that 15 kilograms of alcohol, valued at 37.50 marks, was placed in the kegs containing certain belladonna leaves and stalks cut up, and 12 kilograms of alcohol, valued at 30 marks, in the kegs containing aconite leaves and stalks cut up, and that these values were included in the general value on the consular invoice; that the merchandise consists of green belladonna leaves and stalks and green aconite leaves and stalks imported for the purpose of maceration in alcohol and for the purpose of making tinctures and extracts; that the alcohol in which the leaves were first immersed was continued in use in the maceration in this country, while it incidentally served as a preservative in the importation of said leaves, the amount of alcohol so used lessened the quantity of alcohol required for complete maceration."

William H. Garland, Asst. U. S. Atty.

Walden & Webster (Henry J. Webster, of counsel), for the importers.

COLT, Circuit Judge. The decision of the Board of General Appraisers is affirmed, upon the authority of *Boericke & Runyon Company v. United States* (C. C.) 126 Fed. 1018. The government contends that the evidence before the Board in the case at bar, is not in accord with the facts presumably found by the court in its opinion in *Boericke & Runyon Company v. United States*. No such inference, however, can be properly drawn from the opinion of the court in *Boericke & Runyon Company v. United States*, since an examination of the evidence in that case shows substantially the same state of facts as in the case at bar, and the Board of General Appraisers have expressly found that the merchandise is the same.

The decision of the Board of General Appraisers is affirmed.

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#### In re BALSARA.

(Circuit Court, S. D. New York. May 28, 1909.)

ALIENS (§ 61\*)—NATURALIZATION—CONSTRUCTION OF STATUTE—"FREE WHITE PERSONS."

Quere, whether the words "free white persons," as used in the naturalization statutes, should be held to include all branches of the Aryan race, or limited to those races who were represented in this country at the time the first naturalization statute was enacted.

[Ed. Note.—For other cases, see *Allens*, Dec. Dig. § 61.\*

Citizenship under state and federal laws, see note to *City of Minneapolis v. Reum*, 6 C. C. A. 37.]

Carl A. Hanseman, for petitioner.

Hugh Govern, Asst. U. S. Atty.

LACOMBE, Circuit Judge. The phrase "free white persons" must be taken as used with the same meaning in the various successive statutes in which it appears. There is much force in the argument that the Congress which framed the original act for naturalization of aliens (Act April 14, 1802, c. 28, 2 Stat. 153) intended it to include only

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

white persons belonging to those races whose emigrants had contributed to the building up on this continent of the community of people which declared itself a new nation, admission to the privileges of citizenship in which was by that statute sought to be restricted. No doubt such interpretation is unscientific, and, it may be, not always easy of application; but there are equally serious objections to accepting the words "white persons" as including all branches of the great race or family known to ethnologists as the Aryan, Indo-European, or Caucasian. To do so will bring in, not only the Parsees, of which race the applicant is a member, and which is probably the purest Aryan type, but also Afghans, Hindoos, Arabs, and Berbers. Individuals of those races may be desirable citizens, but it may well be doubted whether Congress intended to make citizenship here free for all of them upon merely the meager examination of qualifications and antecedents which the statutes provide for.

It seems desirable that some authoritative interpretation of this statute should be secured, and the representative of the government is prepared to appeal from an order admitting to citizenship. Therefore, since the applicant appears to be a gentleman of high character and exceptional intelligence, such an order may be entered upon his application.

JAMES B. SIPE & CO. et al. v. COLUMBIA REFINING CO.

(Circuit Court, S. D. New York. May 3, 1909.)

**1. INJUNCTION (§ 114\*)—PARTIES—JOINDER OF COMPLAINANTS.**

Two corporations, one of which is the successor in business of the other, may join in a bill to enjoin acts of defendant which will injure both complainants.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 210; Dec. Dig. § 114.\*]

**2. EQUITY (§ 148\*)—PLEADING—MULTIFARIOUSNESS.**

A bill to enjoin defendant from using a secret formula alleged to have been fraudulently obtained from complainant, and also from so dressing and naming the product as to constitute unfair competition, is not necessarily multifarious, where it alleges that the acts complained of are all parts of the same enterprise.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.\*]

In Equity. On demurrer to bill on the ground that the complaint is multifarious and for misjoinder of parties.

John C. Pennie, for complainants.  
Herman Goldman, for defendant.

LACOMBE, Circuit Judge. This demurrer could be easily disposed of if it were concerned only with the joinder of the two companies in the prosecution of defendant for its improper acts, which have worked injury to both complainants, and which acts, if continued, threaten injury directly to the Delaware company and in-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

directly to the Pennsylvania company, possibly making it liable to its vendee upon its guaranty.

The objection that the bill is multifarious, because it joins two separate causes of action, is more serious. It is averred that defendant has fraudulently obtained possession of a secret formula, the property (in succession) of complainants, and has been and is manufacturing and selling paint oil made in accordance therewith. It is also averred that defendant is offering its goods for sale as "Japinol," which is a colorable imitation of the trade-name "Japan Oil," under which complainant's product has been marketed for many years. The prayer for relief asks that both of these practices be enjoined. It is one thing to steal a man's secret formula, and by the use of it to produce goods which are identical with those he makes. It is another thing to make up goods which are not identical with those he makes, but which are inferior or different from them in some way, and then sell such goods as being in fact the genuine article, through misrepresentations on wrappers or in advertisements. But as set forth in the bill these transactions are all parts of a single enterprise. It is also alleged that an employé was enticed away and induced to give the names and addresses of customers—unfair competition in an effort to get the trade of persons who wish to make use of paint oil. I am inclined, therefore, to hold, although not without some doubt, that the bill is not obnoxious to the objection that it is multifarious. It would certainly be unfortunate to have to try this same controversy twice over in separate suits because of too rigid an adherence to rules of practice.

The demurrer is overruled.

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#### KEY WEST CIGAR MANUFACTURERS' ASS'N et al. v. ROSENBLOOM.

(Circuit Court, S. D. New York. May 1, 1909.)

##### 1. TRADE-MARKS AND TRADE-NAMES (§ 88\*)—UNLAWFUL COMPETITION—RIGHT TO SUE—ASSOCIATION OF MANUFACTURERS.

Where an association of cigar manufacturers, as an association, did not manufacture or deal in cigars, and was not in any competition with defendant, it could not sue in equity for unfair competition, alleged to consist in the sale by defendant of cigars not made in Key West in packages marked and labeled to indicate that they were made there.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 98; Dec. Dig. § 88.\*]

##### 2. TRADE-MARKS AND TRADE-NAMES (§ 91\*)—JOINDER—RIGHT TO JOIN.

Several cigar manufacturers, interested in obtaining the same relief against defendant for unfair competition in the sale of cigars not made in Key West, in packages marked and labeled to indicate that they were made there, were entitled to join as complainants.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 101; Dec. Dig. § 91.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. COURTS (§ 308\*)—FEDERAL COURTS—JURISDICTION—CITIZENSHIP.**

Where one or more of several joint complainants was of the same citizenship as defendant, federal jurisdiction on the ground of diverse citizenship did not exist.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 855, 856; Dec. Dig. § 308.\*]

Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

In Equity. On demurrer to a bill for unfair competition by defendant in the sale of cigars not made in Key West in packages so marked and labeled as to indicate that they are made there.

Sidney R. Perry and Stewart & Stewart, for complainants.

L. & I. J. Joseph, for defendant.

LACOMBE, Circuit Judge. The bill sets forth a cause of action in favor of the individual complainants, who manufacture and sell cigars actually made in Key West; but it is not apparent on what theory the "association" of such manufacturers can maintain such a suit. It neither manufactures nor deals in the cigars, and is not in any competition with defendant. Complainants' counsel asserts that in *California Fruit Cannery Association v. Myer* (C. C.) 104 Fed. 82, a similar suit was sustained. The report of that case does not indicate that any such point was raised, and Judge Morris' opinion begins with the statement that:

"The complainants are a number of corporations in California, engaged in that state in the business of canning pears grown there."

There is no reason why the several complainants who seek the same relief should not be joined as parties plaintiff; but two of them happen to be citizens of New York, and therefore this suit cannot be maintained in the federal courts against defendant, who is a citizen of the same state.

The demurrer is sustained, with leave to amend complaint within 20 days, so as to obviate the objections to it in its present form.

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In re COLE.

(District Court, D. Rhode Island. July 12, 1909.)

No. 506.

**BANKRUPTCY (§ 140\*)—TITLE OF TRUSTEE—MORTGAGED GOODS—DELIVERY TO MORTGAGEE—RETENTION OF KEYS.**

Where a key to a storeroom containing the mortgaged goods was delivered to the mortgagee, who visited the room, examined the goods, and retained the key, there was a delivery and retention of the goods by the mortgagee, though the mortgagor retained another key; there being no evidence that the mortgagee had knowledge thereof, or that the mortgagor ever visited the storeroom, or exercised any control over the goods.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy.

James H. Rickard, Jr., for appellant.  
Mendell W. Crane, for trustee.

BROWN, District Judge. Upon the facts found by the referee, I am of the opinion that possession of the mortgaged personal property was delivered to and retained by the mortgagee Terkel.

A key of the storeroom containing the goods was delivered to the mortgagee, who visited the storeroom, examined the goods, and afterwards retained the key. Under the circumstances he was not required to inquire if the mortgagor retained another key, but was entitled to assume that the key given to him for the express purpose of giving him possession of the goods did in fact give him a possession which was exclusive. The mere fact that the mortgagor retained another key, without evidence that he ever visited the storeroom or exercised any control of the goods after delivery of the key to the mortgagee, is insufficient to show that the mortgagee had knowledge of the existence of a second key, or that he consented to a joint possession of the goods.

There was apparently some conflict in the testimony as to whether there was in fact more than one key; but the referee has expressly found that Terkel received from Cole a key to the storeroom, and bases his opinion that there was not a sufficient taking and retaining of possession upon the ground that such possession was as much retained by the mortgagor as the mortgagee, because each retained a key to the storeroom. I see no reason for disturbing the referee's finding of fact that each retained a key to the storeroom. Under the circumstances, however, the mere retaining of a second key by the mortgagor is insufficient to show that the mortgagee's possession was not exclusive.

The decision of the referee disallowing the claim is overruled, and the claim is allowed.

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In re BLAKE.

(District Court, E. D. New York. July 13, 1909.)

**BANKRUPTCY (§ 140\*)—PREFERENCE—POSSESSION.**

A bankrupt executed certain deeds, which he delivered as security for a loan under an agreement that, if the loan was not paid on May 15, 1909, the lender should have, between May 15th and June 1st, an option to cancel the notes and purchase the land. The deeds were recorded as deeds March 27, 1909, and again with the agreement as mortgages on May 28th following. The record as deeds was made on the grantee's paying an equity of \$400 cash, on it becoming apparent that the bankrupt would not be able to meet the notes when due. He was adjudicated a bankrupt on June 7, 1909. *Held*, that since, if the arrangement to exercise the option and pay a cash consideration constituted a preference, the relief of the bankrupt's trustee must be by action, during pendency thereof, the grantee was entitled to possession and to collect the rents and profits.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Charles M. Davenport, for trustee.  
David H. Taylor, for Ogden.

CHATFIELD, District Judge. The bankrupt gave a note, accompanied by certain deeds, to one Ogden, in return for a loan of \$17,000. The deeds were delivered under an agreement that if the loan should not be paid, with interest, on the 15th of May, 1909, Ogden should have, between May 15th and June 1st, an option to cancel said notes and purchase said lands. The deeds in question were recorded as deeds upon the 27th day of March, 1909, and again, with the agreement, as mortgages upon the 28th day of May, 1909; the record as deeds having been made inasmuch as it had become apparent that the bankrupt would be unable to meet the notes at the time they became due, and an equity of \$400 cash having been then paid to the bankrupt. The debtor, Blake, was adjudicated a bankrupt on June 7, 1909.

Whether it be assumed that the title passed by the premature exercise of the option, or whether Ogden held the title merely as security for his claim, it nevertheless follows that he is entitled to retain possession of the property, and to collect the rents and income therefrom, pending a determination of what his real status may be. *Lunny v. McClellan*, 116 App. Div. 476, 101 N. Y. Supp. 812; *Barson v. Mulligan*, 66 App. Div. 486, 73 N. Y. Supp. 262. Even if the arrangement to exercise the option and pay a certain amount of cash constituted a preferential payment, the relief must be by action, and Ogden is entitled to retain possession pending this determination.

The present motion to have the property turned over to the trustee, and to restrain Ogden or his representative from collecting the rents, must be denied; but some provision may be made by which the trustee can be informed, or secured, if necessary, with reference to the amount and disposal of the revenues from the property for a short period, within which he must take action looking to a determination of the rights of the estate, if he be advised to bring such an action.

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IN RE KNIGHT.

(District Court, E. D. New York. July 13, 1909.)

**ALIENS (§ 61\*)—NATURALIZATION—PERSONS CAPABLE—HALF-BREEDS—"WHITE PERSON."**

Petitioner was born on a British schooner in the Yellow Sea. His father was an Englishman, and his mother half Chinese and half Japanese, their marriage having occurred at Shanghai under the British flag. Petitioner enlisted in the United States navy off the coast of China in 1882, and first came to the United States August 5, 1892. He had served honorably since his enlistment until his application for citizenship, when he was 43 years old. *Held*, that petitioner was not a free "white person," and was therefore not entitled to naturalization, under Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333), providing that the act shall apply to aliens being free white persons and those of African nativity and descent, and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Act Cong. May 6, 1882, c. 126, § 14, 22 Stat. 61 (U. S. Comp. St. 1901, p. 1333), prohibiting the admission of Chinese to citizenship.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119-122; Dec. Dig. § 61.\*

For other definitions, see Words and Phrases, vol. 8, pp. 7446, 7447.

Citizenship of Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing v. United States*, 35 C. C. A. 332.]

Louis R. Bick, Asst. U. S. Atty., and Hugh Govern, Jr., Sp. Asst. U. S. Atty.

Petitioner, in pro. per.

CHATFIELD, District Judge. The applicant is some 43 years of age, and has served honorably in the United States navy since the year 1882. He has a medal for service in the battle of Manila Bay, in which he was upon the flagship Olympia, and his record in the navy is more than sufficient to meet the requirements of act July 26, 1894, c. 165, 28 Stat. 124 (U. S. Comp. St. 1901, p. 1332). Knight enlisted off the coast of China, upon the Monocacy, and first came to the United States upon the 5th of August, 1892. It appears from the record that he was born upon a schooner flying the British flag, in the Yellow Sea, off the coast of China; that his father was of English birth and parentage; and that his mother was one-half Chinese and one-half Japanese, having been married to the applicant's father at Shanghai, under the British flag.

The court is entirely satisfied as to the applicant's intelligence and character, and the only question arises under the provisions of section 2169 of the Revised Statutes (U. S. Comp. St. 1901, p. 1333) viz.:

"This title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

A person of the Mongolian race, either Chinese or Japanese, cannot be naturalized, even with honorable service in the army or navy (In re Buntaro Kumagai [D. C.] 163 Fed. 922), and the ineligibility of Chinese has been expressly stated by the provisions of Act May 6, 1882, c. 126, 22 Stat. 61 (U. S. Comp. St. 1901, p. 1333), of which section 14 is as follows:

"That hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."

But no case to which the attention of the court has been drawn seems to specifically determine what percentage of Mongolian blood will exclude the applicant from classification as a "white person." In the case of *In re Saito* (C. C.) 62 Fed. 126, the statutes with relation to the word "white" are recited, and a native of Japan was refused naturalization for the reasons above stated.

In the case of colored persons, a question similar to the one at bar has been raised, and in *Re Camille* (C. C.) 6 Fed. 256, the applicant, with a white father and an Indian mother, was held not to be a "white person." This case is based upon a number of decisions in Ohio, where the question of the mixture of white and red, or white and black, races has been considered; and there seems to be nothing in the present

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes



naturalization statute, or any of the acts of Congress, which would lead to a different conclusion. A person, one-half white and one-half of some other race, belongs to neither of those races, but is literally a half-breed.

Naturalization creates a political status which is entirely the result of legislation by Congress, and, in the case of a person not born a citizen, naturalization can be obtained only in the way in which Congress has provided that it shall be granted, and upon such a showing of facts as Congress has determined must be set forth. It must have been within the knowledge and foresight of Congress, when legislating upon this question, that members of other races would serve in the army and navy of the United States, under certain conditions, and it must remain with Congress to determine who of this class can obtain, under the statutes, the rights of a citizen of the United States.

The present application must be denied.

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CENTRAL TRUST CO. OF NEW YORK v. TREAT, Collector.

(Circuit Court, S. D. New York. June 10, 1909.)

INTERNAL REVENUE (§ 9\*)—SPECIAL TAX ON BUSINESS—BANKS—"BANKER."

War Revenue Act June 13, 1898, c. 448, § 2, 30 Stat. 448 (U. S. Comp. St. 1901, p. 2286), provided that bankers using a capital not exceeding \$25,000 should pay a tax of \$50 and \$2 additional for every \$1,000 in excess of \$25,000, and that, in estimating, the capital surplus should be included. The section also declares that every person, firm, etc., having a place where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted on draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be a "banker" within the act. *Held*, that it was only the capital surplus used in the banking business that was subject to tax, and hence the undivided profits of a trust company, invested in bonds and stocks, were not subject to taxation, though the corporation was engaged in some of the activities of a bank, and the profits so invested were available to make good losses in the corporation's enterprises and to increase its credit.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 16; Dec. Dig. § 9.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 695-697.]

This is an action to recover \$22,156 paid by the plaintiff under protest as a tax claimed by the defendant, a collector of internal revenue, to be due under War Revenue Act June 13, 1898, c. 448, § 2, 30 Stat. 448 (U. S. Comp. St. 1901, p. 2286). The relevant parts of the section read as follows:

"Sec. 2. That from and after July first, eighteen hundred and ninety-eight, special taxes shall be, and hereby are, imposed annually as follows, that is to say:

"(1) Bankers using or employing a capital not exceeding the sum of twenty-five thousand dollars shall pay fifty dollars; when using or employing a capital exceeding twenty-five thousand dollars, for every additional thousand dollars in excess of twenty-five thousand dollars, two dollars, and in estimating capital surplus shall be included. The amount of such annual tax shall in

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

all cases be computed on the basis of capital and surplus for the preceding fiscal year. Every person, firm, or company, and every incorporated or other bank, having a place where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be a banker under this Act: Provided, that any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors, and which does no other business of banking, shall not be subject to this tax."

The only matter in dispute is whether the tax is payable on \$11,078,-355.29, being accumulated and undivided profits resulting from the conducting of the business of complainant for many years.

Joline, Larkin & Rathbone, for plaintiff.

Henry L. Stimson, U. S. Atty., for defendant.

LACOMBE, Circuit Judge (after stating the facts as above). In view of former decisions in this circuit (*Leather Manufacturers' Bank v. Treat* [C. C.] 116 Fed. 774; *Id.*, 128 Fed. 262, 62 C. C. A. 644) there would be no difficulty in finding that these accumulated undivided profits are either "surplus" or "capital." In the case cited the plaintiff was a bank engaged solely in a banking business, and presumably all the property that it had was employed in such business. But in the case at bar the plaintiff is not a bank or banker, and, although it does some of the things enumerated in the section as indicative of such business, its principal business seems to be distinctively that of a trust company.

It will be observed that the "capital and surplus," which is subjected to the tax, is that which is used or employed by the banker; i. e., in the banking business. The evidence shows that the entire amount of these undivided profits before, during, and at the end of the fiscal year were invested in municipal and railway bonds and in the stocks of corporations, and were not in any sense employed in the business of banking, although the ownership of this large amount of securities available to make good losses in any of the enterprises which the corporation was conducting naturally increased its credit generally.

Counsel may prepare and submit findings in accordance with this decision, whereupon they will be signed, and judgment entered for the plaintiff.

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**FARMERS' LOAN & TRUST CO. v. TREAT. Collector.**

(Circuit Court, S. D. New York. June 10, 1909.)

Turner, Rolston & Horan, for plaintiff.

Henry L. Stimson, U. S. Atty., for defendant.

LACOMBE, Circuit Judge. This cause is in all respects similar to *Central Trust Co. v. Treat*, 171 Fed. 301, in which a memorandum of decision is filed to-day, and will be similarly disposed of.

## UNITED STATES v. PERRY et al.

(Circuit Court, D. Massachusetts. April 6, 1909.)

No. 115 (1,776).

## CUSTOMS DUTIES (§ 30\*)—CLASSIFICATION—FROZEN FISH.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 261, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), relating (1) to "fish, fresh, \* \* \* frozen, packed in ice, or otherwise prepared for preservation, not specially provided for," and (2) to "salmon, fresh," salmon packed in ice for preservation are dutiable under the first provision; for Congress by enumerating fish packed in ice separately from fish fresh, indicated an intention to exclude the former class from the provision for the latter.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 30.\*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision of the Board of General Appraisers, which is reported as G. A. 6,208 (T. D. 26,856), sustained the protests of F. C. Perry and others against the assessment of duty by the collector of customs at the port of Boston. The Board's opinion reads as follows:

FISCHER, General Appraiser. These protests cover a very large number of importations of mackerel, halibut, and salmon, packed in ice for preservation and contained in packages each of which is of a capacity not less than one half barrel. Duty was assessed thereon at the rate of 1 cent per pound under the last subdivision of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 261, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), and the merchandise is claimed to be dutiable properly at three-fourths of 1 cent per pound under the first subdivision of said paragraph.

Paragraph 261 reads as follows:

"261. Fish, fresh, smoked, dried, salted, pickled, frozen, packed in ice, or otherwise prepared for preservation, not specially provided for in this act, three-fourths of one cent per pound; fish, skinned or boned, one and one-fourth cents per pound; mackerel, halibut or salmon, fresh, pickled or salted, one cent per pound."

It is obvious that the first subdivision of this paragraph is broad enough to cover all fish (except, perhaps, living) in every conceivable condition, fresh or preserved, and that, if the lawmakers had omitted all other reference to fish in the tariff, all denizens of the deep would be dutiable under said subdivision. It follows that, unless a particular kind of fish, whether considered with reference to its species or its condition or manner of preservation, is specifically provided for in other portions of the fish schedule, it is dutiable under the opening clause of paragraph 261.

With these considerations in mind we shall apply ourselves to the question before us. There is here no dispute as to the facts. The fish are mackerel, halibut, and salmon, respectively. They are fresh, in the sense of not having been dried, smoked, salted, or pickled, and they are imported packed in ice. The question to be determined, then, is one of law—whether or not the provision for "mackerel, halibut or salmon, fresh," includes such varieties of fish when imported frozen or packed in ice. It seems to us that, by the terms of the paragraph itself, this query must be answered in the negative. Congress, by separately enumerating fish fresh, fish frozen, and fish packed in ice, has differentiated the three classes of fish; and that this is no mere redundancy of terms, but, on the contrary, is a legislative recognition of a distinction that is well attested by decisions of the courts and the Board, by rulings of the Treasury Department, and by the testimony of numerous trade witnesses in other hearings before the Board, is indisputable.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

We are referred to the case of *Cross v. Seeberger* (C. C.) 30 Fed. 427, as an authority adverse to the claim of the protestants in the cases at bar; but on examination and full consideration of it we do not find that this is accurate. That case arose under Tariff Act March 3, 1883, c. 121, 22 Stat. 488, which contained a provision for fresh fish, but none for frozen fish or fish packed in ice, and it held that an importation of frozen fish in bulk was free of duty under paragraph 699 of that act as "fish, fresh, for immediate consumption"; that is, under a statute which contained no provision for frozen fish, it was held that the provision therein for fresh fish was broad enough to cover frozen fish—a conclusion that is obviously sound, because the only other styles of fish mentioned were those pickled, salted, dried, etc. When, however, a subsequent statute makes a denominative provision for frozen fish, it follows as a logical consequence, and by an elementary rule of construction that it is thereby removed from the operation of the broader provision and is dutiable under its specific enumeration, which is the precise condition we have in the tariff act of 1897, under which these importations were made.

We hold, therefore, that mackerel, salmon, and halibut, when frozen or packed in ice, are not dutiable as "mackerel, salmon or halibut, fresh," but fall within the terms of the opening clause of paragraph 261, and are dutiable at three-fourths of 1 cent per pound, as claimed. The protests are accordingly sustained, and the decision of the collector reversed in each case.

This conclusion is in exact accord with that announced by the Board in G. A. 5,727 (T. D. 25,430), on frozen halibut. It is true that in G. A. 6,127 (T. D. 26,646), a ruling of a different tenor was made; but it appears that in that case the fish had been assessed at 30 per cent. ad valorem under paragraph 258, and the only claim of the protest was at 1 cent per pound under paragraph 261, no mention being made of the three-fourths of a cent per pound. The point at issue here was not squarely presented in that case, and the Board which made the decision inadvertently overlooked the previous ruling of G. A. 5,727. G. A. 6,127 may be considered as overruled.

Precisely in point is G. A. 5,726 (T. D. 25,429) where the Board overruled a claim that certain smoked herring upon which duty had been assessed as smoked fish were properly dutiable as "herrings, pickled or salted," on the ground that herrings are salted before they are smoked, and that consequently the provision for salted herring is sufficiently broad to include smoked herring. The Board negatived this contention, and held that "smoked," having a narrower signification than "salted," was a more specific provision. On appeal this decision was affirmed in *Mattlage v. U. S.* (C. C.) 139 Fed. 704, T. D. 26,037.

William H. Garland, Asst. U. S. Atty.

Searle & Pillsbury (Charles P. Searle, of counsel), for importers.

COLT, Circuit Judge. In this case I fully concur in the conclusion of the Board of General Appraisers, and I can add nothing to the opinion of General Appraiser Fischer, speaking for the Board.

The decision of the Board of General Appraisers is affirmed.

## H. K. PORTER CO. v. BOYD.

## E. I. DUPONT CO. v. JOHN SHIELDS CONST. CO.

(Circuit Court of Appeals, Third Circuit. March 3, 1909.)

No. 26.

**1. SALES (§ 202\*)—TRANSFER OF TITLE AS BETWEEN PARTIES—WAIVER OF DEFAULT IN PAYMENT OF PRICE ON DELIVERY.**

Where personal property sold, to be paid for on delivery in cash and notes, was delivered and held and used by the purchaser for five months before any settlement was made, during which time the seller was urging payment but at no time questioned the sale, the legal title as well as possession of the property passed to the purchaser, any right the seller may have had to reclaim it having been waived and lost by his failure to exercise it promptly on the purchaser's default.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 545; Dec. Dig. § 202.\*]

**2. BAILMENT (§ 8\*)—ESTOPPEL TO DENY TITLE OF BAILOR.**

While the principle of estoppel which precludes a tenant from disputing his landlord's title applies as well to leases or bailments for hire of personal property, it applies only in either case where the person sought to be estopped obtained possession of the property under and by virtue of the contract of lease or bailment, and no estoppel arises where he was already in possession when the contract was made and asserts ownership in himself prior to and independently of such contract.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. § 32; Dec. Dig. § 8.\*]

**3. SALES (§ 456\*)—CONDITIONAL SALE—DISTINGUISHED FROM LEASE.**

Where personal property sold to be settled for on delivery was delivered without settlement, and retained and used by the purchaser until it became vested with the legal title, an instrument then executed between the parties, without change of possession, by which the seller purported to lease the property to the purchaser for three months in consideration of payments aggregating the amount of the original purchase price with interest, covenanting on such payments being made to execute a bill of sale of the property, and also that in case it retook the property on default it should sell the same and pay over any surplus proceeds to the lessee, was not in fact a lease, although so denominated and one in form, but in effect a contract of conditional sale, which was void because title had already passed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1327-1331; Dec. Dig. § 456.\*]

What constitutes a contract of conditional sale, see note to *Dunlop v. Mercer*, 86 C. C. A. 448.]

**4. CORPORATIONS (§ 560\*)—RECEIVERS—TITLE OR RIGHTS ACQUIRED—SUCCESSION TO RIGHTS OF CREDITORS.**

A receiver for an insolvent corporation, appointed at suit of general creditors, has the rights of an attaching or levying creditor as to property of the corporation of which he takes possession, and his possession defeats a secret lien on any of the property, which was purely equitable, although it may have been enforceable as between the parties, and especially where such lien was given to one who was at the time a general creditor, and to enforce it would give him an inequitable preference over other general creditors.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 560.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
171 F.—20

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see *E. I. Dupont Co. v. John Shields Const. Co.*, 162 Fed. 198.

R. W. Archbald, Jr., for appellant.

R. Stuart Smith, for appellee.

Before GRAY, Circuit Judge, and BRADFORD and LANNING, District Judges.

BRADFORD, District Judge. In December, 1905, the court of chancery of New Jersey, on a bill filed by certain stockholders and creditors of The John Shields Construction Company, hereinafter referred to as the construction company, a corporation of that state, on behalf of themselves and other creditors and stockholders of that company, appointed a receiver for it on the ground of insolvency. Subsequently ancillary proceedings were instituted in the circuit court of the United States for the eastern district of Pennsylvania, wherein Halsey M. Barrett was, December 30, 1905, appointed ancillary receiver of the construction company, and thereafter, certain vacancies by resignation having occurred in the ancillary receivership, William H. Boyd was, July 13, 1907, appointed such ancillary receiver. He duly qualified for the discharge of his official duties July 29, 1907. The appeal in this case was taken by the H. K. Porter Company, hereinafter referred to as the Porter company, a corporation of Pennsylvania, from a decree in the ancillary proceedings, denying the petition of that company for an order on the ancillary receiver of the construction company to pay to the former company \$2,300, being a part of the agreed value of two locomotives hereinafter mentioned, sold by order of the court below. It appears from the record that in May, 1905, the Porter company contracted through its representatives and agents, Wonham & Magor, to sell two locomotives to the construction company and deliver the same to that company at Quarryville, Pennsylvania, for the price of \$4,900, to be paid and secured as follows; one-third in cash on shipment, one-third in a note at sixty days, with interest at 6% added, and the remaining third in a note at ninety days, with interest at the same rate added. Pursuant to the above contract the Porter company duly delivered to the construction company at the stipulated place the locomotives, but the latter company wholly failed to perform its part of the contract; neither paying cash nor giving any note or notes on account of the purchase price. But such default did not prevent the property in the locomotives from passing from the Porter company to the construction company. The correspondence and transactions between the parties in May, 1905, constituted both in form and intention a contract of sale followed by delivery of the locomotives. Whether or not the sale could have been avoided for fraud is not a question before us. No fraud in the transaction is alleged against the construction company. Nor was any attempt made by the Porter company aside from procuring the execution of the written instrument of October 16, 1905, to disaffirm or to avoid the sale. There can be no doubt that the construction com-

pany in May, 1905, became the unconditional owner of the two locomotives and, notwithstanding its indebtedness for the purchase price, continued to be such owner until the execution of the written instrument above referred to; and during all that time and thereafter, and until the ancillary receiver of the construction company sold them by order of court, the possession of the locomotives continued in that company or its ancillary receiver. If the Porter company at any time had, by reason of mere failure on the part of the construction company to comply with the terms of payment, a right to reclaim the locomotives and avoid the sale, there was admittedly such delay by the Porter company as to constitute a waiver. The record does not disclose any conduct, act or declaration on the part of the Porter company or construction company prior to the latter part of September, 1905, by way of disaffirmance or inconsistent with an unconditional sale of the locomotives to and their ownership by the construction company. Indeed, the controlling weight of evidence negatives the existence of any intention on the part of either of the two companies before that time to disclaim, disaffirm or otherwise avoid the sale and terminate ownership by the construction company. No redelivery of the locomotives to the Porter company was made or requested. They remained in the possession of the construction company and its ancillary receiver until sold pursuant to the order of the court below. The Porter company repeatedly attempted to collect from the construction company the purchase price, but was unsuccessful. Thus the transaction prior to the correspondence and negotiations between the two companies in the latter part of September, culminating in the execution of the written instrument of October 16, 1905, presented the aspect of and was an absolute sale and delivery of the locomotives to and their ownership by the construction company, and an indebtedness of that company to the Porter company for the whole purchase price with interest. The above mentioned written instrument relates to the two locomotives in question, was executed under seal by and between the Porter company as party of the first part and the construction company as party of the second part, and its body, so far as material to consider in this connection, reads as follows:

"This Indenture, made this sixteenth day of October, A. D. 1905, between H. K. Porter Company, of Pittsburgh, Pennsylvania, party of the first part, and The John Shields Construction Co., party of the second part, Witnesseth, That the said party of the first part hath let, and by these presents doth let unto the said The John Shields Construction Co., party of the second part, two certain locomotive engines, \* \* \* for the term of ninety days from date, and for the sum of five thousand ninety one dollars and fifty-one cents, to be paid in the following manner, to wit: Cash, to be paid at once, \$1,000; The John Shields Construction Co.'s 60 days' note, dated October 16th, 1905—due December 15th, 1905, \$2,040.70; The John Shields Construction Co.'s 90 days' note, dated October 16th, 1905—due January 14th, 1906, \$2,050.81.

"And It Is Further Agreed, by and between the parties to these presents, that if default be made in the payment of the first, or any of the above named instalments or payments, or if said party of the second part shall undertake to dispose of said locomotive engines, or if the same shall be attached, levied upon, or taken by a third party, then it shall be lawful for, and the said party of the first part may re-enter into possession of said locomotive engines, so described as aforesaid, take away, repossess and enjoy

the same as though these presents were not made; but that the re-entry by said party of the first part and repossession of said engines, shall not operate as a payment of the indebtedness of the said party of the second part above contracted, nor discharge said party of the second part from liability for the same; but the said party of the first part shall have the right to dispose of said engines at public or private sale, in good faith without notice, and after payment of costs and expenses of said sale and of said retaking and the other expenses growing out of the default of said party of the second part, shall credit the net proceeds thereof upon the indebtedness of said party of the second part, and if the same shall not be sufficient to pay the full amount of said indebtedness, the said party of the second part shall be liable for, and will at once pay over the balance thereof. If there be any surplus, the same shall be paid over by the party of the second part. And the said party of the second part covenants and agrees that the said locomotive engines shall be taken to their railroad at Quarryville, in the State of Pennsylvania, and there kept and used, and not removed from the possession and control of the said party of the second part without the written consent of the party of the first part thereto first had and obtained; and at the expiration or sooner determining of the said term, he will quit and surrender the said locomotive engines in as good condition as reasonable wear and use will permit. And the said party of the first part hereby covenants and agrees that the said party of the second part, on paying the above specified instalments, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said locomotive engines, for the said term. And the said party of the first part hereby covenants, promises and agrees to and with the said party of the second part, that if the said party of the second part shall well and truly keep the covenants herein made, and shall pay the aforesaid instalments, as the same shall become due and payable, and if this lease shall not be determined sooner, by consent or otherwise, they, the said party of the first part, will make, execute and deliver to the said party of the second part, a good and sufficient Bill of Sale for said locomotive engines, the consideration whereof shall be the amount of the above named payments, received for the said term, making in all the sum of five thousand ninety one dollars and fifty-one cents."

The Porter company relies upon the above instrument to sustain its alleged right to recover from the ancillary receiver the \$2,300 set apart by agreement to represent the two locomotives sold by him by order of court. Aside from the contract of October 16, 1905, the claim made by the Porter company would be wholly devoid of color. It is contended that the contract was a lease of the locomotives for a term of ninety days and under its provisions the lessor was, on the occurrence of any default therein specified on the part of the lessee, entitled to regain their possession; and, further, that the construction company as lessee was, and its ancillary receiver is, estopped from denying the title of the Porter company to the same. If it be assumed that circumstances might exist under which a contract in the form of the instrument in question could operate as a chattel lease and work an estoppel with respect to denial of title or ownership, such an assumption has no relevancy to this case. It does not necessarily follow from the fact that one is referred to as a lessee in an instrument to which he is a party, having the form and similitude of a lease, that he is precluded from questioning the right of ownership of the other party as to the property, real or personal, therein mentioned. Of course, if one gains possession only by means of and claims title solely under the instrument, he will, as a general rule, be estopped or precluded from disputing title with the other party to the contract during its continuance and until he shall have surrendered or redelivered the prop-



erty. But where he has otherwise gained possession, asserts ownership in himself, and neither claims nor defends under or by virtue of the instrument, there is no such estoppel. Chief Justice Marshall in *Blight v. Rochester*, 7 Wheat. 535, 547, 5 L. Ed. 516, said:

"The title of the lessee is, in fact, the title of the lessor; he comes in by virtue of it, holds by virtue of it, and rests upon it, to maintain and justify his possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims, that the paramount ownership of the lessor shall be acknowledged, during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor, without disparaging his own, and he cannot set up the title of another, without violating that contract by which he obtained and holds possession; and breaking that faith which he has pledged, and the obligation of which is still continuing, and in full operation."

In *Willison v. Watkins*, 3 Pet. 43, 47, 7 L. Ed. 596, Mr. Justice Baldwin, in delivering the opinion of the court, said:

"It is an undoubted principle of law, fully recognized by this court, that a tenant cannot dispute the title of his landlord either by setting up a title in himself, or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates in its full force, to prevent the tenant from violating that contract by which he obtained and holds possession. *Blight v. Rochester*, 7 Wheat. 535 (5 L. Ed. 516). He cannot change the character of the tenure, by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered on its termination by the lapse of time, or demand of possession."

• It is unnecessary to multiply references to cases enunciating the principles declared in the above citations. They apply, we think, with equal force to leases of real estate and to leases or bailments for hire of personal chattels, and warrant an estoppel or preclusion as to title only where those relying on such estoppel or preclusion obtained possession of the subject-matter of the lease or bailment under and by virtue of it. In the case before us the construction company did not obtain possession of the locomotives under or by virtue of the instrument of October 16, 1905, or the negotiations leading up to it. At that time and since May, 1905, the possession of the property was held by the construction company under and pursuant to the sale in May, and during no portion of that time had the Porter company either its possession or ownership. That company having October 16, 1905, neither the possession nor the ownership of the locomotives, was then without power to execute a lease or bailment of them. Thus, even on the assumption that the instrument in question was in form a lease of the locomotives, there is no ground on which the doctrine of estoppel or preclusion as usually applicable in cases of lease, can here be recognized and enforced. Further, we are unable to adopt the view that the instrument of October 16, 1905, even aside from the fact that possession and ownership of the locomotives were then exclusively in the construction company, was or could have operated as a lease. While it is true that the instrument contains the words "hath let," "doth let," "term," "quit and surrender," "reasonable wear and use," and other phrases and expressions appropriate to and usually found in

leases, it is quite evident on a consideration of its provisions and the conditions existing at the time between the parties, that, whatever else was its nature, it was not a lease or bailment for hire. The sum of \$5,091.51 which, under the terms of the instrument of October 16, 1905, was to be paid by the construction company to the Porter company, is the amount which at that time the latter company was entitled to receive from the construction company in cash and notes bearing interest on the basis of an absolute sale of the locomotives to the construction company May 18, 1905. It was made up as follows:

Total amount specified in agreement of October 16, 1905.....	\$5,091.51
Price of locomotives.....	\$4,900.00
Difference in freight charges from Pittsburg to New York, and Pitts- burg to Quarryville, Pennsylvania....	19.68
	<u>\$4,919.68</u>
Interest at 6% from May 18, 1905, to October 16, 1905.....	121.35
	<u>\$5,041.03</u>
Cash "to be paid at once".....	\$1,000.00
Balance .....	<u>\$4,041.03</u>
One-half of balance (disregarding .03) included, aside from interest, in 60 day note.....	2,020.50
60 days' interest on note at 6%.....	20.20
	<u>2,040.70</u>
Remaining half of balance (disregarding .03) in- cluded, aside from interest, in 90 day note....	2,020.50
90 days' interest on note at 6%.....	30.31
	<u>2,050.81</u>
	<u>\$5,091.51</u>

Further, it is obvious from the written correspondence between the parties leading up to and culminating in the signing and sealing of the instrument of October 16, 1905, that the primary purpose of the parties by that instrument was, not to create a mere lease or bailment, but to secure payment of what was then due and owing to the Porter company by reason of the absolute sale of the locomotives May 18, 1905. And again, and pointing in the same direction, is the provision that if the construction company should keep the covenants and pay the instalments as the same should become due and payable, then, in the absence of an earlier termination of "this lease," the Porter company would make, execute and deliver to the construction company "a good and sufficient bill of sale for said locomotive engines, the consideration whereof shall be the amount of the above named payments, received for the said term, making in all the sum of five thousand ninety one dollars and fifty-one cents." It is unnecessary further to pursue the reasons which have led us to the conclusion that the instrument of October 16, 1905, could not in any aspect of the case operate as a lease or as a bailment. It certainly was not a chattel mortgage nor was it a pledge. Regarding the form of the instrument alone, we think that, if under any circumstances it could reserve or secure to the Porter company a legal in contradistinction to an equitable right, title or claim to the locomotives as against the construction company or its ancillary receiver, its operation would have been by way of condi-

tional sale. It is unnecessary to inquire whether the doctrine adopted by the Supreme Court of Pennsylvania touching conditional sales of chattels in its relation to the rights of creditors of the vendee is binding upon this court with respect to chattels there situated. No such question properly arises in this case. But, even were it assumed that such doctrine is not conclusive upon us, and that the principles laid down in *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285, are controlling, the Porter company could not derive any benefit from such an assumption. For, as both title to and possession of the locomotives were held absolutely and exclusively by the construction company under the sale in May, 1905, the Porter company October 16, 1905, had nothing, so far as the locomotives were concerned, to sell and consequently no right to regain possession by reason of any default on the part of the construction company. Under the circumstances the instrument of October 16, 1905, viewed as a contract of conditional sale, was simply a nullity. Nor is the ancillary receiver estopped or precluded from assuming this position, for he neither claims nor defends under that instrument, nor did the construction company or he get possession of the locomotives pursuant to it; but solely under and by virtue of the absolute sale in May, 1905.

It is nevertheless, in substance, further contended on the part of the Porter company that whatever may be the technical name of the instrument of October 16, 1905, it was a contract to the effect that "the construction company is to make certain payments \* \* \* and if it does not do so, the Porter company may come and get the locomotives, and sell them for the construction company's account;" that forbearance by the Porter company to sue was a sufficient consideration to sustain the contract; and there being a sufficient consideration, "it can make no difference that the construction company then owned and had possession of the locomotives." We regard this contention, in view of the fact that no pledge was created, owing to non-delivery of the locomotives by the construction company to the Porter company, nor a chattel mortgage executed, as an attempt successfully to invoke the doctrine of equitable lien or charge on property arising from contract. It is true that, in the absence of delivery or recording, an equitable lien or charge may be created on personal chattels, by an agreement on sufficient consideration, that the property shall serve as security for a debt or other obligation, which lien or charge will be enforceable between the original parties and also against third persons who are mere volunteers or who take the property with notice of the agreement. *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865; *Booz v. Philadelphia & L. Transp. Co.* (C. C.) 124 Fed. 430. On the assumption that forbearance by the Porter company or its extension of the time for payment of the price of the locomotives was a sufficient consideration to support an agreement creating a lien on them to secure the payment of such price, such lien was purely equitable in contradistinction to legal. Any theory of the case which requires the Porter company to rely on the existence of such an equitable lien or charge is repugnant to the position taken by that company in its petition; for it there asserts ownership in itself, saying that by reason of the default

made by the construction company in the payments required by the agreement of October 16, 1905, "your petitioner was and is entitled to have, repossess and take away the said engines and that your petitioner's title thereto is good and effectual save as against subsequent purchasers for value or execution creditors." This is an allegation of legal ownership and does not harmonize with the theory of a purely equitable charge or lien as recognized in the cases last above cited and others to the same effect. But in view of the fact that such repugnancy might, other things being equal, be cured under the power of amendment so liberally exercised by the federal courts, we think it proper further to consider the case aside from such inconsistency. If, then, it be assumed that by virtue of the agreement of October 16, 1905, although entered into diversio intuitu, an equitable lien on the locomotives was created, good and enforceable as between the Porter company and the construction company, the question remains whether it can be enforced against the proceeds of their sale in the hands of the ancillary receiver. No citation of authority is requisite to support the proposition that such a secret lien could not avail against an attachment or execution creditor, not chargeable with knowledge or notice of its existence at the time of contracting his claim. It is equally clear that it is not necessary that it should appear that the creditor became such on the strength of the possession by the debtor of the property attached or levied on and the presumption of absolute ownership arising from such possession. As stated by Tilghman, Ch. J., in *Martin v. Mathiot*, 14 Serg. & R. (Pa.) 214, 16 Am. Dec. 491:

"A rule of law so restricted, would be of very little value. It rarely occurs that a man can prove, what it was that induced him to give credit. It is a rule of general policy, which declares possession to be the evidence of property, and the presumption is, that every man is trusted according to the property in his possession."

But it is contended that the ancillary receiver of the construction company does not represent its creditors, but only the company, and that they did not acquire by virtue of the receivership the rights of attaching or execution creditors. The extent of a receiver's power of representation depends upon the nature and purpose of the suit in which he is appointed and the scope of his authority as defined in the appointment, or, in the absence of a particular or precise definition, as implied from the fact of appointment considered in connection with the object sought to be obtained in the suit. The proceedings against the construction company both in New Jersey and in Pennsylvania were instituted by general creditors, were based on its insolvency, and contemplated the collection of its assets, their reduction into money and its distribution among the creditors, and, in case of a surplus, stockholders. The ancillary receiver here as well as the domiciliary receiver in New Jersey represents the corporation, its stockholders and its creditors, and holds possession of its assets within the eastern district of Pennsylvania under and by virtue of the authority and mandate of the court below, to the end that they may be disposed of under the order of that court, general or specific, in accordance with the principles of law and equity applicable. It is of no importance what

term may with most propriety be used to designate the taking and holding possession of the property of the construction company by the ancillary receiver. Whether it be called an equitable execution, an equitable attachment, a sequestration, or an impounding, is a matter of indifference. It does not affect the essential nature of the thing done. The receiver entered into and held possession by virtue of his appointment and the mandate of the court. A sheriff enters into and holds possession of property under an execution or attachment by virtue of his election or appointment and the order or writ of the court. In either case the property is compulsorily taken by judicial authority for the purpose of being applied to the payment of claims, theretofore or thereafter to be ascertained in nature or amount. In case of a receivership for an insolvent corporation procured at the instance of general creditors on the ground of insolvency, we are unable to perceive why a secret lien unenforceable at law should not be defeated by the seizure of the property by the "hand of the court" as effectually as by the making of an attachment or levying of an execution by a sheriff. The fact that the claims of many creditors may be involved in the former case and perchance only one in the latter does not differentiate the two. Plain justice requires that such a secret lien should be defeated in the former case; for not only does equity delight in equality, but the receivership bars creditors from pursuing the remedy, which otherwise would be open to them by way of attaching or levying on the personal chattels, to defeat the lien. We perceive no force in the suggestion that to allow the receiver to defend against the establishment of the asserted lien would be to permit him to take sides as between different creditors or classes of creditors. In such a case as the present, the rule of equity requires the pro rata division of the assets among the creditors, subject to the allowance of costs and expenses and the adjustment and liquidation of priorities and preferences. Equality or a pro rata distribution of the assets among the creditors being the most equitable result attainable, no liens or preferences should be recognized unless satisfactorily established; and it is not only proper, but it is incumbent on the receiver to protect the funds or assets in his hands against all attempts of creditors to defeat equality of distribution, through the assertion of secret liens to which they are not entitled as against the interests of the general and unsecured creditors. Such a lien might be recognized and satisfied in whole or in part out of the special fund subject to it as between the original parties, in so far as such fund might be included in a surplus of assets left after the payment of all costs and expenses and other debts and claims; but only in that improbable event. But it is unnecessary to pursue this particular inquiry. In *Printing Press Co. v. Pub. Co.*, 213 Pa. 207, 62 Atl. 841, the Supreme Court of Pennsylvania held that where on a creditor's bill a receiver was appointed for an insolvent corporation he was not limited to the rights of such corporation as to chattels held by it under a conditional sale but had the rights of a levying creditor. Mitchell, Ch. J., delivering the opinion of the court, among other things, said:

"The authority of a receiver and the effect of his action depend almost entirely on the purpose of his appointment and the extent of his powers con-

ferred by the decree appointing him. \* \* \* From this it must be assumed that the receiver in this case represented the creditors in whose interest he was appointed, and was clothed with all the powers that creditors would have had in acting for themselves. \* \* \* A voluntary assignee for the benefit of creditors is a mere representative of the debtor and is bound where he would be bound: *Wright v. Wigton*, 84 Pa. 163; but *Tams v. Bullitt* (35 Pa. 308) establishes the distinction that when the assignee, trustee, or whatever he may be called, derives his authority, not from the mere voluntary act of the assignor, but from a mandate of the law, even when enforced in the language of that case, through a 'compulsory assignment' from the debtor, in the interest of the creditors, he represents the latter and is vested with their powers. The same principle applies a fortiori to a receiver deriving his authority not at all from the debtor, but altogether from the court acting in the interest and for the enforcement of the rights of creditors. When, therefore, on a creditor's bill, a receiver is appointed for an insolvent corporation, he is not limited like an assignee for the benefit of creditors, by the rights of the debtor corporation as to property held by it under a conditional sale, but has the rights of a levying creditor."

This decision fully accords with our views and confirms us, were confirmation needed, in holding that the ancillary receiver had the rights of an attaching or levying creditor and that consequently the secret lien was, as against creditors, defeated, leaving the Porter company to participate as a general creditor in the assets on terms of equality with the other general and unsecured creditors. Here there is even stronger ground than in *Printing Press Co. v. Pub. Co.*, supra, for recognizing and enforcing the rights of the receiver as representing creditors; for, while in that case the title of the conditional vendor was both legal and equitable as against the vendee, here, on the assumption that there was a secret lien in favor of the Porter company, it was purely equitable and wholly unaccompanied by any legal title or right as against the construction company. There are many decisions not only by the lower courts but by the Supreme Court touching the rights of conditional vendors or lien holders as against trustees or receivers in bankruptcy. We deem it unnecessary to allude to such cases further than to say that they involved questions of statutory construction or interpretation under the bankruptcy legislation of the United States and have no pertinency to the matter now in hand.

But there is yet another ground on which the petition of the Porter company, whether amended or unamended, must fail. It is that, under the particular circumstances of the case, the assertion by that company of a preference or lien to secure the balance of the purchase price of the two locomotives is inequitable and unconscionable. By the absolute and unrescinded sale and delivery in May, 1905, the Porter company became only a general creditor of the construction company, occupying no better position than any third person who had become a creditor by selling and delivering personal chattels to the latter company on credit. It is true that by the instrument of October 16, 1905, the Porter company extended the time for the payment of a portion of the purchase price of the locomotives, and that this forbearance, for which it was to be remunerated at the satisfactory rate of six per cent. per annum on the deferred payments, may technically constitute a sufficient consideration for the agreement as between the two companies. But the Porter company suffered the loco-

motives to remain for months in the possession and use of the construction company without any attempt to retake them, thereby conferring on the latter company their ostensible ownership and creating and feeding a presumption of absolute and unencumbered dominion by that company. The least that could be expected of the Porter company would have been the recording of the agreement of October 16, 1905, or the securing and recording of a chattel mortgage at or before the execution of that agreement, to charge those dealing with the construction company with notice of the existence of a lien on the locomotives. But no chattel mortgage was at any time obtained nor was the agreement of October 16, 1905, recorded until after the appointment of the ancillary receiver. We think no court of equity should allow the Porter company after such negligence on its part, now to come in and by the assertion of a lien or preference prejudicially affect the pecuniary interests of those who became creditors of the construction company perchance through such omission by the former company to give notice to the public of the claim it now sets up. The decree of the court below should be and hereby is affirmed, with costs.

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PHILADELPHIA & W. C. TRACTION CO. v. KORDIYAK.

(Circuit Court of Appeals, Third Circuit. May 6, 1909.)

No. 26.

1. APPEAL AND ERROR (§ 1068\*) — REVIEW — HARMLESS ERROR—INSTRUCTIONS—ERROR CURED BY VERDICT.

Instructions, in an action for a personal injury, that upon certain findings the jury might award exemplary damages, and that, if they did so, they should return two verdicts, one for compensatory and one for exemplary damages, even if erroneous, were harmless error, where the jury returned but a single verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

2. STREET RAILROADS (§ 118\*)—ACTION FOR INJURIES—INSTRUCTIONS.

Instructions given and refused in an action for a personal injury alleged to have been caused to plaintiff by being thrown from a moving street car of defendant by the conductor considered, and the action of the court held without error.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-269; Dec. Dig. § 118.\*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Wm. I. Schaeffer, for plaintiff in error.

Edward D. Mitchell, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. Frank Kordiyak, the defendant in error, a subject of the Czar of Russia, brought an action of trespass in the Circuit Court of the United States for the Eastern District of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Pennsylvania, against the Philadelphia & West Chester Traction Company, hereinafter referred to as the defendant, for damages for injuries to his person resulting, as alleged, from the negligence of the defendant, and recovered a judgment against it for \$2,000. For the reversal of that judgment this writ of error is before us. In the statement of claim it is, among other things, averred in substance that the plaintiff on or about April 4, 1908, became a passenger in a trolley car operated by the defendant on its line from Sixty-Ninth and Market streets, Philadelphia, to Ardmore, Pennsylvania; that the defendant so carelessly, negligently and wrongfully operated the car that the "plaintiff was thrown and ejected from said car and sustained serious and permanent injuries to his body and limbs, by having his left leg amputated, his skull and left arm fractured, and other serious injuries to his body." There was testimony given by the plaintiff to the effect that April 4, 1908, after it had become dark he with three friends together got on a trolley car of the defendant at Manoa Road at a point to the west of and beyond the city limits in order to return to Philadelphia; that the car conductor came to him for his fare "and I went to look in my pocket and I found it had dropped through"; that the conductor spoke to him in English, which he does not understand, and then "took me with the hand and threw me out of the car"; that "I had my hand in the pocket and he came and grabbed hold of me by this arm and took and threw me off, and I couldn't stop myself very well because I still had this hand in my pocket"; that it was his vest pocket with a hole in it through which his money had slipped to the lower portion of his vest; that when he was thrown off the car it was moving fast; that he hit his head against something and does not remember whether any other part of his body was hurt because "my head was hit and I seemed to have lost consciousness"; that "when I started to remember, I started to get up on my hands, and just then something struck me, and then I don't remember any more"; that he had not been drinking that day; that when the conductor asked him for his fare "I didn't say anything, I just looked for the money"; and that while so looking for his money the conductor "stood in front of me for a while, and then he took me by the arm and threw me off the car." There is testimony in behalf of the defendant directly contradictory of that given by the plaintiff. The conductor who is charged by the plaintiff with having thrown him from the car testified to the effect that he did not lay his hands on the plaintiff; that "I didn't do anything to him. I just merely asked him for his fare and left him looking for it"; and that the plaintiff left the car voluntarily and of his own motion. The same conductor testified that the same car while moving westward on its return trip from Sixty-Ninth and Market streets passed the plaintiff at or near Cedar Lane about 8:30 o'clock p. m.; and that the plaintiff at that time was walking on the southerly side of the West Chester pike on the macadamized sidewalk eastwardly toward Sixty-Ninth street. There is also testimony to the effect that the car from which the plaintiff testified he was ejected left Ardmore that night at 3 minutes past 8 o'clock on its eastwardly run; that another car operated by the defendant on the same



road left Ardmore on a similar run at 33 minutes past 8 o'clock; that at 48 minutes past 8 o'clock the later car struck the plaintiff about 250 feet east of State Road; that State Road is about four-fifths of a mile to the east of Montrose Cemetery; and that Cedar Lane is from 1,100 to 1,200 feet east of Montrose Cemetery and from 2,800 to 3,000 feet west of State Road. The motorman of the car which struck the plaintiff testified, among other things, to the effect that he stopped his car at State Road and when he received from the conductor the signal to go ahead, "I started my car on half speed, five points, and I crossed over State Road, I judge near a hundred feet, and I threw my power off, and went a hundred feet further—I judge about two hundred and fifty feet east of State Road—and I saw this man step up on the rail going east towards Sixty-Ninth street terminal, and as soon as I seen the man I blew my whistle and threw my emergency air on and hollered at him, and he paid no attention at all; he didn't make any effort to get off the track or anything else, he just kept on coming east toward Sixty-Ninth street terminal, and I struck him, and I stopped my car and he was laying right at the back step"; that the man who was struck when the witness first saw him "was stepping up crossing the rail—the south rail of the east bound track. \* \* \* He was getting up from the ditch on to the track. He was on the south side of the track. He wasn't on the pike side. \* \* \* He came from the ditch up on to the track." There was also some testimony of the witness Simon to the effect that the plaintiff when seen by those on the car which struck him was "walking with his back to our car. He seemed to be walking slowly, and right after that the car struck him." On the material points of the case the testimony in behalf of the plaintiff and his witnesses was in irreconcilable conflict with the testimony in behalf of the defendant. The jury with all the testimony before it in the exercise of its undoubted function returned a verdict for the plaintiff. It appears from the plaintiff's testimony that in falling from the car from which he states he was ejected he received injury, striking his head and losing consciousness. For this injury, the other elements of liability on the part of the defendant existing, the plaintiff would have been entitled to recover, even if he had not been struck by the later car.

The first assignment of error is to the affirmance of the plaintiff's third point, as follows:

"3. If the jury find from the evidence, that the plaintiff took a seat in the car belonging to the defendant company, and that the employees of the defendant company afterwards ejected him at a dangerous place and while the car was in motion, and that the plaintiff was injured, your verdict must be for the plaintiff."

The proposition presented by the above point must be taken in connection with other portions of the charge and when so taken is not erroneous. The second assignment is based upon the affirmance of the plaintiff's eighth point, as follows:

"8. If the jury find from the evidence that the employe of the defendant company ejected the plaintiff from said car at a dangerous place and while said car was in motion, then in that case they should find for the plaintiff and their verdict should be exemplary, punitive or vindictive damages."

What has been said touching the first assignment is applicable here. The third assignment is based on the affirmance of the plaintiff's ninth point, as follows:

"9. If the jury find from the evidence that the injuries were inflicted in a manner wilfully or with that entire want of care which make the act a reckless and conscious indifference as to the consequence of the act and a reckless and conscious indifference to the rights of others; then you may go beyond the actual damages sustained and give the plaintiff an additional sum in the form of exemplary, punitive or vindictive damages as a punishment to the defendant."

We perceive no substantial error in this proposition when taken in connection with the rest of the charge. The fourth assignment relates to the affirmance of the plaintiff's tenth point, as follows:

"10. In giving exemplary, punitive or vindictive damages there must be two verdicts: (1) Compensatory damages as compensation to the plaintiff for the losses and injuries which he has sustained, and (2) exemplary, punitive or vindictive damages for the reckless, wilful and negligent act of the defendant."

On the assumption that the proposition presented by this point is unsound, the error was harmless. In view of the fact that the jury rendered only one verdict it fairly may be inferred that exemplary, punitive or vindictive damages were not allowed. It may be that the jury took the view that the plaintiff, though wrongfully ejected from the car, was not wantonly or maliciously so ejected. The evidence was conflicting on the question whether the car was in motion when the plaintiff was put off. The fifth assignment is based on the affirmance of the plaintiff's eleventh point, as follows:

"11. That the jury may disregard the plaintiff's own testimony as being interested and decide the case on his witnesses' testimony only, and if you come to the conclusion that their testimony is true then your verdict must be for the plaintiff."

We perceive no error in the above instruction. The plaintiff's witness Bilik testified that while the plaintiff was trying to get his money from his pocket "the conductor grabbed him by the left arm and threw him off the car" while it was going "fast." The jurors were at liberty to believe or reject this testimony, and if they believed it, it was their duty to find a verdict for the plaintiff. The sixth and seventh assignments relate to the refusal of the third and fourth points of the defendant which were as follows:

"3. The servants of a street railway company having its tracks at the side of a country road are not bound to anticipate the presence of pedestrians upon its tracks at points where there are no crossings and where there is ample unobstructed roadway in which they might walk in safety, and failing to do so, or to be on the watch for pedestrians at such places is not negligence.

"4. A person who voluntarily walks upon the track of a street railway company at night in the same direction in which the cars are running, at a point where there is ample unobstructed roadway wherein he could walk with perfect safety, is guilty of contributory negligence and cannot recover if he is injured while so doing by a car coming upon him from the rear."

It is well settled that a court in charging a jury is under no obligation, at the request of counsel, to state abstract propositions of law such as those embodied in the defendant's third and fourth points.

But, further, we think, aside from this objection, there was nothing in the case requiring the enunciation of the first of the above propositions even if so modified as to assume a concrete instead of an abstract form; there being nothing in the testimony on either side to suggest negligence on the part of the defendant in its operation of the car which struck the plaintiff. The eighth assignment is based on the refusal of the defendant's fifth point, as follows:

"5. If the jury believe that the plaintiff was injured by being struck by an eastbound car while he was walking or standing upon the defendant's track facing in the same direction in which the cars were going at a point a short distance east of State Road, their verdict must be for the defendant."

The instruction asked was clearly improper; for, as already stated, the other elements of liability on the part of the defendant existing, the plaintiff was entitled to recover for injuries received by him when thrown from the car by the conductor, if he was so thrown, and that was a question for the jury, even if he had not been struck by the later car. In view of this conclusion it is unnecessary to go into an inquiry whether the wrongful act of the defendant through its conductor in throwing the plaintiff from the car, if that were the fact, was the proximate cause of the injuries received by the plaintiff when struck by the later car. If by reason of the injuries received by him when so thrown from the car he became dazed or unconscious or only semi-conscious, and while in that condition, though wandering along or across the defendant's tracks, was struck by the later car, we are not prepared to hold that his ejection from the first car was not the proximate cause of the injuries he received from being struck by the other car. But it is unnecessary to decide and we refrain from further considering this point. The ninth and last assignment is based on the refusal to affirm the defendant's sixth point, as follows:

"6. Under all the evidence the verdict of the jury must be for the defendant."

This assignment, in view of what has already been said, of course, cannot be sustained. On the whole we are satisfied that the judgment below should be affirmed, with costs, and it is so ordered.

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ST. LOUIS & S. F. R. CO. v. CUNDIEFF.†

(Circuit Court of Appeals, Eighth Circuit. May 11, 1909.)

No. 2,903.

1. COURTS (§ 431\*)—FEDERAL COURTS—PLEADING IN CIVIL ACTIONS AT LAW—CONFORMITY TO STATE PRACTICE—ACTIONS PENDING ON ADMISSION OF OKLAHOMA.

Section 1, Schedule, Const. Okl., which provides that "No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the form of government, but all shall continue as if no change in the form of government had taken place," applies to forms of procedure, and the provision of section 2, that the laws in force in Oklahoma Territory shall be in force in the state until changed or repealed, does not make such laws relating to pleading applicable to causes pending in the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied August 23, 1909.

courts of Indian Territory at the time of the admission of the state and thereupon transferred to the Circuit Court of the United States, which continue to be governed by the laws in force in the Indian Territory.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 431.\*]

2. WITNESSES (§ 268\*)—CROSS-EXAMINATION—SCOPE.

Where a witness, introduced by the plaintiff in an action for a personal injury by being struck by a railroad train, testified that he saw the accident and was one of the first to reach plaintiff after the injury and described the surroundings, movements of the trains, etc., the defendant was entitled on cross-examination to show by the witness statements made by plaintiff at the time as a part of the *res gestæ*.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 268.\*]

3. RAILROADS (§ 348\*)—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Plaintiff, while walking across a railroad track at a crossing on a dark and foggy evening, was struck and injured by a freight train which backed against him and was moving at a speed of not more than 5 or 6 miles an hour. He was a railroad man and was familiar with the crossing. Witnesses introduced by him testified that they saw the train at a distance of not less than 30 feet, and there was no obstruction to prevent plaintiff from hearing or seeing it if he had stopped and looked and listened before stepping on the track. *Held*, that he was chargeable with contributory negligence as matter of law, which precluded his recovery; that in view of the other testimony and of the physical facts his own testimony that he did so stop and look and listen was not entitled to credence and did not create a conflict of evidence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 348.\*]

Amidon, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma.

J. Lionberger Davis (D. T. Flynn, T. G. Chambers, and C. B. Ames, on the brief), for plaintiff in error.

Charles B. Rogers, for defendant in error.

Before HOOK, Circuit Judge, and RINER and AMIDON, District Judges.

RINER, District Judge. This was an action to recover damages for personal injuries. The action was originally brought in the United States Court for the Northern District of the Indian Territory, prior to the time of the admission of the state of Oklahoma into the Union, of which this district became a part. After the admission of the state of Oklahoma, the case was removed to the Circuit Court of the United States for the Eastern District of Oklahoma. The original petition was filed in the United States Court for the Indian Territory on the 12th of June, 1907, and the railroad company filed its answer October 12, 1907. The answer denied the allegations of the petition and also set up as a defense contributory negligence on the part of the plaintiff. October 12, 1907, the day the answer was filed, the plaintiff in the court below filed a motion to strike from the answer portions thereof.

Oklahoma was admitted into the Union November 16, 1907, and on December 11, 1907, the defendant in the court below filed its petition for removal, and the case was removed to the Circuit Court. On April

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

17, 1908, the case come on for trial, the motion to strike was not called to the attention of the court, and the trial proceeded on the petition and answer. At the conclusion of the evidence the defendant moved the court to direct a verdict for the defendant upon the ground that under the pleadings, as well as the evidence, the plaintiff was not entitled to recover. The motion was overruled, and an exception saved. The jury returned a verdict in favor of the plaintiff, and on the 20th of April, 1908, the defendant filed a motion for judgment notwithstanding the verdict, on the ground that the pleadings in the case showed that the defendant was entitled to a verdict because no reply had been filed to that part of the answer setting up as a defense the contributory negligence of the defendant.

It is conceded by the plaintiff in error (hereafter referred to as the "railroad company") that prior to the admission of Oklahoma the Arkansas practice prevailed in the Indian Territory, and that under that practice no reply to the answer was required, but all affirmative allegations of the pleading were treated as in issue. The schedule of the Constitution of Oklahoma (sections 1 and 2) provides as follows:

"Section 1. No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place.

"Sec. 2. All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitations or are altered or repealed by law."

The statutes of the territory of Oklahoma, prior to its admission as a state (St. 1893, § 3980), provided:

"When the answer contains new matter, the plaintiff may reply to such new matter, denying, generally or specifically, each allegation controverted by him, and he may allege in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer, or he may demur to the same for insufficiency, stating in his demurrer the grounds thereof; and he may demur to one or more of such defenses set up in the answer, and reply to the residue."

And that (St. 1893, § 4006):

"Every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer, not controverted by the reply, shall, for the purpose of the action, be taken as true."

It is contended by the railroad company that these statutes, by virtue of the constitutional provision above referred to, governed in the trial of this case, and that therefore the railroad company was entitled to a judgment on the pleadings for the failure of plaintiff to reply to the affirmative defense set up in the answer.

It is insisted by the railroad company that as soon as statehood became effective the Oklahoma Code of Procedure applied to all cases then pending in the Indian Territory courts. It is conceded, however, that, if the issues had been joined under the Indian Territory practice, the Oklahoma Code would not relate back and require further proceedings; but it is said that the issues were not joined because there was pending a motion to strike portions of the answer, up to the time

the plaintiff and defendant announced that they were ready for trial.

We do not think the issue upon the question of contributory negligence, to which, under the Oklahoma Code, it was necessary to reply, was governed by the statutes of Oklahoma. The issue was raised without a reply under the Arkansas practice, which, at the time the answer was filed, prevailed in the Indian Territory. The motion to strike never became operative, because it was never called to the attention of the court, and by going to trial without doing so the plaintiff, of course, abandoned it. Furthermore, it is entirely clear from an examination of the motion, which is set out in the record, that, if it had been sustained, there would still remain in the answer a specific denial to every material allegation in the complaint and also the defense of contributory negligence. It is insisted by the railroad company that the provision of the Constitution to the effect that no existing rights, actions, suits, proceedings, etc., shall be affected by the change in the forms of government, does not relate to the forms of procedure. We think this contention cannot be sustained.

The rule of constitutional construction is that the ordinary and common meaning of the words used, in the light of other provisions of the Constitution, must be adopted. The preamble to section 1 of the schedule to the Constitution of Oklahoma provides:

"In order that no inconvenience may arise by reason of a change from the forms of government now existing in the Indian Territory, etc., it is hereby declared as follows."

And then follows the provision above referred to, together with other provisions, declaring process issued prior to the admission of the state under the authority of the territory of Oklahoma, or under the authority of the laws in force in the Indian Territory, valid and giving it the same force and effect as if issued in the name of the state.

Construing all of these provisions together, we are of opinion that they do not change, and were not intended to change, the method of procedure in cases pending in the courts of Indian Territory and of the territory of Oklahoma, but that the civil cases pending in the Indian Territory should, after statehood, continue under the law in force in the Indian Territory, and under that law no reply was required, prior to statehood. We do not think that the provision of the Constitution relied upon by the railroad company so changes the situation as to make a reply necessary.

The second assignment of error relates to the refusal of the court to permit Dean, a witness for the defendant in error (hereafter referred to as the "plaintiff"), on cross-examination to testify that the plaintiff at the time he received his injury stated to the witness that he was standing on the main line watching the train going east on the passing track, and that the injury was caused by this condition.

The theory upon which this witness was asked these questions on cross-examination, as suggested by counsel, was: That he was one of the first persons to reach the plaintiff after the accident; that he came to the plaintiff almost immediately after the accident; that he had testified to the condition and surroundings, and to remarks made by some of the employes of the railroad company at the time; and

that therefore the entire transaction and everything else relating to these conditions, including plaintiff's statements, constituted a part of the *res gestæ* and were admissible on cross-examination. Counsel concede the rule to be that the cross-examination should be confined to the subject-matter about which the witness has testified on direct examination, but insist that as he had testified in the direct examination that he saw the plaintiff as the train was backing over him, that at that time he (the witness) was about 100 feet distant from the plaintiff, that he immediately went to his assistance, that he and a witness by the name of Pershing were the first ones to reach the plaintiff after the accident, that soon thereafter three trainmen came up, and one of them made some remark about the accident, and that the witness had also described the surroundings, conditions, movement of the trains, place where the plaintiff was found, and all the things which he saw, therefore it was entitled to this testimony, not only on the ground that it was evidence against the plaintiff, but that being made immediately after the accident, and to the first person who reached him, the statements were a part of the *res gestæ*, and that where the witness, on his direct examination, went into a part of the facts concerning the accident and the condition in which the plaintiff was found, it was permissible, on cross-examination, to show the statements made by him as a part of the transaction itself. We think this testimony was competent, and that it was error to exclude it. It is insisted by the plaintiff that the railroad company could have had the benefit of the testimony by making the witness its witness. That is quite true; but, as we view the case, it was not bound to do so. *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; *Sargent v. Home Benefit Association (C. C.)* 35 Fed. 711; *Travelers' Protective Association v. West*, 102 Fed. 226, 42 C. C. A. 284.

The third assignment of error presents the question of contributory negligence. The record shows: That on the 2d of April, 1907, the railroad company was engaged in the business of a common carrier and operating a line of railroad through the town of Vinita in the Indian Territory; that this line of railway was a part of a trunk line of railroad over which is operated a large number of freight and passenger trains; that on the evening of the 2d of April, 1907, between 7:30 and 8 o'clock, plaintiff attempted to cross the tracks on Scraper street in the town of Vinita; that the street runs in a general northerly and southerly direction and crosses the railway tracks at right angles; that in attempting to make this crossing the plaintiff was struck by a train backing down on the main line and suffered the injuries complained of. The tracks of the railroad company run approximately east and west, and at Scraper street crossing there are four tracks; the most southerly track being known as "track No. 7," the next one north of that the "house track," the next one north of the house track the "main line," and the next one north of the main line the "passing track." The distance between track No. 7 and the house track, as disclosed by the record, was 111 feet; between the house track and the main line, 55 feet; and between the main line and the passing track, 16 feet. The record shows: That on the evening in question there were two freight trains going east, one closely fol-

lowing the other; that these trains had orders to take the siding at Vinita to permit a freight train coming west to pass; that the first east-bound train passed east on the main line until it crossed Scraper street; that the second train east bound took the passing track which connects with the main line some distance to the west of Scraper street; that the train first to arrive after crossing Scraper street backed down west on the main line, crossing Scraper street and onto a siding, designated in the record as "track No. 3," which was west of the crossing, for the purpose of clearing the main line for the west-bound train. The testimony shows: That, as this train was backing across Scraper street, the second train to arrive, which was on the passing track, was pulling forward in an easterly direction, crossing Scraper street; that the plaintiff was proceeding north on Scraper street to his home, which was on the north side of the railway tracks; and that he arrived at the main line crossing just at the time the train on the main line was backing over the crossing, and was struck by the cars.

He testified: That the train was backing at a rate of speed not to exceed five or six miles an hour; that there were no lights on the rear end of the train, a box car being attached to the train at the rear end of the caboose; that there was no obstruction whatever to prevent the plaintiff from seeing the train which injured him, if it was sufficiently light for him to see it. Had the accident occurred in the daytime, instead of in the evening, the case would not have required discussion, as the rule is well established that where the physical facts are such that the party injured, if he had looked, could have seen the train, the court would disregard his statement that he did look and failed to see it.

The plaintiff testified: That the evening was dark and foggy; that he stopped before going upon the track, but just how far distant from it is not shown, and looked east and west, and could not see the train, although he testified that he did see the train going east on the passing track before he attempted to cross the main line. The case was tried entirely upon the plaintiff's evidence. Three witnesses besides the plaintiff saw the accident. The plaintiff testified that before he crossed the house track, which was 71 feet south of the passing track, he could see the train on the passing track going east. If this is true, it is difficult to understand why he could not see the train on the main line, as there was nothing between him and that train to obstruct his view, and the main line was nearer to him than the passing track. He further testified that, before reaching the main line, he saw a brakeman on the second car ahead of the caboose on the train on the passing track, so that it must have been light enough, according to his own testimony, to enable him to count the cars between the brakeman and the caboose. If the light was sufficient to enable him to do that, it seems to us that it was sufficient to enable him to see the train on the main line, which was nearer to him, if he had stopped and looked as he testified he did.

Weed, one of his witnesses, testified: That he could see the train backing down on the main line; that, when he first saw it, he was at a point about halfway between track No. 7 and the house track, or,



as shown by the record, about 110 feet distant from the main line; and that the first thing that attracted his attention to it was that he heard it.

Pershing, another witness, who was going east between the passing track and the main line, saw the train when it was 30 or 35 feet south of him.

Dean, another witness, who was accompanying Pershing, saw the train just as the engine was passing over the plaintiff, and he testified that at the time he saw the train it was 30 or 35 feet distant from where he was.

Thus we have the testimony of three of the plaintiff's witnesses, all less favorably situated than he to observe the train, who saw it distinctly at least at a distance of 30 feet.

Plaintiff was a railroadman, familiar with this crossing, and alleged in his petition that it was a part of the trunk line, and that trains were frequently passing and repassing over this crossing. With nothing whatever to obstruct his view or hearing, his statement that he stopped and looked seems to us contrary to all reasonable probability and in direct opposition to the physical facts as disclosed by the record. It is a matter of common knowledge that a freight train moving on a railroad track makes a noise, and, as it only takes two or three steps at most to cross a railroad track, this train, backing at the rate of five or six miles an hour, must have been within a few feet of him at the time the plaintiff attempted to cross.

The testimony, aside from his, taken in connection with the physical facts, shows clearly, we think, that, with the exercise of ordinary care upon his part, this accident could not have happened. There is no evidence tending to show that the wind was blowing, or that there was anything to interfere with his hearing, even if he could not see, and it seems incredible that he could not hear a train of freight cars moving on a track so near to him as to overtake him before he could take two steps. Under these circumstances, we think his testimony that he stopped and looked is entitled to no credence and does not create a conflict in the evidence. *C. & N. W. Ry. Co. v. Andrews*, 130 Fed. 65, 64 C. C. A. 399, and cases there cited.

A person attempting to cross a railroad track must look and listen. A mere casual observation does not satisfy the rule. In the case just cited, the court, speaking through Judge Van Devanter, said:

"The general rule is that a person coming upon or over a railroad crossing is required to use for his own protection ordinary care—such care as men ordinarily exercise under the same or similar circumstances. The amount of care which will satisfy this requirement is necessarily adjusted to and varies with the danger to be guarded against. As the danger, or the probability of injury therefrom, increases, so do men ordinarily increase the care which they exercise for their own protection. If, therefore, when plaintiff approached the crossing, smoke interfered with the view along the tracks to the west, and prevented him from readily or plainly determining whether a train was coming from that direction, he was at once apprised of the increased danger, and it became his duty to exercise greater caution and vigilance for his own safety than would have been required otherwise."

In *Chicago, R. I. & P. Ry. Co. v. Pounds*, 82 Fed. 217, 27 C. C. A. 112, Judge Thayer said:

"A railroad track is in itself a warning of danger, because trains may be expected to pass at any moment. Therefore the courts have repeatedly declared that a person is, as a matter of law, guilty of contributory negligence if he drives upon a crossing without making a vigilant use of his senses of sight and hearing. If either of these senses is impaired, or for any reason cannot be exercised to advantage, he ought to be more vigilant in the use of the other." *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Chicago, etc., Ry. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Northern Pac. Rd. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Garlich v. Railroad Co.*, 131 Fed. 837, 67 C. C. A. 237; *Tomlinson v. Railway Co.*, 134 Fed. 233, 67 C. C. A. 218; *C., B. & Q. Ry. Co. v. Christina Munger* (decided at this term) (C. C. A.) 168 Fed. 690.

These cases and many others from the Supreme Court and from this court apply this rule. In most of the cases holding what is apparently a contrary doctrine, it will be found upon investigation that there were physical and topographical obstructions to the faculties of sight and hearing; but in this case there is nothing of that kind.

Conceding that all of the acts of negligence charged against the railroad company are true, yet we think that the contributory negligence upon the part of the plaintiff is so conclusively shown by this record that the court erred in not sustaining the motion to direct a verdict.

The judgment must be reversed, with instructions to grant a new trial.

AMIDON, District Judge (dissenting). In my judgment the foregoing opinion departs widely from the rule established by the Supreme Court defining the duty of travelers at railroad crossings, and imposes upon them the whole burden of avoiding collision.

The accident occurred at the town of Vinita, in Indian Territory, a city having between 3,500 and 4,000 inhabitants. The railroad passes through the city from east to west. The main business district lies immediately south of the right of way, and extends along a street parallel therewith. About one-half of the population resided north of the tracks, and Scraper avenue, upon which the accident occurred, was the principal thoroughfare used by them in passing to and from the business district. The defendant has four tracks over this street. The southernmost is an industry track. North of this, 111 feet, is a freight siding. North of that, 55 feet, is the main track, north of which, 16 feet, is a passing track. The accident occurred on the evening of April 2, 1907, between 7:30 and 8 o'clock. The night, according to plaintiff's testimony, was "a very dark, kinder cloudy, foggy night." This statement is in no way contradicted, but is confirmed by the testimony of another witness. Cundieff had been to the business district and started to go to his home north of the track. He approached the crossing on the east side of Scraper avenue. At the time a freight train was moving east on the northernmost track, obstructing his passage. When he got near to the second track, he saw three lights on the freight depot platform immediately west of Scraper avenue, and a signal was given by one of these lights which would be a proper direction to a train to move ahead. The freight train answered the signal with two blasts of the whistle, from which the plaintiff understood that it was about to pull out of the city. When within six or eight

feet of the freight siding, being the second track from the south, he looked both east and west to see if any train was approaching, and seeing none he passed over that track. Before going upon the main track he again stopped and looked for trains, and was unable to discover any. He says: "I stopped and looked again on the main line to cross it." At this time the train that was passing east on the north track was about to clear the crossing as he saw by the lantern of a brakeman who was hanging from the side of the car next to the rear. He proceeded over the crossing, expecting to reach the north track at the west side of the street by the time the train had cleared it; but as he was passing over the main track he was struck by the rear end of a string of cars that was being backed westward over that track by a locomotive at the other end, and received the injuries for which this action is brought. The track inclined slightly to the west, and the train was moving five or six miles an hour. There was no light at any place on this string of cars, nor any trainmen to warn the public of its approach. One witness speaks of seeing a caboose in the train of which these cars were a part, at the time it pulled into the city; but every other witness testified positively that there was no caboose in this string of cars, nor any lights displayed upon it. The crossing was not lighted. No bell was rung or whistle sounded.

Upon these facts the court holds that Cundieff was guilty of contributory negligence as a matter of law in failing to discover the cars by which he was injured. This conclusion is reached from the evidence of four witnesses testifying that they were able to see one or both of the trains in question at distances ranging from 30 to 71 feet. From this as a basis the conclusion is held to be inevitable that if Cundieff had looked he must have seen the car that struck him in time to have avoided the collision. In my judgment this conclusion is not warranted, because the observations were made under widely different circumstances.

The plaintiff testified that before he crossed the house track, which was 71 feet south of the passing track, he could see the train on that track going east. "If this be true," the court says, "it is difficult to understand why he could not see the train on the main line, as there was nothing between him and that train to obstruct his view, and the main line was nearer to him than the passing track." At the time he saw this train on the passing track, however, the train on the main track must have been east of the crossing and wholly outside his range of vision. He was not asked to state how long he stood at the house track, or between that and the main track, waiting for the train that was moving east to clear the crossing; but a fair inference from the evidence is that considerable time must have elapsed. There is nothing in the record that would justify a belief that he looked past the train that injured him when he saw the train on the north track. I assume, however, that the language of the court quoted means that, if Cundieff could see the train on the passing track at a distance of 71 feet, it would have been possible for him to see the train on the main track in time to avoid the collision. It seems to me, however, that this overlooks two controlling facts: First, the train on the passing track pre-

sented itself to Cundieff broadside. It was moving as he was thus looking in the direction of it, and might very well have been disclosed to his view first by the different cars passing between him and lights north of the track. Common experience would show that a train under such circumstances would be visible when a train that was approaching the observer showing nothing but a dark end would not be discovered. Second, Cundieff's attention might have been first directed to the train on the north track by the sound which it produced, and his attention thus have been focused upon it. It is an elementary law of optics, as well as a matter of common knowledge, that it is possible to see an object of whose presence we have been made aware by its sound, when it would not have been seen if the attention had not thus been drawn to it by the certainty of its presence. There was no opportunity, however, for Cundieff thus to discover the train that was moving on the main track at the time of the injury. The long train that was passing east on the north track was, he says, making considerable noise. His ears were first filled with its roar. Any other similar sound coming within the range of his hearing would have been naturally attributed to that train as its cause.

It is next urged that because Cundieff discovered the brakeman on the side of the train on the north track, and stated that he was on the second car from the rear, it must have been light enough, according to his own testimony, to enable him to count the cars between the brakeman and the caboose. "If the light was sufficient to enable him to do that," the opinion says, "it seems to us it was sufficient to enable him to see the train on the main line, which was nearer him." It is easy for me to understand that Cundieff might have discovered the length of the train by its sound, and thus estimated the number of cars in it, or that he might have discovered the rear of the train by the appearance of lights in the northern part of town, as the train moved eastward, and ceased to obstruct his vision. If the rear car of this train was a caboose (about which the evidence is in conflict), of course, that would clearly indicate to an observer the number of cars between the brakeman with his lantern on the side of the train and the caboose. This is all of the testimony of Cundieff from which the inference is drawn that he ought to have discovered the train on the main track, and it seems to me wholly insufficient to justify the inference as a matter of law.

A witness by the name of Weed testified that he saw the train that injured Cundieff from a point south of the main line on Scraper avenue; but he states that he first discovered it by the light of the train on the north track. His testimony on that subject is as follows:

"Q. Had you seen the train that was supposed to have run over him?

"A. I did not only by the light of the other train."

In another part of his evidence this witness testified that he also heard the train. His testimony is badly confused as to where he stood at the time he made these observations; but he gave as his final judgment that he was not more than 30 feet south of the main track. Three features of his evidence impress me: First, he was made aware of the train causing the injury by the lights north of it; second, he

was a sufficient distance from both trains so he could easily have distinguished the sound of the one from the other; and, third, he looked at the train from the side and not from the end. That he was able to see this string of cars under such circumstances is therefore to me very slight proof that Cundieff ought to have seen them under his essentially different conditions.

There were two other witnesses by the name of Pershing and Dean. At about the time of the accident they were traveling east on the right of way north of the north track. They crossed over between this track and the main track about 150 feet west of Scraper avenue. They then saw the string of cars that had struck Cundieff. At that time it was passing on a spur leading off to the southwest immediately west of Scraper avenue. They testified that they were able to see these cars at a distance of from 30 to 35 feet, and from this the court draws the inference that Cundieff could have seen them for a like distance, and was negligent in failing to do so. In my judgment these witnesses occupied an entirely different position from that which he occupied: First, there was nothing to distract their attention from the sound of these cars, and they may have first discovered them by their noise, and then directed their gaze to ascertain its cause. Second, the plat that was introduced in evidence shows that these cars passed between these witnesses and the three lanterns of the trainmen that were standing on the platform of the freight depot, and they might have discovered the presence of the cars by their cutting off these lights. Third, the cars passed between them and the main business part of the city, and for this reason they could easily have discovered the cars by their intercepting the lights in that part of the town. Finally, the cars were presented to them nearly broadside. They therefore occupied an entirely different relation to the cars from that which Cundieff occupied. It must also be borne in mind that their estimate as to the distance was made in the night, and was for this reason subject to serious error. It further appears that these witnesses estimated the number of cars as eight; but this may have been simply an opinion based upon the distance between the rear of the cars and the light of the locomotive which they say they saw as it passed over Cundieff, and disclosed him lying on the ground, or they might have discovered the number of cars as they passed to Cundieff, going along opposite the train. So their statement that there were about eight cars in the string is no proof of what could be seen by Cundieff.

It is next urged that the string of cars which struck Cundieff must have made considerable noise, which he should have heard; but, as already stated, it would have been perfectly easy for Cundieff to confound any noise made by these cars with the noise of the train that was passing on the track immediately north. It is said that it only took two or three steps to cross the track; but all the authorities agree that the law does not fix any specific point from which the traveler must look. Elliott on Railroads, § 1166(a); Cleveland, etc., R. R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985. Cundieff says that after he crossed the house track, and before he entered upon the main track, he looked for trains upon that track. Just how many feet he was

away, or how rapidly he moved, is wholly a matter of conjecture. He says he thought he would have to swerve a little to the west in order to get around the rear of the train that was passing on the north track. He was waiting for the crossing to be cleared, and his movements may have been slow in view of that fact. Such evidence is clearly for the consideration of the jury. *Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362, 366, 54 N. E. 785. Certainly it is departing, in my judgment, widely from any previous decision, for the court to hold as a matter of law that Cundieff was negligent in not hearing the train that was moving towards him very slowly without any sound of bell or whistle, while another train was passing within a few feet.

It seems to me that all the facts upon which the court finds the plaintiff guilty of contributory negligence as a matter of law are simply features proper for the consideration of the jury in determining the issue. The rule which declares that when the "physical facts" show that the traveler must have discovered the train if he had looked and listened, his negligence becomes a matter of law, can properly be applied only when the physical facts are themselves unambiguous. Even in Pennsylvania, where the duty of the traveler is more burdensome than in any other state, contributory negligence will not be declared as a matter of law unless the evidence clearly shows that the plaintiff must have discovered the train if he had looked and listened. *Davidson v. L. S. & M. S. Ry.*, 171 Pa. 522, 33 Atl. 86; *Kuntz v. N. Y., C. & St. L. R. R. Co.*, 206 Pa. 162, 55 Atl. 915. The doctrine has never been enforced, so far as I can learn, except in cases where the train approached a crossing in the open day, with an unobstructed track, or in the nighttime when it exhibited a headlight or some other conspicuous illumination, or when a single train was within hearing, and causing sufficient noise to make it physically impossible that the traveler would not have heard it if he had listened. After a careful examination of the authorities, I feel confident in the assertion that the rule mentioned has never before been applied to a dark freight train moving over a public thoroughfare without any warning bell, whistle, or light, while another train was passing. Here it is not "physical facts," like a headlight at night, or a train on an open track in the daytime that form the ground of the court's decision, but evidence touching how far cars could be seen under circumstances widely different from those which surrounded the plaintiff. In the *Houston Case*, 95 U. S. 697, 24 L. Ed. 542, where the rule was first stated, the deceased had a clear view of the train for three-fourths of a mile. The headlight of the engine was burning. It was also bright moonlight, and the train, which was moving rapidly, created a loud noise. Later cases following this decision have all exhibited trains whose approach to the crossing was manifest with equal clearness. In the present case the night was very dark and foggy. The crossing was obstructed by a long freight train that was moving over it. As the passage clears, the plaintiff goes forward, after looking and listening for danger, when a string of freight cars is backed down upon him on a parallel track. The grade is slightly favorable, so that in all probability no noise is made by the exhaust of the locomotive. The sound of the cars is con-

ceased by the roar of the train that is passing on the adjoining track. No light whatever is exhibited, nor is any bell rung or whistle sounded. I ask with all candor what circumstance is here wanting which ought to be present in order to make a case proper for the consideration of a jury? There is no absolute rule of law that the traveler's failure to see a train is negligence. Whether it is such must depend upon the circumstances. Is it the purpose of this court to establish as a rule of law that a pedestrian cannot in any case recover for injuries suffered at a railway crossing? That his failure to discover a train, however negligent its management, establishes contributory negligence as a matter of law? In every one of the hundreds of cases in which a recovery has been sustained, it was physically possible for the traveler to have discovered the train. Whether his failure to make the discovery showed a want of such care as reasonably prudent men are accustomed to exercise in going upon crossings was held to be a question for the jury; but the majority in the present case seem to me to apply the rigid rule that, if it can be said upon a calm consideration of the evidence that it was physically possible for the plaintiff to discover the train, his failure to do so establishes his legal negligence. The enforcement of such a rule devolves upon the traveler the whole burden of avoiding collisions at crossings. That, in my judgment, is not the law. The duty is mutual. Railroad companies are bound to warn the public by some signal of the approach of their trains. I, of course, am well aware that the omission to appeal to the ear of the traveler by the ringing of the bell and the sounding of the whistle will not excuse him from the use of his eyes; and if the situation is such that by looking, as a prudent man would have looked under all the circumstances, he might have discovered the train, his failure to do so establishes his negligence. That, however, is not the present case. Here the railroad company not only omitted the signals which appeal to the ear, but also all signals which appeal to the eye. The train approached the crossing without any outward indication of its presence. Railroads, by years of customary practice, have taught the public to believe that a train approaching a crossing in the nighttime will exhibit a light or sound a bell, or both. Can it be held to be negligence on the part of the public that it relies upon this invariable custom? When there is no light and no signal, is it the duty of the public to assume that the company is likely to be guilty of an act of criminal negligence, and to institute a search in the dark to find a train? That would require, not ordinary, but most extraordinary, care. In not one time in a million will a train be pushed over a public crossing in the nighttime without one or both of the usual warnings. It has been repeatedly declared by the courts that to do so is an act of gross and criminal negligence. If the present accident had resulted in death, instead of injury, the trainmen, under the laws of Oklahoma, as well as under the laws of a majority of the states of the Union, would have been guilty of manslaughter for doing an act so imminently dangerous and so utterly regardless of human life. Can railroads by an invariable practice drill the public as to what may be expected in the movements of trains at railway crossings, and then when they depart from that practice say that the traveler is guilt-

ty of negligence because he relied upon the practice? The senses discover what experience has taught them to expect. If an object is accustomed to exhibit certain conspicuous features, the eye, when looking for the object, looks for those features only, and, if they are not shown, the mind by an involuntary judgment calls back the eye from further search. Any other process would make the ordinary movements of life impossible. We should have to pause at every step to conduct a multitude of original investigations instead of being guided by the quick, involuntary judgments that are the results of common experience. When Cundieff looked up the track and saw no light and heard no bell or whistle, he had a right to believe that no train was approaching, and to act accordingly. He was not called upon to turn a searching gaze into the night to see if he could not descry a dark train creeping down upon him. Prudent men do not do that. If the law requires them to, it requires what is unusual, unnatural, and unjust. It overlooks the mutual and reciprocal duties of the railroad company and the traveler. It exonerates the former from the consequences of its criminal negligence, and requires the public to use extraordinary care to avoid the unusual and unexpected dangers arising from such negligence.

In the federal courts there are two well-defined classes of cases on the subject of accidents at crossings. In the one the train approaches the crossing in the open day with a clear track, or in the nighttime exhibiting a headlight or some other equally conspicuous illumination. This class of cases starts with *Houston v. Railroad Company*, 95 U. S. 697, 24 L. Ed. 542, which has already been fully described. To it belongs *Schofield v. Chicago, Milwaukee & St. Paul Ry. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224 (daytime, with a clear view of the train for 70 rods, with nothing to distract the attention); *Elliott v. Chicago, Milwaukee & St. Paul Ry. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068 (open day with clear view of the train, and plaintiff, a section boss, walked in front of the cars, and evidence affirmatively showed that he neither looked nor listened); *Northern Pacific v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014 (open day, a clear view of the track for 300 feet, and affirmative evidence that plaintiff did not look, but drove upon the track with his head down). In all of these cases plaintiff sought to recover because the train failed to ring the bell or sound the whistle. The court held that, if he had used his eyes, he must have seen the train, and that he was guilty of contributory negligence in not looking. To this class all the cases cited in the prevailing opinion will be found upon examination to clearly belong.

The second class involves situations in which, the physical facts being shown, it was uncertain whether the plaintiff was negligent in failing to discover the train. Most of them, like the present case, involved the passing of a string of cars over railway crossings in the nighttime without light or sound. This class of cases also had its beginning in the same volume as the *Houston Case*, and is first illustrated by *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403. There a string of cars were thrown over a suburban crossing by a flying switch without any warning of their approach, and the case was



held to be one for the jury. The court states forcibly the duty of railroads to notify the public by some warning of the approach of their trains to crossings, and that, if no warning is given which appeals clearly either to the eye or ear, the traveler cannot be held guilty of contributory negligence in failing to discover the train. This case, like the Houston Case, was a unanimous opinion of the court. Its doctrines have been applied in the following cases: *D. L. & W. L. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213 (a flying switch in the nighttime); *Grand Trunk v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485 (an obstructed crossing); *Texas & Pac. Ry. Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132 (a traveler on foot, and dark freight train backed over a crossing in the nighttime); *Baltimore & Potomac R. R. Co. v. Cumberland*, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. Ed. 447 (a reversed locomotive without headlight, but showing a lantern—a much stronger case for the defendant than the present).

There are two other cases in the Supreme Court whose facts are so nearly similar to the facts of the case here under review that I think they should be more fully discussed. *Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 104, 41 L. Ed. 186. Gentry was an engineer residing at Big Springs, Tex., a division point. He started to go to his engine in the yards between 8:30 and 9 o'clock on the evening of March 13th. He traveled by a path leading under the staging of a coal chute. The distance between the coal chute and the track upon which he was killed was 13 feet. While traveling over this space, he had a clear view of the track. A road engine with a flat car attached in front of it was being temporarily used in the yards for switching purposes. Its headlight was burning brightly, and illumined the half of the car farthest from the engine. Gentry stepped in front of the car and was killed. The main defense was contributory negligence. The statement of facts in the decision of the Supreme Court is not clear. Owing to what was said in *C., M. & St. P. Ry. Co. v. Clarkson*, 147 Fed. 397, 77 C. C. A. 575, as to the evidence upon which the Gentry Case was decided, I have obtained a copy of the original record from the clerk of the Supreme Court, and examined the testimony for the purpose of ascertaining precisely the facts that were there before the court. From this it appears that the plaintiff in support of her case introduced the testimony of 15 railroadmen. Two of these stated that the flat car could not be seen. One did not testify at all upon that subject. Ten stated either that it would be "difficult to see such a car under the circumstances," or "a person standing in front of the engine opposite the track could not easily see the flat car." Three witnesses (one of whom was a brother of deceased), on the evening of the accident, made a test with the same engine and the same car at the point where Gentry was killed, to ascertain whether the car would be visible. One of these witnesses stated the result of that experiment as follows:

"We passed under the coal chute as we supposed L. G. Gentry did, and had the engine go down the main line. I could see the flat car. I cannot say whether I would have seen it or not had I not known it was there, and had I not been looking for it."

The brother of the deceased stated:

"I do not think that an unsuspecting person would have seen the car as the headlight shone over it and blinded the eyes. I did see the car, because I knew it was there, and was looking for it."

The third witness, a brother engineer, testified as follows:

"If a person was standing in front of said engine, the flat car could be seen with difficulty. I was standing by the side of the car when the engine and car passed me about 5 or 6 feet from me. Of course, I knew the car was there, and it was very little difficulty for me to see it; but a person not knowing it was there might not have seen it easily. If a man knew the car was there, he could very easily see it by the headlight. Standing by the side of the track the headlight of the engine would have no effect upon the vision of the person, I don't think; but standing in the middle of the track, and looking at such headlight, it might have had a dazzling effect upon the vision. About half of the car was illuminated by such reflected light from the headlight. The end of the car was much more illuminated than back towards the middle of the car and towards the engine. The end of the car farthest from the engine was in a brighter light and clearly visible."

With a single exception plaintiff's witnesses all agreed that the headlight would illuminate about one-half of the car.

The remarkable feature of the decision is this: The defendant requested the following instruction, which was refused:

"You are instructed that it is the duty of an employé or any other party about to cross a railroad track to look and listen for passing engines, cars, or trains, to ascertain whether or not same are approaching before going upon the track, and if a party fails to exercise such care he cannot recover. You are therefore instructed that if the deceased, L. G. Gentry, by looking or listening, could have known of the approach of the engine and car, in time to have kept off the track and prevented the injury to himself, and if he failed to do so, you will find for the defendant."

There was nothing in the charge as given which embodied the substance of this request; but the court held that its refusal was not error. The Houston Case in 95 U. S. 697, 24 L. Ed. 542, and other decisions of the Supreme Court declaring the duty to look and listen before going upon the track, were urged upon the attention of the court, and in distinguishing the instant case from those cases the court said:

"But the present case did not admit of or require an instruction upon this special subject. There was no evidence upon which to rest such an instruction. As already stated, no one personally witnessed the crossing of the track by the deceased, nor the running of the flat car over it. Whether he did or did not stop and look and listen for approaching trains the jury could not tell from the evidence. The presumption is that he did, and, if the court had given the special instruction asked, it would have been necessary to accompany it with the statement that there was no evidence upon the point, and that the law presumed that the deceased did look and listen for coming trains before crossing the track."

It may be doubted whether all this language can now be regarded as consistent with later decisions of the Supreme Court. It would seem as if the physical facts, in combination with the evidence above referred to, made such a showing as to render the requested instruction proper. What the opinion of the Supreme Court in this case, however, does teach with unmistakable emphasis, is that "physical facts," in order to establish contributory negligence as a matter of law, must

be unambiguous. The facts themselves, without argument, must show that, if the traveler had used his faculties of hearing and seeing, he must have discovered the train. The plaintiff's evidence in the Gentry Case established beyond any reasonable doubt that, if Gentry had looked for the car, he could have seen it. His own brother, as the result of the test made on the same evening as the accident, bore testimony to that effect; but the court held that the car was not clearly visible, and therefore that the rule declared in the Houston Case could not be applied. In the present case the dark end of the train that injured the plaintiff was certainly as obscure as the car that killed Gentry. Here, too, the court is not left to the feeble presumption that the plaintiff exercised care. He appeared as a witness, and testified positively that he looked and listened for the train, and was unable to discover its presence. The car that struck the plaintiff was obscured by reason of the very dark night. The car that struck Gentry was obscured because of the radiance of the headlight. In the Gentry Case the Supreme Court held that it was not even proper to call the jury's attention to the rule requiring the traveler to look and listen. Here the jury, upon a charge to which the defendant took no exception, have found in plaintiff's favor. Surely we cannot reverse their finding without rendering a decision that is clearly in conflict with the opinion of the Supreme Court in the Gentry Case.

The latest decision of the Supreme Court (Baltimore & Potomac R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262) is directly in point on its facts. The defendant's four tracks were laid in Virginia avenue, in the city of Washington, and were crossed by South Capital street. The crossing was well lighted by four gas lamps at each of its corners, and further by two electric lights which were sufficiently near to throw considerable light upon the place. The flagman's box at the crossing obstructed the view to one standing outside the gates; but inside the gates the view along the track was clear. The accident occurred about midnight. At the time a limited passenger train was running out of the city over the crossing. The deceased was killed by a "runaway" Pullman car which was being switched in the yard, and had broken loose by reason of a defect in the coupling. The tracks were slightly inclined, and this car moved slowly down toward the crossing about as fast as a man could walk, in the direction opposite to that of the passenger train, and reached the crossing at the same time as the locomotive of that train. It was a vestibuled car, and the end towards the crossing had a brilliant lamp in the vestibule which clearly illuminated the end of the car and the track for some distance in front of it. The evidence shows that Landrigan was struck at the east side of Capital street, and the car approached from the west, so it was at least clearly visible while it was passing over the entire street, and to one standing inside of the gates it was visible for a much greater distance. Landrigan had been employed for eight years as an assistant boss in the defendant's roundhouse. His home was north of the railroad tracks, and he had been accustomed to pass over the crossing daily during the period of his employment. He stepped upon the track on the night in question in front of the Pullman car, and was struck by it

and killed. At the conclusion of the evidence the defendant moved for a directed verdict upon the ground of his contributory negligence, which was denied, and the case submitted to the jury, who returned a verdict in favor of the plaintiff. There is not a circumstance in the present case justifying a reversal of the judgment which was not present in that case, and there are several circumstances tending to show that the plaintiff there was negligent, which are not here present: First, the crossing was well lighted so as to leave no room for doubt that the car could have been seen if the traveler had looked in its direction. Second, the brilliant light in the vestibule of the sleeper is another strong circumstance showing that the car was plainly visible as it approached the point of the accident. Third, the only evidence tending to show that Landrigan looked and listened before going upon the track was the presumption of care. In the present case there is the same presumption coupled with the positive evidence of the plaintiff that he did look and listen. Landrigan's attention, the same as plaintiff's here, was distracted by another train upon a parallel track. If that case was properly affirmed, surely the present should be.

I shall not further prolong the opinion to examine cases in detail, but shall simply cite others of a similar nature in which judgments for the plaintiff have been sustained upon evidence less cogent than is shown by the present record: *Texas & Pac. Ry. Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132; *B. & O. R. R. Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; *D., L. & W. R. R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *C., R. I. & Pac. R. R. Co. v. Sharp*, 63 Fed. 532, 11 C. C. A. 337; *McGhee v. White*, 66 Fed. 502, 13 C. C. A. 608; *C., M. & St. P. Ry. Co. v. Donovan*, 160 Fed. 826, 87 C. C. A. 600; *Henavie v. N. Y. C. & H. R. R. Co.*, 166 N. Y. 281, 59 N. E. 901; *Judson v. Central Vt. R. R. Co.*, 158 N. Y. 597, 53 N. E. 514; *Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362, 54 N. E. 785; *Smedis v. B. & R. B. R. R. Co.*, 88 N. Y. 13; *French v. Railroad Co.*, 116 Mass. 537; *Canning v. B., R. & P. Ry. Co.*, 168 N. Y. 555, 61 N. E. 901.

The Houston Case was decided in 1877. For more than 30 years the courts have rigorously enforced the rule requiring the traveler to look and listen. During that period the roll of death and accident at crossings has steadily increased from year to year. I have no disposition to abate the rule in any degree, when the facts to which it is properly applicable are present; but in my judgment the duty rests upon railroads to apprise the traveler in some way clearly of the approach of trains, and sound public policy forbids their exemption from liability when they fail to do so.

## UNITED STATES v. FAIRBANKS.

## SAME v. WARREN.

(Circuit Court of Appeals, Eighth Circuit. June 3, 1909.)

Nos. 2,926, 2,927.

**1. INDIANS (§ 27\*)—LANDS—ACTION TO DETERMINE RIGHT TO ALLOTMENT.**

In an action brought by a person claiming the right to an allotment of land on an Indian reservation against the United States to establish such right, as authorized by Act Feb. 6, 1901, c. 217, 31 Stat. 760, the jurisdiction of the court is not restricted to a determination of the right of the plaintiff to any allotment; but, where a particular tract is claimed, the right of any adverse claimant may also be litigated, and for that purpose he may, and should, be joined as a party defendant.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 27.\*]

**2. INDIANS (§ 13\*)—LANDS—CONSTRUCTION OF STATUTE AUTHORIZING ALLOTMENT.**

Under the general Indian allotment act of 1887 (Act Feb. 8, 1887, c. 119, 24 Stat. 388), a continuing power was vested in the President, which is not exhausted by the first order for allotments; but others may be thereafter made from time to time in his discretion.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.\*]

**3. INDIANS (§ 13\*)—LANDS—ALLOTMENTS IN SEVERALTY.**

The fact that a member of an Indian tribe was born after the passage of the general Indian allotment act of 1887 (Act Feb. 8, 1887, c. 119, 24 Stat. 388), or of the Nelson act of 1889 (Act Jan. 14, 1889, c. 24, 25 Stat. 642), does not exclude such person from the right to an allotment under either of such acts.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.\*]

**4. INDIANS (§ 13\*)—LANDS—ALLOTMENTS IN SEVERALTY.**

The effect of the Steenerson act (Act April 28, 1904, c. 1786, 33 Stat. 539), was to abrogate the limitation placed by the ruling of the department on the prior Indian allotment acts, excluding from their operation land chiefly valuable for its timber, and as soon as it took effect any Indian entitled to an original allotment under the prior acts had the right to select the same from any unappropriated lands, and was not required to wait until additional allotments were made under the Steenerson act.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.\*]

Appeal from the Circuit Court of the United States for the District of Minnesota.

These suits involve conflicting claims to two 80-acre allotments of land on the White Earth Indian reservation under the general allotment act (Act Feb. 8, 1887, c. 119, 24 Stat. 388), the Nelson act (Act Jan. 14, 1889, c. 24, 25 Stat. 642), and the Steenerson act (Act April 28, 1904, c. 1786, 33 Stat. 539). On the 29th of June, 1904, the plaintiffs, Annie Fairbanks and Edward L. Warren, presented to the Indian agent in charge of the White Earth reservation applications for allotments of the land in question as "additional" allotments under the Steenerson act. The agent declined to receive the applications upon two grounds: First, because the qualified residents on the reservation had not yet all received their "original" allotments under the acts of 1887 and 1889; second, because the preliminary work necessary for the making of allotments under the Steenerson act had not yet been done. For reasons which are fully explained in the opinion of this court in *Woodbury v. United States*, 170 Fed. 302, these applications were premature, and created no right or interest in the land. August 8, 1904, Louis and Alice Mooers, minors, ap-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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plied by their father for an allotment of the same lands as original allotments under the acts of 1887 and 1889. Their applications were accepted and filed. April 24, 1905, arrangements having been completed for the allotment of "additional" under the Steenerson act, the plaintiffs again presented their applications for the allotment of the lands in question under that statute. These applications were also received by the agent of the reservation. Thus two separate sets of applications were accepted at the same office for the same tracts of land. The rights of the parties in this suit depend upon which of the filings has priority. After much vacillation the Interior Department, by decision of the Secretary of the Interior dated May 13, 1907, sustained the claims of the Mooers, and directed that the lands be allotted to them. The present suits were afterwards brought under Act Feb. 6, 1901, c. 217, 31 Stat. 760, for a determination in court of complainants' rights. Decrees were entered in their favor, and the present appeals are brought to review those decisions.

R. J. Powell (Charles C. Houpt, U. S. Atty., on the brief), for the United States.

George B. Edgerton, for appellees.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

AMIDON, District Judge (after stating the facts as above). A preliminary question is raised by the government as to the jurisdiction of the court to deal with the rights of the Mooers in these suits. It is urged that under Act Aug. 15, 1894, c. 290, 28 Stat. 305 as amended by Act Feb. 6, 1901, c. 217, 31 Stat. 760, the court has jurisdiction only to determine whether the plaintiff is entitled to any allotment of land on the reservation, but has no jurisdiction to determine conflicting rights between different applicants for allotment of the same lands. This contention is based upon the provision of the statute which reads as follows:

"In said suit the parties thereto shall be the claimant, as plaintiff, and the United States as party defendant."

We cannot give to this language the effect claimed by counsel for the government. An earlier part of the statute declares that all persons who have or claim a right to any allotment of land upon an Indian reservation—

"may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper Circuit Court of the United States."

This language clearly extends the jurisdiction to the defense of rights as well as their assertion. The object of requiring the United States to be made a defendant is that it may exercise that supervision over allotments of land which is necessary to protect the rights of Indians. It seems to have been the practice to make adverse claimants parties with the government. *Smith v. Bonifer* (C. C.) 132 Fed. 889; *Patawa v. United States* (C. C.) 132 Fed. 893; *Parr v. U. S.* (C. C.) 132 Fed. 1004; *Smith v. United States* (C. C.) 142 Fed. 225; *Waldron v. U. S.* (C. C.) 143 Fed. 413. Of course, if the controversy is wholly between the United States and the Indian, involving only the question of his right to any allotment, then the United States would be the only party defendant. *Sloan v. U. S.* (C. C.) 118 Fed. 283.

The Mooers children are not made parties. We entertain a serious

doubt as to whether the court could properly proceed to judgment in these cases and render decrees which so seriously affected their rights without their being made defendants. *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499. But, as that question is not raised by counsel, we pass it by.

In the pleadings no issue whatever is raised as to the capacity of the Mooers children to take an original allotment of land upon the reservation. No evidence was adduced upon that subject. The trial court, however, ascertained from their applications that the children were, respectively, 7 and 9 years of age, and reached the conclusion that, since they must have been born subsequent to the date on which the acts of 1887 and 1889 took effect, they could not be entitled to allotments under those statutes. This was the principal ground of its decision adjudging their allotments to be void. We find nothing in the statutes to support such a holding. The original act of 1889 fixes no definite time for the making of allotments. The first section looks to an indefinite period. It begins as follows:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, \* \* \* the President of the United States be, and he is hereby authorized, whenever in his opinion any reservation or any part thereof, of such Indians, is advantageous for agricultural and grazing purposes, \* \* \* to allot the land in said reservation in severalty to any Indians located thereon."

In specifying the amount to go to the different classes of allottees, the statute uses this language:

"To each other single person under eighteen years, now living, or who may be born prior to the date of the order of the President, directing an allotment of the lands embraced in any reservation."

The evidence in this case does not show the date of the order of the President directing that allotments be made under this statute. In our judgment, however, the making of one order did not exhaust the powers of the President. The statute vests a continuing power, and he could provide from time to time for allotments in favor of those born upon the reservation subsequent to the first order dealing with the subject, so long as there were lands of the reservation which had not been allotted. The statute submits the whole subject of the distribution of the lands embraced in the reservation, to the President, acting through the Interior Department. This view receives confirmation from the language used in section 3 of the Nelson act of 1889, as follows:

"And thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on the Red Lake reservation, and to all other of said Indians on the White Earth reservation, in conformity with the act of 1887."

These statutes have been interpreted by the Interior Department as vesting a continuing power. In fact, the agent before commencing allotments under the Steenerson act, sent notice to all Indians whose names appeared upon the rolls, and who had not received original allotments, requiring them to make their selections, and specifying that if they failed to do so it would be the duty of the agent to act in their behalf. Such a notice was sent to the father of the Mooers children

in respect to their rights. The names of these children had been entered upon the rolls of the agency. They had received all the benefits of federal law, as members of the tribe, and the agent testified that his object in sending the notice was to call attention to their right to receive allotments, because he was of the opinion that they were entitled thereto. Their ages appeared upon the face of their applications, and have passed before the Commissioner of the General Land Office and the Secretary of the Interior. Those officers must have both become aware of the point raised by the trial court, and yet in their judgment the fact that the children were born subsequent to the date when the acts of 1887 and 1889 took effect, and possibly to the order of the President made for the purpose of carrying out those acts, did not seem to them to create any bar to their right to receive allotments. It having been the practice of the department to allot lands to Indians residing on the reservation, regardless of the time of their birth, it is quite likely that a decision adverse to that practice at this time would disturb titles long vested. The statutes relating to the White Earth reservation are wholly different from those controlling the allotment of the lands of the Five Civilized Tribes of Indian Territory. In that case a specific date was fixed, and it was provided that no Indian born upon the reservation subsequent to that date should be entitled to enrollment as a member of the tribe for the purpose of receiving an allotment. *Hayes v. Barringer* (C. C. A.) 168 Fed. 221. We are of the opinion that the court erred in holding that the Mooers children were not entitled to "original" allotments.

The acts of 1887 and 1889 were confined to lands that were "advantageous for agricultural and grazing purposes." The department, in construing this language, ruled that lands which were chiefly valuable for the pine timber growing thereon, did not come within the statute. Such lands had therefore been excluded from allotment. The Steenerson act abrogated this limitation. The agent was not aware of this feature of the Steenerson act, and for that reason held that the Mooers applications for the lands in question were invalid, and permitted the second filing. The trial court was also of the opinion that, inasmuch as the Steenerson act first gave a right to the allotment of pine lands, all persons claiming such allotments should be treated alike, and that no allotment of such lands could be made until the agency was ready to begin the work of making additional allotments under the Steenerson act. We think this ruling was erroneous. The regulation of the department excluding timber lands from the benefit of the statutes of 1887 and 1889 was itself questionable. A very large portion of the area of the United States at the present time devoted to agriculture was originally timber land. The effect of the Steenerson act abolishing the rule was to leave the lands of the reservation the same as if the regulation had never been in force. As soon as that act took effect any Indian who had not received his original allotment was entitled to select therefor any unappropriated land on the reservation. This was the interpretation of the Secretary of the Interior, and we think it accords with the provisions of the statute. It is true that allotments could not be made under the Steenerson act until the preliminary work necessary for that purpose had been completed. But the



Mooers children were not claiming under that statute. It related only to additional allotments. They were claiming original allotments under the acts of 1887 and 1889. Depending upon those statutes they were not obliged to defer the choosing of their allotments until the time fixed for making allotments under the Steenerson act.

Counsel for plaintiffs makes much of the fact that the father of the Mooers children had inclosed parcels of land with a fence, and had stated to his neighbors that he intended to claim those parcels as allotments for his children. The fact is, however, that he never made any application for those lands at the local land office, and in the absence of such applications the fencing in of the land gave the children no right or claim thereto. Their right to allotments must be determined by the proceedings which they took in the land office, and their applications for the lands here involved are the only proceedings of that character on their behalf.

The decrees must be reversed, with directions to enter decrees dismissing the bills upon the merits.

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PINELAND CLUB et al. v. ROBERT et al.

SAME v. SANDERS et al.

(Circuit Court of Appeals, Fourth Circuit. June 9, 1909.)

Nos. 850, 851.

1. WILLS (§ 433\*)—DOCUMENTARY EVIDENCE—EXEMPLIFICATION OF WILLS—SOUTH CAROLINA STATUTE.

Under Civ. Code S. C. 1902, § 2994, which provides that "in all actions the exemplifications of wills under the hand of the judge of probate and the seal of the court in which such will may have been admitted to probate \* \* \* shall be admissible in evidence in any of the courts of this state," a copy of a will, unaccompanied by a certificate signed and sealed, is not an exemplification of the will, and is not admissible in evidence.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 433; \* Evidence, Cent. Dig. § 1321.]

2. WILLS (§ 433\*)—DOCUMENTARY EVIDENCE—EXEMPLIFICATION OF WILL—COPY OF RECORD.

Act S. C. Dec. 20, 1866 (13 St. at Large, Ex. Sess. p. 384) § 7, provides that "in all cases in which any instrument in writing is required by law to be recorded or registered and such record or registry, together with the original, is lost or destroyed, but a copy thereof, certified to under the hand of a proper officer, has been preserved, such certified copy shall be recorded or registered and be in the room and stead of the original." Section 4 of the same act provides for obtaining an order for such substitution from the court or judge in chambers on service of notice. *Held*, that the entry on the records of a probate court of what purported to be a copy of a will, accompanied by a certificate signed by a former judge, but not bearing the seal of the court, nor showing that such will had ever been admitted to probate, and without any record of any order of a court or judge authorizing such recording, was not such a substitution as authorized by the statute, and that a certified copy of such record was not an exemplified copy of the will admissible in court as an evidence of title.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to real estate, under Civ. Code S. C. 1902, § 2994; there being, furthermore, no record of the probate of the original of such will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 433; \* Evidence, Cent. Dig. § 1321.]

**3. EVIDENCE (§ 181\*)—SECONDARY EVIDENCE—GROUNDS FOR ADMISSION.**

What purports to be a copy of a will is not admissible as secondary evidence of its contents, without proof of the due execution and existence of the original and that it has been lost or destroyed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 600; Dec. Dig. § 181.\*]

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

These two cases were consolidated and heard together by the court below. They were instituted by the defendants in error to recover of the plaintiffs in error certain lands lying in Hampton county, S. C. The title to two tracts of land is involved in this controversy. The third tract was involved, but as to this tract a verdict was entered for the defendants below. The plaintiffs below claim title under will of John H. Robert, Sr., who died on July 4, 1835, and who, the plaintiffs allege, left a will dated December 21, 1833. The will devised both tracts of land to the testator's son, Lucius. The plaintiffs claim that under the will Lucius took a life estate only, with remainder to his children. The plaintiffs below in case No. 850 are Edward Robert and Anna Connerat, both of them children of Lucius. The plaintiffs below in No. 851 are Pauline Sanders, a daughter of Lucius, and M. R. Sanders, L. B. Sanders, C. W. Sanders, Callie Daniel, and T. C. Carmichael, children of Isabella, another daughter of Lucius, who died in his lifetime. The defendants' title to the Cotton Hill tract and the Pineland tract, being the lands involved in these two cases, commences with a deed from William M. Bostick, trustee, to Joseph W. Maner, executed in the year 1860, which was lost or destroyed and the record of which was burned in the war. Thereafter, on June 1, 1867, Bostick, trustee, executed a confirmatory deed, which recites the earlier deed, and that it was executed in pursuance of a court proceeding in the year 1859 to authorize Bostick, trustee, to sell and convey the land to Joseph W. Maner. The said Maner sold a part of these lands to Maj. William J. Lawton, by deed dated January 14, 1874, and the remainder he sold to William R. Lawton by deed dated December 5, 1889. The two Lawtons sold and conveyed to John K. Garnett, and Garnett sold and conveyed to the trustees of the Pineland Club. The defendants and those under whom they claim insist that they have been in the continuous, open, notorious, and adverse possession of the Cotton Hill and Pineland tracts ever since the deed of 1860 from Bostick, trustee, to Maner.

J. S. Clark (Smythe, Lee & Frost, on the brief), for plaintiffs in error.

B. A. Hagood (Benj. H. Rutledge, C. J. Colcock, James A. Harley, and E. F. Warren, on the briefs), for defendants in error.

Before GOFF and PRITCHARD, Circuit Judges, and MORRIS, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). The first question to be determined is as to whether the plaintiffs below offered any valid or legal proof of the will of John H. Robert, Sr. Title to real estate may be established in South Carolina by three methods—the first being a grant from the lords proprietors, the king, or the state, and a complete chain to the plaintiff; second, establishment of adverse possession in one of the plaintiff's grantors for more than 10 or 20 years, as the case may be, the title by 10 years being given

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by statute of limitations and that by 20 years presuming a grant; third, by establishing a common source of title from whence both parties to the record, plaintiff and defendant, derive their title. If the plaintiffs in an action like the one at bar establish a common source of title with that of the defendant, then they are relieved from the burden of proving the title of the common source from which they derive such title.

The Supreme Court of South Carolina in the case of *Robert v. Ellis*, 59 S. C. 137, 37 S. E. 250, had this identical will before it, in which proceeding it was sustained; but that was because of the agreed statement of facts before the court as to the existence of the copy of the will and as to the probate of the same. However, the defendants in the case before us had the right, which they duly exercised, of questioning the existence as well as the proof of such will, and therefore it is incumbent upon us in this case to determine the same.

In this instance it is sought to establish title to the lands in controversy by establishing a common source of title from whence both parties to the record derive their title. Therefore this case must stand or fall upon the question of fact as to whether the plaintiffs have established a common source. If they establish a common source, then they are not required to go further and prove the title of the common source from which they derive their title. It appears that plaintiffs offered a copy of the will of John H. Robert, Sr., to which is attached a certificate to the effect that it is a true and correct copy from the records of the ordinary, and this certificate is signed by E. F. Morrall, ordinary. However, the seal of the ordinary is not attached to this copy. The paper offered purports to be a certified copy of the records of the ordinary, and the signature of the ordinary was proven. Under Morrall's certificate, another certificate was attached to this paper, signed by J. C. Cunningham, judge of probate. This certificate states that the paper is a true and correct copy of the will of John H. Robert, Sr., and it appears that this paper was offered by plaintiffs, first upon the faith of Morrall's certificate, and later upon the faith of Cunningham's certificate.

The plaintiffs in error's first assignment is to the effect that plaintiffs below failed to show either a grant from the state or a common source of title. This raises the question as to whether the court below erred in admitting, as competent evidence, the copy of the will tendered by the plaintiffs below. The first objection to this document is based upon the ground that the certificate accompanying the same was not sealed in accordance with the provisions of section 2494 of the Civil Code of South Carolina of 1902, which reads as follows:

"In all actions, the exemplifications of wills under the hand of the judge of probate and the seal of the court in which such will may have been admitted to probate \* \* \* shall be admissible in evidence in any of the courts of this state."

The provisions of this statute are mandatory, plain, and explicit, and leave no doubt as to the legislative intent. Under this statute a copy of a will, unaccompanied by a certificate, signed and sealed, cannot be deemed to be an exemplification of a will. Where it is attempted, as in this instance, to prove a record by the method provided by the

statute, it is essential that the requirements of the statute be complied with strictly; but it appears in this case that the plaintiffs below had failed to comply with the provisions of the statute in this respect, and under such circumstances the paper offered is not in compliance with the requirements of the statute.

The next objection made by the defendants below was to the effect that the copy offered by the plaintiffs below is not an exemplification of the will. Webster defines "exemplification," when used in a legal sense, to mean:

"A copy or transcript attested to be correct by the seal of an officer having custody of the original."

That the probating of a will is a judicial proceeding is well established. The court which performs these functions is known as the "probate court," and the law by virtue of which it is created provides that it shall be a court of record. A will cannot be recorded until a decree has been entered by a probate court admitting the same to probate. The proceedings in that court are required to be regular, and every step necessary to secure such decree must be taken before the same can be entered. Thus it will be seen that, where a will has been admitted to probate in pursuance of a decree obtained in the probate court, one can readily ascertain from the records as to whether the proceedings were regular and as to whether the record is complete.

In order that wills may be preserved and perpetuated, the Legislatures of the various states have wisely provided the means by which they may be admitted to probate and entitled to registration in pursuance thereof. Once a will has been admitted to probate in pursuance to a judicial proceeding of this character, such paper may not only be recorded in the proper records of the county in which the testator resides, but the original, after being recorded, when accompanied with a proper certificate as to its identity, may be introduced as evidence in any proceeding where it may be relevant as such; and in order that the rights of those claiming under such an instrument may be fully protected, in the event of the destruction of the records or the original by fire or otherwise, parties in interest may, by presenting a copy thereof, certified under the hand and seal of the proper officer, have the same again recorded, and thereafter an exemplification of such copy may be used as competent evidence in any court of record.

Section 7 of the law of South Carolina approved December 20, 1866 (13 St. at Large, Ex. Sess. p. 384), provides:

"In all cases in which any instrument in writing is required by law to be recorded or registered and such record or registry, together with the original, is lost or destroyed, but a copy thereof certified to under the hand of the proper officer has been preserved, such certified copy shall be recorded or registered and be in the room and stead of the original."

The plaintiffs below evidently rely upon this section in support of their contention that the recording of the copy in question was proper and in accordance with the law of that state. This brings us to a consideration of the question as to whether the will was re-recorded in accordance with the provisions of section 7 of this act. In this connec-

tion it is pertinent to consider section 4 of the act to which we have referred, which reads as follows:

"Orders for leave to substitute any new records or records in judgments or decrees destroyed or lost may be made at chambers as well as in term time, without the consent of the parties, provided they have been served with notice as hereinbefore provided. \* \* \*

Sections 4 and 7, being a part of the same act and relating to the same subject, must be construed together. Section 4 provides the means by which leave may be obtained to substitute new records for judgments or decrees destroyed or lost, and the recordation in the first instance having been based upon a decree of the probate court, in order to entitle the same to be substituted instead of the record of which it is a copy, it became necessary for the plaintiffs to appear before the court at chambers or in term time in order to have the same passed upon before it could be properly admitted to probate and thereby re-recorded.

Section 7 provides that a copy of any instrument lost or destroyed, when certified under the hand of the proper officer, may be recorded or registered, and be in the room and stead of the original. Therefore, in order to determine as to whether the copy of the will in this instance, in the condition in which it was offered as evidence, is an exemplification of such will, as contemplated by section 2494 of the Civil Code of South Carolina of 1902, we must ascertain as to whether the same has been re-recorded in accordance with the requirements of sections 4 and 7.

An exemplification of a will, as contemplated by the law in this instance, must necessarily mean a copy of the will accompanied by a certificate of the proceedings necessary to be taken in order to authorize the same to be entered of record. This is especially true as respects the order admitting the will to probate. As we have already stated, the original of this will, if it existed, could only be offered as evidence when accompanied by a proper certificate showing that it had been duly probated and recorded in accordance with the laws of that state. Such being the case, it can hardly be insisted that a copy of a will, unaccompanied by any of the means of identification necessary to render it competent as evidence, would be admissible in a trial affecting the title to land as in this instance. To hold that the copy of the will in question is competent evidence would be tantamount to holding that less formality is required in the introduction of a copy than when the original is offered as evidence.

There is nothing in the record to show that any proceedings were instituted by virtue of which a decree was entered admitting the will to probate, and an examination of the copy shows that the seal of the court, as required by the statute, was not attached thereto. The Supreme Court of South Carolina, in referring to the meaning of the term "exemplification of a will" in the case of *Hankinson v. Railroad Company*, 41 S. C. 17, 19 S. E. 213, said:

"For the letters of administration amount practically to a judgment of the court of probate rendered on the proceedings on record in that court and instituted for that purpose, and in the absence of any statute upon the subject the general rule would require that the whole record of the proceedings

culminating in a judgment would have to be introduced in order to prove the judgment. \* \* \*

In this instance the plaintiffs rely upon the certificate of J. C. Cunningham, judge of probate. The judge of probate was called as a witness, and brought with him his record book in which this will was recorded in 1873. From the record thus produced it appears that there was no decree admitting the will to probate, nor was there any decree admitting the same to record. Judge Cunningham, among other things, testified as follows:

"Q. Are you probate judge of Beaufort county? A. Yes, sir. Q. Is there any record in your office of the will of John H. Robert? A. Yes, sir; there is. Q. Will you produce the evidence of that will? Is this the only record in your office giving what purports to be a copy of the will of John H. Robert? A. Yes, sir. Q. Has this book which you bring in here any name? A. No, sir. Q. Is there any writing on the fly leaves? A. No, sir. Q. What book is it? How would you describe the book? A. I have always described it as the 'old book,' whenever there was any reference wanted. We have two books, the old and new. Q. The will that you last put is on page 158 of this book? A. Yes, sir; against there. Q. Have you made a search in your office for any other record of this will? A. Yes, sir; a thorough search. Q. What has been the result? A. Found nothing at all. Q. Nothing but this? A. Nothing but that. Q. In the records of your court is there any probate of this will? A. None at all; never have found one. Q. There is nothing in regard to the will except that? A. I cannot see; in fact, there is nothing, no evidence in the office over 12 years."

The witness also, among other things, testified:

"Q. You put your certificate on the will of Robert which has been put in evidence, when you only meant to certify that it was a true copy of this copy which is in this book here? A. I think that was specifically stated. Q. Your intention was to certify? A. Yes; because I mentioned at the time—I said: 'I can't give this as a copy of John H. Robert's will. I give it to you as a certificate as I found it on record in this office'—certified copy of the will which I found on record at that time. Q. Is there any order in your office authorizing, so far as you know, the probating of that will on the books? A. None that I know of. Q. Do you know of anything connected with that will at all, excepting just as it is in that book there? A. Nothing; nothing more than that paper, purporting to be the copy from which that was taken, brought in by Mr. Colcock."

While it thus appears that the copy of the will, together with the certificate of E. F. Morrall, ordinary, had been copied in full in the book produced by Judge Cunningham, it does not appear that, at the time this copy was entered upon the records, it was accompanied by any certificate by which it could have been identified as being authentic, nor was there any decree authorizing the same to be admitted to probate and recorded in accordance with the law of that state. In fact, there is nothing to show that any effort whatever was made by the plaintiffs to comply with the provisions of the statute which authorizes the recordation of instruments of this character. It must be borne in mind that the record shows affirmatively that the instrument in question was entered upon the record in utter disregard of the requirements of the law of that state and without the slightest authority for the recordation of the same; and, there not being sufficient legal evidence to show that it is a copy of the original, the question as to whether such paper is a copy of the original will is therefore involved in doubt and uncertainty.

Under these circumstances we do not think that a copy of a will presented in this manner can be treated as an exemplification of a will. If the plaintiffs had offered legal proof of the execution of the will in the first instance, and also as to its contents, together with evidence of its loss or destruction, then the copy in question, after being identified as a copy of the original will, would have been competent as secondary evidence. But there is a total lack of proof as to the execution or existence of the original will. There seems to have been no effort on the part of the plaintiffs below to lay the foundation for the introduction of this paper as secondary evidence. It appears from the testimony of one of the witnesses that he made a search for the will, but could not find it. It is true that a Mr. Colcock testified that the copy which was offered in evidence was obtained by him from the attorney of the defendants in the case of *Robert v. Ellis*, 59 S. C. 137, 37 S. E. 250. But this evidence, standing alone, is not sufficient. It is elementary that, in order to lay the foundation for the introduction of secondary evidence, it must clearly appear that the lost paper actually existed. The general rule is laid down in 19 Am. & Eng. Ency. of Law, p. 575, as follows:

"In an action on an instrument which the plaintiff claims to have been lost or destroyed, he must, before he can introduce secondary evidence of its contents, prove its former existence as a genuine instrument, and that it has been lost or destroyed. \* \* \*

Also in the case of *Weatherhead's Lessee v. Baskerville et al.*, 11 How. 360, 13 L. Ed. 717, the court, in discussing the rule, among other things, said:

"The point still to be noticed is so much of the instruction given to the jury, informing them that they might presume from the evidence that there had been a legal partition of the testator's land in respect to his daughters by order of a court when the executor assigned them certain parts of it. By the law of Tennessee such a partition is a judicial act and becomes a record. It can only be proved as such records may be, and, when it is alleged to have been lost or destroyed, its contents can only be reached by proofs of a certain and fixed kind, well known in the law. In the proper sense of the term 'presumed,' the records of courts are never so. The existence of an ancient record of another kind may sometimes be established by presumptive evidence. But that is not done without very probable proof that it once existed, and until its loss is satisfactorily accounted for. The rule in respect to judicial records is that, before inferior evidence can be received of their contents, their existence and loss must be clearly accounted for. It must be shown that there was such a record, that it has been lost or destroyed, or is otherwise incapable of being produced, or that its mutilation from time or accident has made it illegible; in this last, though, not without the production of the original in the condition in which it may be. The inferior evidence to establish the existence of a judicial record must be something officially connected with it, such as the journals of the court, or some other entry, though short of the judgment or record, which shows that it has been judicially made. The burning of an office and of its records is no proof that a particular record had ever existed. It only lays the foundation for the inferior evidence. If that cannot be got, the result must be, and is, that there has been an allegation of the existence of a record, without proof. There is no way of bringing it to the knowledge of others. Nor can it be said to be known certainly by him who asserts it. In this case, without any such proof, the jury was told that they might infer, from the burning of the records of the county of Mero and the conduct of the parties interested in the testator's lands, that there had been a partition according to law. If the

instruction is put exclusively upon the want of proof to justify it, it could not be maintained. But it was contrary to the positive proof in the record. \* \* \*

The defendants in error rely upon the cases of *Counts v. Wilson*, 45 S. C. 571, 23 S. E. 942, and *Howard v. Quattlebaum*, 46 S. C. 95, 24 S. E. 93, in support of their contention. In those cases there was sufficient proof to clearly establish the existence of the will; but in this instance the testimony is not sufficient to answer the requirements of the rule. If the plaintiffs below in the case at bar had been able to furnish sufficient proof as to the existence of the will as was done in those cases, then undoubtedly the instrument in question would have been competent evidence for the purpose for which it was tendered. However, we are of opinion that, in the absence of such proof in this instance, the court below erred in admitting this instrument as competent evidence.

For the reasons hereinbefore stated, the judgments of the Circuit Court are reversed, and the cases are remanded, with instructions to proceed in accordance with the views herein expressed.

Reversed.

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GEISER MFG. CO. v. CASSELL.

(Circuit Court of Appeals, Eighth Circuit. May 11, 1909.)

No. 2,874.

SALES (§ 168\*)—CONSTRUCTION OF CONTRACT—SALE ON TRIAL.

Where a printed contract prepared by plaintiff for the sale by it to defendant of a steam thrasher contained a warranty that the machine would do as good work as any made, but also a number of technical requirements to be observed by defendant making him liable for the price of the machine, even though it did not comply with the warranty, unless they were strictly followed, such as that he must report its failure to work after five days' trial to plaintiff in Pennsylvania and give it time to remedy the defect or substitute a new machine and return the machine if it failed to work to the place where he received it and accept another on the same terms, a written clause, added on demand of defendant, that "this machine is sold on this condition that the settlement for the rig is not to be made before after machine has been tried and fulfills its guaranty, and all kinds of grain threshed that a separator is made for, and party is satisfied that the rig works all right," superseded such provisions and became the test by which his obligation to accept the machine was determined; and, where a fair trial by defendant and experts of plaintiff demonstrated that the machine would not do good work, defendant was not bound to accept or pay for it because he did not comply with all of the technical provisions of the printed part of the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 168.\*]

In Error to the Circuit Court of the United States for the District of Minnesota.

This action was brought by the plaintiff below, being also the plaintiff in error, to recover the purchase price of a threshing outfit consisting of an engine, separator, feeder, and some other minor parts. The price was \$2,150

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



and a second-hand machine, which the jury found to be worth \$800. The defendant signed an order for this machinery, upon a printed form prepared by the plaintiff. It contained a guaranty "that the machinery is as well built, and all things being equal, will do as good work as any other machine in the United States." It bound the defendant to receive the machine and try it. In case of its failure to work satisfactorily after a five days' trial, he agreed to notify the plaintiff at its home office, Waynesborough, Pa., "by prepaid telegram and registered letter," stating wherein it failed to conform to the warranty. A reasonable time was then to be given to the plaintiff to remedy the defect, and, if that should be impossible, to furnish a new machine. It was further provided: "The failure of any separate machine or attachment, or part thereof, shall not affect the liability of the purchaser for any other separate machine that is not defective." Keeping the machine longer than six days, without giving notice of defect, was to be a waiver of the warranty. There was another provision binding the purchaser, if the machinery could not be made to fulfill the warranty, "to return same to place where received, at which time another may be furnished on the same terms of warranty." The foregoing provisions were all embodied in a printed form. At the time the defendant negotiated for the machine, he refused to sign the order unless other provisions were added giving him an opportunity to test the machinery in a fair and practical manner before any liability for its price should accrue. As the result of this refusal, there was added to the blank in writing the following provision: "This machine is sold on this condition that the settlement for the rig is not to be made before after machine has been tried and fulfills its guaranty, and all kinds of grain threshed that a separator is made for, and party is satisfied that the rig works all right." The order embodying this written provision was sent to the plaintiff's general agent at Minneapolis, in whose custody machines were kept, and who was vested with authority to enter into contracts for the sale of the same. He accepted the order, and shipped the machine. It was faithfully tried by the defendant, with the aid of two experts, supplied by the plaintiff, for six days, and as the result of that trial, in the judgment both of the defendant and the experts, it was found not to do good work, and the defects disclosed were of such a character that they could not be remedied. The defendant refused to accept the machine, and so stated to the plaintiff's local agent, and was told by him that he could leave it standing by the roadside, and that he, the local agent, would come and get it. The defendant at the same time mailed to the plaintiff, at its home office, a letter, stating the trial that had been made to use the machine, and the defects that such trial had disclosed. It was further stated that plaintiff's experts were unable to make it do satisfactory work, and that the agent "told me that if I could not make it run, to leave it on the place, and he would come after it and pay the charges and expenses. \* \* \* I have had large experience in threshing, and I am thoroughly satisfied that this machine cannot be made to do good work, and hereby notify you to come and take it away according to the agreement, and I leave the machine at my place in the town of Hudson, subject to your order, as I received it at the station of Forada, and you have no agent there. Kindly let me hear from you at once." A similar notice was sent to the company at its general office in Minneapolis. Another copy was delivered to Mr. Haugen, the local agent, personally. The evidence showed that the general agent at Minneapolis received the notice, and thereafter sent experts to examine the machine. A motion was made at the conclusion of the evidence for a directed verdict in plaintiff's favor, which was overruled, and exception taken. Numerous exceptions were also taken to the charge of the court, and to its refusal to give certain requests. The jury returned a verdict in favor of the defendant.

Henry W. Benton, Joseph W. Molyneaux, and Frank J. Morley,  
for plaintiff in error.

C. J. Gunderson, for defendant in error.

Before HOOK, Circuit Judge, and RINER and AMIDON, District Judges.

AMIDON, District Judge (after stating the facts as above). Most of the contentions of the plaintiff rest upon a construction of the contract, which omits to give proper effect to the condition in writing which was added upon the demand of the defendant. By a well-settled rule, where there is any conflict between printed portions of a contract and those in writing, the written portions control. In our judgment the written stipulation in this case completely transformed the nature of the contract. The printed order was highly artificial—was prepared with studious care to protect every right of the plaintiff, and to impose upon the defendant an absolute liability for the entire purchase price of the machine, for a violation of any one of its many technical formalities. Such was its manifest design, even though the machine failed wholly to perform the work for which it was purchased. For this one-sided and technical scheme of the order, the written stipulation substituted a fair and practical arrangement. If, upon a just test, the outfit was found not to do good work, no liability was to arise for its purchase price. On the other hand, if it satisfied the warranty, the defendant became at once obligated to settle for it in accordance with the terms of the order. The evidence leaves no doubt that the defendant throughout the transaction acted with entire sincerity and justice. He gave the machine a fair and practical test under the supervision and with the aid of experts supplied by the plaintiff. His objections were not captious or technical. He did not refuse arbitrarily to be satisfied with a machine which did fair work. On the contrary, the outfit was found to be wholly inefficient to do the work for which it was sold. Upon these facts, by the terms of the written stipulation, there was to be no liability. The scheme of the printed order contemplated a test for six days. The plan of the written order fixed no such limitation, but provided that the threshing outfit should be tried upon "all kinds of grain that a separator is made for." We think this provision is inconsistent with the strict limitation of the printed order, and must control in the determination of the rights of the parties.

The three points made by the plaintiff which have most merit are the following:

1. The printed order contained the following language:

"Upon starting, if the purchaser is unable to make it operate well, notice wherein it fails to conform to the warranty is to be given by the purchaser to the Geiser Manufacturing Company, at Waynesborough, Pennsylvania, by prepaid telegram and registered letter. \* \* \* Failure to notify the Geiser Manufacturing Company, as provided, shall be a waiver of the warranty, and a full release of the Geiser Manufacturing Company, without in any way affecting the liability of the party ordering."

It is conceded that defendant did not notify the plaintiff "by prepaid telegram or registered letter." The notice was sent in the ordinary course of mail. For this departure from the exact terms of the printed order it is now contended that defendant became absolutely liable for the purchase price of the property. This in our judgment would defeat the very object which the defendant had in mind when he insisted upon the written stipulation. He, no doubt,

was familiar with the painful experience of farmers arising out of the technical provisions of printed orders for farm machinery. He insisted upon naming the one sole condition upon which he was to be liable for the purchase price of the threshing outfit. That condition was that the machinery should, as the result of a fair and practical test, fulfill the guaranty upon which it was sold. For the court to impose a liability for a violation of any of the numerous minor provisions of the printed order would be to defeat the very object which underlies this written stipulation. The defendant's duty to give notice of the failure of the machinery to do good work arises, not out of the technical provisions of the printed order, but out of the nature of the transaction into which the parties entered. He accepted the machinery on trial, and was bound to give the plaintiff reasonable notice of its failure, and offer to return it. We think he has fully discharged that duty.

2. The printed order required the defendant to return the machinery "to the place where received, free of charge," if upon trial it was found to be defective. It is conceded that the defendant did not do this. He explained his reason for not doing it in his written notice. Forada, the place where the machine was received, was a small station at which the plaintiff had no agent, nor were there any other persons engaged in the machinery business at that place, so that defendant could have made them bailees of the machine. If he had taken it to the town and left it, he would have been compelled to commit trespass upon private property. In our judgment this provision of the order was intended only for places at which the company had an agency, or, in the absence of such agency, it required the defendant to return the machine to the station for loading, when notified by the company to do so. Even the printed order does not specify any consequences to accrue from failure of the defendant to comply with this provision. Such failure therefore would simply render him liable for the reasonable value of the service. If the plaintiff had notified him to return the machine to the station for shipment, he would have been liable to damages for failure to perform that part of his contract. That, however, would have been the full extent of his liability.

3. The printed order also contained a provision that:

"Failure of any separate machine or attachment, or part thereof, shall not affect the liability of the purchaser for any other separate machine that is not defective."

That, however, is a part of the scheme of the printed order. The written stipulation deals with "the rig" as an entirety. If it failed to do good threshing work, the defendant was to incur no liability. The different parts of a threshing outfit are made to work together. The defendant had good reason for refusing to be compelled to take a fragment from the plaintiff, and then be driven to search for other parts from other manufacturers.

In our judgment the written stipulation takes this case outside of the rules declared in the cases cited by plaintiff, the more important of which are the following: *Larson v. Minneapolis Threshing Mach. Co.*, 92 Minn. 62, 99 N. W. 623; *Northern Electrical Mfg. Co. v.*

Benjamin Coal Co., 116 Wis. 130, 92 N. W. 553; Trapp v. New Birdsell Co., 109 Wis. 543, 85 N. W. 478; Avery Planer Co. v. Peck, 80 Minn. 519, 83 N. W. 455, 1083, Id., 86 Minn. 40, 89 N. W. 1123; J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826; Nichols & Shepard Co. v. Caldwell (Ky.) 80 S. W. 1099; Davis v. Gosser, 41 Kan. 414, 21 Pac. 240; Nichols & Shepard Co. v. Rhoadman, 112 Mo. App. 299, 87 S. W. 62; Heagney v. J. I. Case Threshing Mach. Co., 4 Neb. (Unoff.) 745, 96 N. W. 175; Nichols & Shepard v. Miller, 76 Neb. 809, 107 N. W. 1010; Nichols & Shepard v. Wiedemann, 72 Minn. 350, 75 N. W. 208, 76 N. W. 41; Nichols & Shepard Co. v. Chase, 103 Wis. 570, 79 N. W. 772. All of these cases turned upon the unqualified provisions of printed orders, similar to the one shown by the evidence here.

The case was fairly submitted to the jury, and a just judgment was rendered. It is therefore:

Affirmed.

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CUMBERLAND LUMBER CO. v. TUNIS LUMBER CO. et al.

(Circuit Court of Appeals, Fourth Circuit. June 12, 1909.)

No. 869.

COURTS (§ 355\*) — MANNER OF SALE BY FEDERAL COURTS — CONSTRUCTION OF STATUTE.

Act March 3, 1893, c. 225, 27 Stat. 751 (U. S. Comp. St. 1901, p. 710), prescribing the manner in which "all real estate or any interest in land sold under any order or decree of any United States court, shall be sold," etc., is mandatory and divests such courts of the discretion which theretofore existed of making sales otherwise than by public auction as therein prescribed, and a sale otherwise made is illegal and void and does not bind the purchaser even after confirmation, who cannot be required to pay for and accept a title which might be subsequently impeached for palpable legal defect in the proceeding itself under which the sale was made.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 935; Dec. Dig. § 855.\*]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

At the time of the proceeding and sale involved in this appeal, a creditors' bill in the name of Wilson, administratrix, and Tunis, administratrix, against the Tunis Lumber Company was pending on the equity docket in the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk. The Tunis Lumber Company was a corporation organized under the laws of Virginia, with its principal place of business in Norfolk, and it was engaged in the lumber business, and was the owner of sawmills, docks, lumber yards, and other property located in the states of Maryland, North Carolina, and Virginia. The court had appointed Theophilus Tunis and Alvah H. Martin, receivers, who were conducting and operating the business of the Tunis Lumber Company, under orders and decrees of the court. On the 16th of March, 1908, certain unsecured creditors of the Tunis Lumber Company intervened in the pending cause by petition, and sought to have a sale of 3,200 acres of James river timber land, 2,700 acres of which was owned in fee by the Tunis Lumber Company with the right to the company to remove the timber from the remaining 500 acres within a specified time, upon the payment of \$96 per year after January 1, 1909. Upon the filing of this petition a notice was is-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sued to the parties to the suit and the receivers to show cause why sale of this property should not be had. Thereupon, after a hearing, the court on the 14th of May, 1908, decreed a sale of the real property above described. The decree entered by the court directed the two receivers to advertise the property for sale in certain newspapers for 10 days, and to receive private sealed bids for the same, to be opened at a time to be designated in the advertisement, not less than 30 days from the beginning of the advertisement, and that no bids of less than \$40,000 would be accepted. The terms of the sale provided in the decree were, one-fourth of the purchase price in cash, to be paid within 10 days after the sale, and the balance of the purchase money in two equal installments, payable in one and two years, with interest from date, to be secured by deed of trust on the property, with the option to the purchaser to pay the entire purchase price in cash, if desired. The receivers set about to effect a sale as thus provided. They made the advertisement required by the decree, stating therein that such bids might be submitted to the receivers, and that they would be opened at 12 o'clock m. on the 30th of June, 1908, at room 1215 Bank of Commerce building in the city of Norfolk, Va., and they also reserved the right to reject any and all bids. Four sealed bids were made to the receivers for the property, as follows: Wm. M. Tilley & Co., \$44,005; Jos. T. Deal, \$45,000; Howard T. Williams, \$61,125; Cumberland Lumber Company, \$63,300. All of these bids were filed by the receivers with a report which they made to the court.

On the 11th of July, 1908, the court, by a decree duly entered, accepted the bid of the Cumberland Lumber Company for the property at the price of \$63,300, the same being the amount offered by the said company in their sealed bid, and the court further decreed that the said bidder comply with the terms of the sale, and that upon such compliance Theophilus Tunis and Alvah H. Martin, special commissioners, appointed for that purpose, were given authority and directed to convey to the purchaser the property sold. So far as the record shows, the one-fourth of the purchase money was not paid by the Cumberland Lumber Company to the receivers, nor were the terms of the sale complied with in any other respect. After the decree of the 11th of July, 1908, accepting the bid of the Cumberland Lumber Company, as above stated, no further proceedings were taken in the matter until the 15th of August, 1908, when the said company filed in the court a petition duly signed and verified, as follows:

"Your petitioner, the Cumberland Lumber Company, respectfully represents to the court: That it was a bidder for certain lands and timber ordered to be sold in the above-entitled cause by a decree entered on May 14, 1908, and that the said bid was accepted by this honorable court, and a decree was entered on the 11th day of July, 1908, confirming said sale to your petitioner; that since the confirmation of said sale your petitioner has discovered that said sale was not had in accordance with Act Cong. March 3, 1893, c. 225, 27 Stat. 751, which provides and directs how sales of real estate shall be had under orders and decrees of any United States court as will be seen by reference to the decrees entered and the advertisements, all on file as a part of the record in the above-entitled cause; and that no notice of these proceedings was given to the Tunis Lumber Company. Your petitioner was not aware of these facts at the time of the confirmation of said sale, and has not paid any part of the purchase price for said lands and timber because of these facts. Your petitioner therefore prays that the motion to confirm said sale shall be reheard, and that the said decree be annulled and set aside, and that your petitioner be released from said bid."

The receivers filed the following answer to this petition:

"These respondents, saving to themselves the benefit of all just exceptions, answer the said petition as follows: By way of preface, these respondents will state that the move to sell the James river timber did not originate with them, as the court is well aware. Certain general creditors had been urging, for some time, that they should be paid. On March 16, 1908, J. P. A. Mottu, Esq., and others, appeared by counsel and filed a petition urging that their debts be paid by selling this property. The receivers made a report thereon, the matter was discussed in open court by counsel of both sides, and on May 14, 1908, an order, prepared by counsel for said petitioners, was signed direct-

ing the calling for sealed bids, after certain advertisements, and the sale of the property pursuant thereto. These respondents at once proceeded to obey the directions of said order by advertising the property for sale in the manner required by said order. They took sealed bids, and the best of said bids was that of the Cumberland Lumber Company, offering \$63,300. There was another bid very near the same amount, to wit, the bid of Howard T. Williams for \$61,125. The court directed the acceptance of the bid of the Cumberland Lumber Company, and the decree confirming the same was prepared and submitted to their counsel before signature, and no point was raised, in any way, shape, or form, as to its legality. Thereupon the decree of confirmation was entered, on July 11, 1908, requiring the said Cumberland Lumber Company to carry out the terms of its bid.

"On the 6th day of August, 1908, the Cumberland Lumber Company filed its petition claiming that this sale is illegal. These respondents took the ground that the most that could be claimed was that the sale was irregular, that the defect was not at all a jurisdictional one, and that there was nobody who could legally question the form of the sale, even if the law mentioned applied to such sales. They offered, by their counsel, to consent to the resale under the statute, in order to save all possible question, provided the Cumberland Lumber Company was willing to stand by its bid, and to guarantee to bid at least that much on the second sale. They suggested a resale at the expense and risk of the Cumberland Lumber Company, and following out the terms of the statute, which would have placed that company in the position of getting the benefit of any surplus over its first bid, and they have offered everything in their power to perfect the title of the Cumberland Lumber Company, if it needs any further perfecting. The said company, however, would agree to nothing along this line, and now files its petition, nearly a month after the confirmation of the sale with their full knowledge, setting up not newly discovered matters of fact, but newly discovered matters of law. These respondents submit that it would not be equitable to allow a resale, under these circumstances, with no guaranty on the part of the Cumberland Lumber Company that they would insure the property's bringing as much as before, especially in view of the fact that there was another bid so near their bid, of which these respondents, by this proceeding, lose the entire benefit. These respondents make as exhibits herewith, and as parts hereof, the said original petition of the unsecured creditors filed March 16, 1908, the order entered thereon filed March 16, 1908, the decree directing the sale thereunder filed May 14, 1908, the report of the receivers as to the bids filed July 11, 1908, and the decree of confirmation of said sale filed July 11, 1908."

Thereupon the court on the 6th of October, 1908, entered the following decree:

"This cause came on this day to be heard upon the petition of the Cumberland Lumber Company to set aside the confirmation of the sale to it on the ground that the same was not conducted as provided by the act of March 3, 1893, relating to sales of land in federal courts, and upon the answer of the receivers thereto, and was argued by counsel. And it appearing to the court that the bid of the said Cumberland Lumber Company was duly reported to the court by the receivers as the highest and best bid, that before the confirmation thereof the said Cumberland Lumber Company was notified, and that the said confirmation was with its full knowledge, and that it raised no objection to the said confirmation on the ground set out in its petition; and it further appearing to the court that the Tunis Lumber Company has consented to the said sale, and that the special commissioners named by a decree heretofore entered in this cause have tendered and will deliver at any time to the said Cumberland Lumber Company a good and sufficient deed for the property in said proceedings mentioned, joined in, and executed by said Tunis Lumber Company; and the court without intending to express an opinion as to the true intent and meaning of the act of the 3d of March, 1893, being of the opinion that there is no equity in the contention of the petitioner, and that the confirmation of the sale is binding upon it and cannot be set aside under the circumstances: It is adjudged, ordered, and decreed that the prayer of the petitioner be, and the same is hereby, denied. And it further appearing to the court that the said petitioner has not complied with the terms of

the said sale as required by the order of confirmation and the practice in that behalf: It is ordered that the said petitioner do show cause in this court, at Norfolk, Va., on the 2d day of November, A. D. 1908, at 10 a. m., why the said property should not be resold at its risk and expense, and it be held liable for any deficiency in such resale, and that a copy of this decree be served on the said Cumberland Lumber Company, or Williams & Tunstall, its counsel, at least 10 days before said sale. And on motion of said Cumberland Lumber Company by counsel in open court (the receiver's counsel being present and waiving a citation), an appeal is hereby granted the said Cumberland Lumber Company from this decree and from the decree of July 11, 1908, confirming said sale, to the next term of the United States Circuit Court of Appeals for this circuit on its giving an appeal bond in the penalty of \$5,000 to be approved by one of the judges of said court."

The appeal of the Cumberland Lumber Company was perfected as required by the order of the court.

W. L. Williams (Williams & Tunstall, on the brief), for appellant.  
Robert M. Hughes and Edward R. Baird, Jr., for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge (after stating the facts as above). This case is before us to be considered upon the following assignments of error:

First. The court erred in entering the decree of July 11, 1908, confirming the sale of certain lands, because it appears upon the face of the proceedings that the act of Congress of March 3, 1893, regulating and governing the sales of lands under the decrees of the United States courts, had not been complied with, and because the said Tunis Lumber Company had had no notice of said confirmation.

Second. The court erred in entering the decree of October 6, 1908, refusing to set aside the said decree of July 11, 1908, motion to set aside having been made during the term at which the decree of July 11, 1908, had been entered, and for the reason that it appeared on the face of the proceedings that the sale of the said land had not been made in compliance with the said act of Congress, and that no notice of the confirmation had been given to the Tunis Lumber Company.

The act of Congress involved here is Act March 3, 1893, c. 225, 27 Stat. 751 (U. S. Comp. St. 1901, p. 710), approved March 3, 1893, entitled "An act to regulate the manner in which property shall be sold under orders and decrees of any United States courts." We give the act in full. It reads:

"First. That all real estate or any interests in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct.

"Second. That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner.

"Third. That hereafter no sale of real estate under any order, judgment, or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale, in at least one newspaper printed, regularly issued and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said prop-

erty shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of the sale herein provided for to be made in such papers as may seem proper."

The question presented to us in this case rests upon the construction to be given to the act of Congress above set out as to whether the provisions of the said act in regard to the sales of real property are mandatory or merely directory, with the further question, arising upon the proceedings had in the case, whether appellant, by its action in relation to the bidding, together with the decree of acceptance of the bid, and confirmation of the sale, can now be heard to complain of the alleged defect in the form of the sale as directed by the decree.

The act of Congress is explicit in its terms. It makes no exception, but provides one method, and only one, by which lands are to be sold under the orders and decrees of the courts of the United States. If, as contended, the act should be construed as merely directory, the inquiry arises, why the necessity of the legislation at all? The power already existed in the courts of equity to order or decree sales of realty by public auction, at such place and on such terms as said courts might direct, also the power to make sales by such other method as the courts in their judgment and discretion might adopt. In the face of these existing powers, and of the fact that the courts of equity had for time almost out of mind used and favored the practice of selling realty by the method of sealed bids, the Congress placed upon the statute books the act of 1893. It will be observed, also, that the title of the act states its purpose to be to regulate the manner in which property shall be sold under orders and decrees of the United States courts.

The intention of Congress to limit the powers of the courts of the United States in respect to the sales of realty is emphasized by the fact that in the second section of the act it is provided that personal property shall be sold as provided in the first section, unless, in the opinion of the court rendering the order or decree for sale, it would be best to sell it in some other manner. Thus it will be seen that it is still left by the plain terms of the act to the discretion of the court to sell personal property otherwise than at public sale; but there is no such provision in the first section, which directs the method by which real property shall be sold. The conclusion therefore seems to us to be irresistible that the intention of Congress was to confine sales of realty, when made by the orders or decrees of the federal courts, to one method, by public sale, as provided in the statute, and to divest the courts of the discretion which theretofore existed of making sales of such property otherwise. It is insisted, however that appellant became the bidder for the land in this case according to the plan of sale adopted by the court, that the bid was accepted and the sale confirmed by the decree of the court without objection, and thereby the bidder was concluded, or, at least, that the bid was made in full light of the proceeding, that it was accepted and confirmed by the court, in which the bidder acquiesced, and that the appellant cannot now take advan-



tage of the irregularity in the manner of the sale. If our construction of the statute is a true one, the decree for sale was not only irregular; but it was directly contrary to the plain mandate of the law, and the acceptance of the bid and the decree of confirmation did not establish a contractual relation between the court and the bidder, such as to bind the latter. In a judicial sale, the court, acting through its duly constituted agency, becomes a vendor, and whilst the court may not be considered a guarantor of title, yet in no case should the court selling real property permit the title of the purchaser to be beclouded by reason of irregularity, defect, or illegality, in the proceeding under which the sale is made. Undoubtedly, if a judicial sale of land is made under conditions which are in accord with legal requirements, and due proceeding, the doctrine "caveat emptor" applies, and the purchaser is concluded; but it would be inequitable to compel a bidder at a judicial sale to pay for and accept a title which might be subsequently impeached for palpable legal defect in the proceeding under which the sale was made. A bidder at a judicial sale has the right to assume that the court which directed the sale acted within its authority, and that the sale is being made under the conditions authorized by the law. Such bidder, who might otherwise purchase a good title, should not have the title jeopardized by reason of the act of the court itself.

The counsel for appellee cites, in support of the position that the decree of the Circuit Court should be affirmed, two cases from the Supreme Court of the United States. The first is *Stockmeyer v. Tobin*, 139 U. S. 176, 11 Sup. Ct. 504, 35 L. Ed. 123. We do not see any particular bearing that this case has upon the one under consideration, as the opinion is only to the effect that in Louisiana mere informalities in a judicial sale do not constitute sufficient ground for setting it aside. The other is the case of *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732. In that case, Mr. Justice Brewer, delivering the opinion of the court says:

"It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and conditions of such a sale, as well as to ordering and refusing a resale. The chancellor will always make such provision for notice and other conditions as will in his judgment best protect the rights of all interested, and make the sale most profitable to all; and, after a sale has once been made, he will certainly, before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted."

The court goes on further to say that the purpose of the law is that the sale shall be final, and that no sale should be set aside for trifling reasons on account of matters which ought to have been attended to by the complaining party prior thereto, etc. This was a case in which complainant was undertaking to defeat the confirmation of a sale where the property had been struck off to another, and the effort was being made to reopen the bidding. The court was of the opinion that the complainant had had ample opportunity, and that the sale should be confirmed. We do not see that there was any question of irregularity or defect in the manner of the sale in that case, and therefore we fail to perceive its application here. It will be observed also that

both of these cases were decided anterior to the act of March 3, 1893, and, of course, the construction of that act was not involved.

Another case cited by the appellee is that of *Godchaux et al. v. Morris et al.*, 121 Fed. 482, 57 C. C. A. 434, decided by the Circuit Court of Appeals for the Fifth Circuit in February, 1903. The act of March 3, 1893, is discussed in that case, and it is held that the failure of the commissioner to offer separately a small parcel of the land of small value, as directed by the terms of the decree, was a mere irregularity which would not defeat the confirmation, unless loss or injury resulted, and it was further held that, where a federal court had jurisdiction to order a sale of real estate, the fact that its decree directed that the sale be made at a place other than the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as required by the act of March 3, 1893, did not render the sale void, nor constitute ground for refusing confirmation, since the decree, although erroneous, is binding, unless reversed on appeal. We understand even in that case that, although the sale was public, the direction to sell otherwise than provided in the statute was error which would have been corrected on appeal; but we do not regard that case as decisive of the point we are considering, for, from our view, it is clear that the prime object Congress had in mind was to require real property sold under the orders and decrees of the United States courts to be disposed of at public sale.

As a general thing (though there are, of course, some exceptions), the decisions of the courts of this country, relative to judicial sales of land, have been in cases where a defeated competitive bidder has undertaken to assert some right, or where the defendant in the action in which the land was decreed to be sold undertook subsequently to establish ownership by reason of alleged irregularity or defect in the proceeding. And it is in these cases, more particularly in the latter class, that the courts of equity have held that the previous action of the party should have a material bearing upon the question of relief sought. If it appear that a bidder was present at the sale, was fully informed of the terms and conditions, as well as the character, quality, and quantity of the property offered, and he stood by and permitted another to become the purchaser, the courts of equity have not been inclined to favor opposition on his part to a confirmation of the sale, and if the land is decreed to be sold by a court of competent jurisdiction, and the owner of the land, who was a party to the suit, is fully informed as to the proceeding, and acquiesces therein, permits his land to be sold, the sale confirmed, title passed to the purchaser, he will not thereafter be heard to assert title to the land because of alleged defect or irregularity in the proceedings under which the sale was made. The latter proposition is founded on the principle of equitable estoppel. This principle is well discussed in the case of *Kirk v. Hamilton*, 102 U. S. 68; 26 L. Ed. 79, and the doctrine there declared is in entire harmony with the elementary treaties on the subject and with American decisions generally.

The discussion of this doctrine in connection with the case here may seem to be something of a digression, and we really think it is; but we

are led to it by reason of the fact that the appellee argues that the action of the appellant, under the circumstances, was such as to take away the right to complain; but we do not think that the appellant comes within the rule laid down in any of the cases referred to, nor have we been able to find any case which holds that a proposed purchaser is bound under conditions, such as existed in this case. The appellant was not a party to the suit. It had no interest in the suit, and, so far as appears, no knowledge of it, anterior to the time the receivers advertised the land for sale, and the appellant is not undertaking to prevent a confirmation of the sale to another, on account of some irregularity or defect in the proceeding; but the effort is to be relieved from a bid made at a judicial sale, because of the fact, as alleged, that, after the bid was made, it was discovered that the decree directed the sale to be made in a manner not authorized by law.

It is well settled, as a general principle, that a bidder at a judicial sale, whose bid is reported to the court and accepted and the sale confirmed, becomes a party to the suit in which the sale is decreed, to the extent that the court may compel compliance; but we do not think that this principle applies in this case.

According to our construction of the act of Congress, the decree for sale in this case was void. It conferred no authority upon the receivers to make the sale of the land in question. Their action therefore was a nullity and constituted no basis for enforceable obligation on the part of the bidder. Therefore, following the views we have expressed, we think that the decree for sale was unauthorized and void, and that the subsequent proceedings, both by the receivers, in attempting to make the sale, and the decree of the court confirming it, were of no legal force.

In the discussion so far, we have not referred to the third section of the act of March, 1893, prescribing the manner in which judicial sales of real property shall be advertised. That section provides expressly that no sale of real estate under any order, judgment, or decree of any United States court shall be had without the advertisement therein provided, which is the publication of notices of the proposed sale in a newspaper once a week for at least four weeks prior to the sale, etc. So taking the entire act together, beginning with the title, which sets out that the purpose of the act is to regulate the manner in which property shall be sold under the orders and decrees of the United States courts, then the first section, which declares specifically that all real estate or interests in land sold under orders or decrees of United States courts shall be sold at public sale, with the provision in the second section leaving it to the discretion of the court to sell personal property otherwise, followed as above stated by the provision for advertisement, it is clear to our minds that it was the intention of Congress to establish a single and uniform method of selling realty under the orders and decrees of the federal courts and to confine the courts to it.

The prayer of the appellant's petition should have been granted, and the decree of confirmation of the sale set aside.

The judgment of the Circuit Court is therefore reversed.

Reversed.

## SOUTHERN PAC. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1909.)

No. 1,672.

## 1. STATUTES (§ 46\*)—ENACTMENT—FORM.

A law must be complete in all its terms when it leaves the Legislature.  
[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 46.\*]

## 2. CONSTITUTIONAL LAW (§ 66\*)—GOVERNMENTAL POWERS—DELEGATION.

While the Legislature may not delegate the power to legislate, it may delegate the power to determine some fact on which the operation of an act is made to depend.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 66.\*]

## 3. CONSTITUTIONAL LAW (§ 64\*)—LEGISLATIVE POWER—DELEGATION.

The provision of the 28-hour law (Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) authorizing the shipper of cattle or the person accompanying them to extend the time of their confinement to 36 hours, was not such a delegation of legislative power as would render the law unconstitutional.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 64.\*]

## 4. CARRIERS (§ 211\*)—INTERSTATE COMMERCE—TRANSPORTATION OF LIVE STOCK—28-HOUR LAW.

The 28-hour law (Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) provides for the unloading of cattle, etc., for food, water, and rest at the expiration of 28 consecutive hours' transportation, except that the time may be extended to 36 hours by the written request of the shipper, except that it shall not be required that sheep be unloaded in the nighttime; but where the time expires in the night, in the case of sheep, the same may be continued in transit to a suitable place for unloading, subject to the 36-hour limitation. *Held*, that such provision was not fatally defective for uncertainty; the meaning being that in case of sheep, if the 28-hour limit expires at night, the transit may be continued to a suitable place for unloading, without the consent of the owner or custodian, except that in no case shall the 36-hour limit be exceeded.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.\*]

## 5. CARRIERS (§ 37\*)—TRANSPORTATION OF LIVE STOCK—28-HOUR LAW—NUMBER OF OFFENSES.

The 28-hour law (Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) prohibits interstate carriers from transporting animals for more than 28 hours without unloading for food, water, and rest, except that on the written request of the owner or person in custody of the "particular shipment" the time of confinement may be extended to 36 hours, and section 3 declares that any carrier knowingly or willfully failing to comply with the provisions of the act shall, for such violation, be liable, etc. *Held*, that the individual shipment, and not the car load, is the unit in case of violation of the act.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.\*]

In Error to the District Court of the United States for the Northern District of California.

For opinion below, see 162 Fed. 412.

The defendant in error filed its complaint against the plaintiff in error, a common carrier and lessee of railroads and lines of roads, alleging that on August 30, 1906, at Reno, Nev., the plaintiff in error received a consignment of sheep, consigned by T. Fallon to the Western Meat Company, of South San Francisco, Cal.; that after loading the sheep at Reno, and

while transporting the same to South San Francisco, and until unloading was commenced at that place, the plaintiff in error did knowingly and willfully confine said sheep in said cars for more than 36 consecutive hours as per request attached, namely, for 38 hours and 45 minutes, without unloading them for rest, water, and feed; that the plaintiff in error was not prevented by storm, or unavoidable cause or accident which could not have been anticipated or avoided by the exercise of due diligence and foresight, from unloading said sheep for rest, water, and feeding during their said conveyance; and that the cars were not such in which the sheep could have sufficient feed, water, space, and opportunity to rest. The plaintiff in error filed a plea in abatement alleging that at the time of the commencement of the action there had been commenced, and were pending in the same court, between the same parties, three other actions for the same cause of action alleged in the complaint in this cause, and that this action constitutes the splitting of a single cause of action. A demurrer to the plea was sustained, and the plaintiff in error answered, alleging that it was not guilty of any violation of said act, and did not knowingly or willfully confine said sheep for a longer period than 36 hours; that there was a written request for an extension to 36 hours, but that the time expired in the nighttime; and that the sheep were continued in transit to a suitable place for unloading, and were delivered before the expiration of said 36 hours to the owner and consignee. The answer alleged, also, the commencement and pendency of the three other actions referred to in the plea in abatement. On the trial it was shown that the plaintiff in error completed the loading of the four separate consignments of sheep referred to in the plea in abatement into its railroad cars at Reno, Nev., on August 30, 1906, at 10:45 a. m., and that the cars containing the same were made up into one train, and as one train the same were conveyed over its road, and that the unloading commenced at South San Francisco on September 1, 1906, at 1:30 a. m., 38 hours and 45 minutes after the loading was completed. The plaintiff in error introduced evidence tending to show that, when the train and cars containing the sheep were started, it was honestly believed and reasonably anticipated that the sheep would not be confined in the cars for a period longer than that permitted by law.

C. W. Durbrow and Knight & Heggerty, for plaintiff in error.

Robt. T. Devlin, U. S. Atty., and Alfred P. Black, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The plaintiff in error contends that Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), under which the judgment was rendered in this case, is unconstitutional, for the reason that it delegates legislative power to the owner or custodian of stock shipped or in transit, whereby, although the act itself makes it unlawful and inflicts a penalty for confining animals in the cars for a longer time than 28 hours, the power is delegated to the owner or person in custody of the shipment to extend the time by a written request that they be confined 36 hours, leaving it to the will or caprice of the owner or person in custody of animals to say whether the carrier thereof shall or shall not comply with the provisions of the act. A law must be complete in all its terms when it leaves the Legislature. But, while a Legislature may not delegate the power to legislate, it may delegate the power to determine some fact on which the operation of its own act is made to depend. Although the act in question herein incidentally protects the owners of live stock, its primary and important purpose is to prevent cruelty to animals in transportation. It needs no argument to show how great is the evil which it is intended to remedy. We find

no ground for saying that the law as framed by Congress is not complete in itself. No part of it is made by the shipper, nor is he given the option to say that the carrier shall not comply with its provisions. The statute fixes the period of 28 hours as the limit of the time of continuous carriage of live stock without rest, food, and water; but it makes the proviso that the shipper, who is or represents the party in interest, may, if the circumstances seem to him to justify it, extend the time to a period of 36 hours. In so providing the law does not give him authority to make that unlawful which otherwise would be lawful.

The delegation of power in this instance is not unlike that which is made by local option laws, in which the Legislature provides that one may not sell liquor in a given place unless the majority of those interested shall by vote grant him the power. Such a law was the act of the Legislature of Illinois, imposing a fine on one who sells goods within a mile of a camp meeting without the consent of the parties in charge, which was held constitutional in *Meyers v. Baker*, 120 Ill. 567, 12 N. E. 79, 60 Am. Rep. 580. In *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253, it was held that, although Congress may not delegate power strictly and exclusively legislative, yet "Congress may certainly delegate to others powers which the Legislature may rightly exercise itself." In *Union Bridge Company v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, the question arose whether power to legislate was delegated to the Secretary of War by an act which gave him the right to determine whether or not a bridge constructed across a navigable stream of the United States is an unreasonable obstruction to navigation. The court, after reviewing the authorities, held that in no substantial, just sense did the act confer upon the Secretary of War power strictly legislative. Said the court:

"By the statute in question Congress declared in effect that navigation should be free from unreasonable obstruction arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty, the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

It is contended that the act is void for uncertainty. It is said that no one can be reasonably sure what the meaning is of the proviso "that it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime, in case of sheep, the same may be continued in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours"; and our attention is directed to the fact that there is no limitation of 36 hours, unless the owner or custodian makes the written request provided for in the act. We find no substantial ground for holding that the act is uncertain. The meaning of the proviso is that if the 28-hour limit expires in the night, in the case of sheep, transit may be continued to a suitable place for unloading, without the request of the owner or custodian, but that in no case shall the limit of 36 hours be exceeded. The court below

charged the jury in substance that if it was obvious to the carrier that the 36-hour limit would expire in the nighttime, so that unloading could not then be accomplished, it was the carrier's duty to unload the sheep before dark. This, we think, is the plain meaning of the act. *United States v. Atchison, T. & S. F. Ry. Co.* (D. C.) 166 Fed. 160, 163.

It is urged that the plea in abatement should have been sustained, and that the motion of the plaintiff in error for a directed verdict should have been granted, because it was shown that at Reno the plaintiff in error had received four separate consignments of sheep, consigned to one consignee at South San Francisco, and had conveyed all of said sheep upon the same train, and that therefore there could have been but one violation of the statute. The statute forbids a carrier of live stock to confine the same in cars for a longer time than the prescribed period without unloading the same. Section 3 provides that any carrier who knowingly and willfully fails to comply with the provisions of the act shall for such violation be liable, etc. The question is whether the unit in the case of violation of the act is the car load of live stock, or each individual shipment thereof. We are of the opinion that it is the latter. We find controlling reason for so holding in the proviso of section 1:

"That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading or other railroad form, the time of confinement may be extended to thirty-six hours."

Said the Circuit Court of Appeals for the Eighth Circuit in *United States v. Baltimore & O. S. W. R. Co.*, 159 Fed. 33:

"It is the owner of the shipment, or his representative having custody of the shipment, who is to be referred to as authority for prolonging the transportation without unloading; and it is manifestly implied that there is a bill of lading or other contract which governs the transportation of that shipment. No other person than the one concerned with that shipment is given the power to prolong the transportation without unloading. And one shipper could not exercise his right if he was one of several; or, if he could, it would disable other shippers from exercising the right to have their stock unloaded for rest and feeding and then go on."

The same conclusion was reached in *United States v. Oregon R. & N. Co.* (C. C.) 163 Fed. 642, *New York Cent. & H. R. R. Co. v. United States* (C. C. A.) 165 Fed. 833-843, *United States v. Atchison, T. & S. F. Ry. Co.* (D. C.) 166 Fed. 160-164, and *United States v. New York, C. & St. L. R. Co.* (C. C. A.) 168 Fed. 699. We find no error.

The judgment is affirmed.

## SOUTHERN PAC. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1909.)

No. 1,671.

## CARRIERS (§ 23\*)—TRANSPORTATION OF LIVE STOCK—28-HOUR LAW—VIOLATION—VENUE.

Since an action against an interstate carrier for violation of the 28-hour law (Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) is a civil action to recover a penalty, section 4, authorizing such action to be brought in the Circuit or District Court of the United States within the district where the violation may have been committed or the person or corporation resides or carries on business, is not unconstitutional, as a violation of the sixth amendment of the federal Constitution, declaring that in criminal prosecutions the accused shall be entitled to a trial in the district where the crime has been committed.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 23.\*]

In Error to the District Court of the United States for the Northern District of California.

For opinion below, see 162 Fed. 412.

C. W. Durbrow and Knight & Heggerty, for plaintiff in error.

Robert T. Devlin, U. S. Atty., and Alfred P. Black, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This action was brought by the defendant in error to recover from the plaintiff in error a penalty for violation of Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918). In the complaint it was alleged that the plaintiff in error, a common carrier and a lessee of interstate railroads, received a consignment of 1,355 sheep on December 4, 1906, at Corinne, Utah, consigned to South San Francisco, Cal., and that in carrying the sheep to their place of destination the plaintiff in error did knowingly and willfully confine them in its cars, en route between Wells, Nev., and Reno, Nev., a period of 51 hours and 30 minutes consecutively, without unloading them for rest, water, and feeding. The case presents, in addition to the questions which were discussed in case No. 1,672 (171 Fed. 361), just decided by this court, the question of the jurisdiction of the court below to entertain an action to recover a penalty for a violation of the statute which occurred in the state of Nevada.

Section 4 of the act permits prosecution of an action in the Circuit Court or District Court held within the district "where the violation may have been committed or the person or corporation resides or carries on its business." It is not denied that the corporation owns the line of railroad over which the shipment was hauled, nor that its principal offices are in the city and county of San Francisco; but it is urged that to permit the prosecution in any other district than that within which the violation of the act occurred is contrary to the sixth amendment to the Constitution. If this were a criminal action, the point would be well taken. But this and other

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



courts have decided that such an action is not a criminal action. *Montana Cent. Ry. Co. v. United States* (C. C. A.) 164 Fed. 400; *United States v. Baltimore & O. S. W. R. Co.*, 159 Fed. 33, 86 C. C. A. 223; *United States v. Sioux City Stock Yards Co.* (C. C.) 162 Fed. 556; *New York Cent. & H. R. R. Co. v. United States* (C. C. A.) 165 Fed. 833; *United States v. New York, C. & St. L. R. Co.* (C. C. A.) 168 Fed. 699.

The judgment is affirmed.

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KERRCH et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. January 22 1909)

No. 772.

**APPEAL AND ERROR (§ 659\*)—RECORD—AMENDMENT.**

A plaintiff in error is not entitled to a writ of certiorari with reference to perfecting a bill of exceptions which occurred through his own fault or neglect, where application for the writ was not made until the trial court had lost jurisdiction to amend the bill under rule 17 of the Circuit Court. *N. Y. & N. E. R. R. Co. v. Hyde*, 56 Fed. 188, 5 C. C. A. 461, applied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2834; Dec. Dig. § 659.\*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

On suggestion of diminution of the record and writ of certiorari.

See, also, 171 Fed. 366.

Harvey H. Pratt (James E. Cotter, Charles F. Smith, and John J. Coady, on the brief), for plaintiffs in error.

Guy A. Ham, Sp. Asst. U. S. Atty., and Asa P. French, U. S. Atty.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

**PER CURIAM.** This comes up on a return to a writ of certiorari to the Circuit Court, based on a suggestion of diminution of the record made by the plaintiffs in error, but in substance amounting to an application for the amendment of the bill of exceptions. The return shows that a tentative bill of exceptions was filed in the Circuit Court, which contained the exception to the admission of evidence to which the present proceeding relates. Subsequently a new draft was prepared and filed, from which the matter to which this application relates was omitted. Later, at a term to which the bill of exceptions had been adjourned, in accordance with rule 17 of the Circuit Court, it was allowed. This was at the October term, 1907. In October, 1908, after the expiration of the October term, 1907, of the Circuit Court, and after the expiration of its February term, 1908, application for a writ of certiorari was made in this court, and allowed, without any question involved being prejudiced by the allowance so far as we are concerned. On the filing of the return by the Circuit Judge to a writ of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

certiorari, it appeared that the omission complained of came through the plaintiffs in error, and was in no part through any laches or fault of the Circuit Court, or of any judge thereof. It also appeared that the application to this court for the writ of certiorari was not within any period of time to which an extension had been granted, either expressly or impliedly, in accordance with rule 17 of the Circuit Court.

Under the circumstances, the question is settled against the plaintiffs in error by rule 17 of the Circuit Court and by the decision of this court in *New York & New England Railroad Company v. Hyde*, 56 Fed. 188, 5 C. C. A. 461, decided June 14, 1893, and by *Hume v. Bowie*, 148 U. S. 245, 253, 13 Sup. Ct. 582, 37 L. Ed. 438.

The suggestion of diminution of the record, made by the plaintiffs in error, filed October 22, 1908, is dismissed as of no effect.

### KERRCH et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. June 3, 1909.)

No. 772.

#### 1. CRIMINAL LAW (§ 1080\*)—PROCEEDINGS FOR TRANSFER OF CAUSE—CITATION.

The citation issued on a writ of error should give the proper names of all of the persons applying for the writ.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1080.\*]

#### 2. CRIMINAL LAW (§ 1023\*)—REVIEW BY APPELLATE COURT—MOTION TO QUASH INDICTMENT.

The rule applied that error will not lie to the overruling of a motion to quash an indictment on account of anything which may be raised by demurrer.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1023.\*]

#### 3. INDICTMENT AND INFORMATION (§ 90\*)—SUFFICIENCY OF ACCUSATION—CERTAINTY.

In an indictment against a bankrupt and others for conspiracy to conceal assets from his trustee in bankruptcy, an averment that a person named was "duly" appointed trustee is sufficient; the matter of appointment being an incidental matter only, and not a vital element of the crime.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 90.\*]

#### 4. CRIMINAL LAW (§ 395\*)—EVIDENCE—MATTER OF PROCURING DOCUMENTS.

On the trial of an involuntary bankrupt for conspiracy to conceal property from his trustee, it was not error to admit in evidence, over defendant's objection and claim of privilege, his books of account which had been taken possession of by a receiver appointed by the bankruptcy court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 877; Dec. Dig. § 395.\*]

#### 5. CRIMINAL LAW (§ 385\*)—EVIDENCE—COURSE OF BUSINESS.

Testimony from witnesses in reference to "course of business" is admissible in criminal cases as well as in civil suits.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 385.\*]

#### 6. CRIMINAL LAW (§ 459\*)—EVIDENCE—EXPERT TESTIMONY.

Evidence by a merchant, accustomed to the class of goods in question, to the effect that a certain invoice corresponded to the goods, is not tech-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nically expert testimony, but is admissible under the general rules admitting evidence of identification.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1048-1050; Dec. Dig. § 459.\*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

See, also, 171 Fed. 365.

James E. Cotter (Harvey H. Pratt and Charles F. Smith, on the brief), for plaintiffs in error.

Guy A. Ham, Sp. Asst. U. S. Atty., and Asa P. French, U. S. Atty.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. Several persons, including Jacob Kerrch, the bankrupt, were indicted in the Circuit Court for conspiring to conceal from his trustee in bankruptcy sundry of his assets. The citation is defective in naming only Kerrch; whoever else joined in applying for the writ of error being covered by the expression "et al., defendants." This is irregular, as the citation is the most important paper with reference to taking out a writ of error or appeal. Referring, however, to the petition for the writ of error, it gives the names of all the persons who were sentenced.

The plaintiffs in error urge 25 errors, but we consider only such as were orally reassigned at bar.

There was no demurrer, but a motion to quash; and error was alleged in refusing the motion. It has been thoroughly stated and restated that error cannot lie to a refusal of a motion to quash an indictment on account of anything which may be raised by demurrer. Nevertheless, as has been again said and resaid, an appellate court may notice what errors might be assigned in arrest of judgment, so that we often notice errors appearing on the face of the record, brought to the attention of the court below by a motion to quash, if they are substantial. The only complaints against the indictment brought to our attention are that it fails to state what tribunal appointed the trustee named in it, or that the person appointed accepted the trusteeship, or gave bond, or ever qualified. The allegation is simply that the person named therein as trustee was "duly appointed trustee." These words, of course, cover in a popular sense everything necessary to complete the appointment.

It is true that, under some circumstances, and, indeed, under many circumstances, it is not sufficient to allege in a general way that a thing was "duly" done; but the details must be stated to such an extent that the court can judge whether what was done was in law "duly" done. This rule, however, would be too burdensome if applied to everything which is merely incidental, or which only leads up to the real substance of the offense. Therefore it is not ordinarily required, except as to what is really a vital element of the crime. Under the statute, the vital thing is that there was a trustee, although, as held by us in *Alkon v. United States*, 163 Fed. 810, it may be suffi-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cient to allege only that a trustee was in contemplation. It follows from this that it cannot be essential to allege any more than is alleged in the present case, so far as the appointment and qualification of the trustee are concerned. Many illustrations of this rule are to be found in Wharton's Precedents. One series closely analogous includes 632 and 633, relating to a conspiracy by prisoners to escape, where the only allegation is that they were "lawfully" confined and "lawfully" detained, without any details by which the court could ascertain whether they were indeed thus lawfully confined or lawfully detained. An indefinite number of precedents, including the ordinary indictment for larceny, alleging property in the person from whom the goods were stolen, without any allegation how the property was acquired, might be referred to. Indeed, the practical rule applicable hereto is such a general one that we need not follow this any further.

It might also be said that, as to a mere motion to quash, deficiencies of this class would be so far matters of form that at common law they would probably be held to be cured by a verdict. *Hardesty v. United States* (C. C. A.) 168 Fed. 25, 27, and cases there cited. But, independently of the manner in which the question was raised, we think, as we have said, that the general rule applies here which applies generally to allegations leading up to the essential elements of the crime charged; so that, according to the common practice in those respects, the indictment stands.

Next the plaintiffs in error urge that the trial court erred in admitting the books of account of the bankrupt, offered by the United States, because they had been obtained from the bankrupt by means of an involuntary judicial proceeding in bankruptcy. The record sufficiently shows that the trial court understood that reliance was placed on the constitutional guaranties given an alleged criminal, and on section 860 of the Revised Statutes (U. S. Comp. St. 1901, p. 661), and especially on the decision and opinion of this court in *Johnson v. United States*, 163 Fed. 30, 89 C. C. A. 508, 18 L. R. A. (N. S.) 1194, where the section of the Revised Statutes relied on is fully set out and discussed. The circumstances of that case, however, were unlike the circumstances here, because *Johnson v. United States* related to the introduction by the United States of the schedules in bankruptcy filed by Johnson.

It is not clear from the record what books were made use of; but the brief for the United States says they were the daybook, cashbooks and checkbooks kept by the bankrupt, and the entries therein. Kerrch was declared a bankrupt as the result of an involuntary petition, and on the filing of that petition Friedman was appointed receiver and took possession of the books. Section 70 of the bankruptcy statute of July 1, 1898 (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 345]), vests in the trustee, when appointed, title to the bankrupt's "documents" relating to his property. By the first section of the same act the word "documents" is to be construed to include "any book or instrument in writing." Section 2 of the same act provides for the appointment of receivers to take charge "of the property of the bankrupt after the filing of the petition." It is clear the purpose of this provision cannot be effected, unless the receiver has all the power to take temporarily into his possession whatever will vest in the assignee when he

is appointed. But we need not pursue this, because we do not understand that it is maintained that the receiver might not, and did not, take possession of the books in question lawfully.

Such being the facts, the proposition of the plaintiffs in error in this particular is not within any case decided by this court, or any case that is authoritative for it. We can also add that it is fully covered by *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, and by our opinion and decision in *New York Central Railroad Company v. United States*, 165 Fed. 833, 843, where *Adams v. New York* is applied, and where also the true construction and limitations applicable to *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, are explained. We are unable to find any error so far as this proposition is concerned.

In connection with the handling by a steamboat line of certain goods alleged to have been purchased by the bankrupt, the general freight agent was called as a witness by the United States; and, it having appeared that he examined the records of the line in regard to the apparent transportation of the goods, he was shown a duplicate receipt for freight, and thereupon, under objection, testified from his knowledge of the general course of business of the office that, in accordance with that course of business, the goods in question arrived and were received by the bankrupt. This was objected to, and the objection was too general to lay the basis for an exception according to the ordinary rule. However, we are not obliged to leave the matter there, because the plaintiffs in error rest mainly on the constitutional guaranty that a person accused shall be confronted with the witnesses against him. This guaranty has nothing whatever to do with common-law rules of evidence admitting declarations, like those of a dying person, or entries on books, made by a deceased person, or with reference to the general course of business, so far as either are otherwise admissible. The record is not developed sufficiently, therefore, to show whether this evidence was admissible or not as pertaining to the general course of business, a class of testimony which, with reference to large manufacturing or financial establishments, or with reference to other large affairs, is sometimes pertinent, as we decided in *Grünberg v. United States*, 145 Fed. 81, 90, 76 C. C. A. 51 et seq., and as also succinctly explained by *Greenleaf on Evidence*, § 120.

The last proposition we have to consider is the objection made to the testimony of a man who was familiar with the class of goods involved here, and who, on being called to examine an invoice from merchants in New York to the bankrupt, testified that it corresponded with goods in question here. He was not asked to testify that it covered the same merchandise, but only as to the question of similarity. An attempt was made to assimilate this to the rules applicable to what is strictly known as expert testimony. There is no relation between the two, and the evidence was clearly of a kind which may be given by any person who has knowledge either of a particular article or a particular class of articles.

The judgment of the Circuit Court is affirmed.

## HITE et al. v. CENTRAL R. OF NEW JERSEY.

(Circuit Court of Appeals, Third Circuit. June 7, 1909.)

No. 42.

## 1. COMMERCE (§ 89\*)—INTERSTATE TRANSPORTATION—CONSTRUCTION OF SCHEDULES—JURISDICTION OF COURTS.

A Circuit Court of the United States has jurisdiction to determine in the first instance the indebtedness of a shipper to a railroad company for demurrage, under the rules adopted by the company and filed with the Interstate Commerce Commission, where it depends on the construction, and not on the reasonableness or unreasonableness, of such rules, although the latter question is one primarily for the Commission.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 89.\*]

Jurisdiction of federal courts of suits under interstate commerce act, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

## 2. CARRIERS (§ 100\*)—DEMURRAGE—CONSTRUCTION OF RULES—"DATE OF ARRIVAL"—"DATE RELEASED."

A coal company contracted with a railroad company for the carriage of coal from the mines to tide water at Elizabethport, N. J., where the coal was loaded upon vessels. When cars arrived in Elizabethport they were placed in the railroad company's general yards until a vessel of the shipper was ready to load, when it registered at the railroad company's pier, and such company berthed it, and ran the cars out on the pier, and dumped the coal into the vessel as an incidental part of the transportation. Sometimes there was delay waiting for a vessel or a berth. The schedule of rules respecting charges filed by the railroad company with the Interstate Commerce Commission required the payment of demurrage when there was an average detention of cars for more than five days, computed on the basis of the time "between the date of arrival of each car and date released." *Held*, that the "date of arrival" meant the time of the arrival of the car in the yards, and not upon the pier, nor the time when notice of arrival was given the shipper's agent, and that the "date released" did not mean the date when the car was unloaded, but the date when the shipper's vessel was registered at the pier as ready to load; the car being then released so far as the shipper was concerned, and any further delay being that of the railroad company.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 100.\*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

See, also, 166 Fed. 976.

Wm. A. Glasgow, Jr., for plaintiffs in error.

A. M. Beitler, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

GRAY, Circuit Judge. The plaintiffs in error were shippers of coal from the bituminous coal region of West Virginia to tide water in New York Harbor. The shipments were made over the Central Railroad Company of New Jersey, which company received the coal from a connecting railroad and transported the same to its destination at Elizabethport, N. J. On the 10th of August, 1906, the plaintiffs in error entered into a written agreement, with surety, with the Central Railroad Company of New Jersey, the defendant in error, for the punctual pay-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment of all moneys then or thereafter to become due from the plaintiffs in error, for tolls, freight and charges on coal or coke passing over the railroads and canals operated by the said defendant in error, and providing for a lien upon such coal or coke in the possession of the said defendant in error, for all sums due and unpaid on account of such freight, tolls, and charges. Attached to said agreement was a power of attorney, authorizing any attorney of a court of record, upon filing a copy of said agreement, accompanied by an affidavit of an officer or agent of the defendant in error, of the amount due under the said agreement, to sign a stipulation for entering an amicable action, and to confess judgment thereon against the plaintiffs in error for such amount, with the usual release of errors, waiver of exemption and stay of execution. On October 28, 1907, such an amicable action in assumpsit was entered in the court below, pursuant to said agreement, and judgment confessed thereon for the amount stated in the accompanying affidavit of the general auditor of the defendant in error, to wit, \$3,291, with interest on the same from different dates, as to different portions thereof. On the 6th of November, 1907, there was entered upon the record of said judgment an acknowledgment by the plaintiff of the receipt from the defendants of the sum of \$1,932, and that the judgment was thereby reduced by that amount.

On the said 6th of November the plaintiffs in error, as defendants below, presented to the court an affidavit, wherein it was stated that before the confession of the judgment in said case, there had been, and still was, a controversy between the parties thereto, as to the amount of demurrage charges due by defendant to plaintiff; that defendants, upon examination of the statements of claim presented by the plaintiff for their demurrage charges, had agreed that the sum of \$1,932 was due to the plaintiff, as being proper charges for demurrage, but had contended and still contend that the balance of the demurrage charges were unjust and contrary to the rules and schedules of the plaintiff, and therefore contrary to the agreement between the parties; that the defendants had offered to pay to the plaintiffs the said sum of \$1,932 in full settlement of the demurrage charges claimed by the plaintiff, but that the plaintiff refused to receive the same in full settlement, and thereupon entered its judgment in pursuance of the said agreement made between plaintiffs and defendants on the 10th of August, 1906; that after entry of the said judgment, the payment by the plaintiff of the said \$1,932 was made, and acknowledgment thereof noted on the record of said judgment, and that the balance of said judgment of \$1,359 is composed of claims for demurrage made by the plaintiff, which the defendants contend are illegal and contrary to the agreement between plaintiff and defendant. The grounds upon which this charge for demurrage is claimed to be illegal, are then stated in the affidavit, in detail, and, so far as pertinent, will appear hereafter in the discussion of the assignments of error filed by the defendants below. After the statement of the facts and circumstances constituting these grounds, the defendants prayed for a rule to show cause why the judgment entered in the said case, as to the sum of \$1,359, together with interest as claimed, should not be opened and the defendants let into a defense. The rule to show cause was granted by the court

below, and an answer filed thereto by the plaintiff. An order to take depositions upon the rule to open judgment was also granted, and upon the return of the same, and after consideration thereof, the rule was discharged. To the order and judgment discharging the said rule, a writ of error was sued out by the defendants, and the record, with the assignments of error thereto, is brought before this court for review.

The questions raised by these assignments are two, and both relate to the proper interpretation of certain rules of the railroad company, the defendant in error, for ascertaining the demurrage charges incurred by the shippers of coal, in respect to the detention of cars after arrival at their destination. Prior to the shipments in question, the defendant in error had filed with the Interstate Commerce Commission the following schedule of rules concerning demurrage charges on anthracite and bituminous coal and coke that might be held for transshipment at Port Liberty, Elizabethport, and several other places on New York Harbor in the state of New Jersey, and it is admitted that, subject to these rules, the shipments in question were made:

"Rule 1. On and after May 1, 1907, all cars of coal and coke held for transshipment by water more than five days per car, upon the average computed by the month, and exclusive of Sundays and legal holidays, shall be subject to demurrage, representing service of cars, at the rate of \$1 per car per day after said five days." (See rule 3.)

"Rule 2. Statements of these charges shall be made up monthly, and shall include only cars that are released during the month covered by such statements.

"Rule 3. In computing time of detention, first ascertain the total number of days between the date of arrival of each car, and date released, from which total deduct the number of Sundays and holidays intervening. From the total figures obtained in this manner for all cars handled for a consignee during the month shall be deducted the product of the number of such cars multiplied by five, the remainder, if any, being the number of days per car for which demurrage will be charged.

"Rule 4. When lading is reconsigned, or sold on track at destination, demurrage charges shall be applied as per rule 1; and the days of detention of any car shall follow that car and be charged to the account of the new consignee. In no event shall more than a total of five days free time be allowed on any car.

"Rule 5. Demurrage charges will be collected either from the consignor or consignee, as are the transportation charges, and all charges must be paid or guaranteed before cars are unloaded."

We agree with the court below, that the present dispute has to do solely with the construction of these rules—especially with the meaning of the phrases, "date of arrival" and "date released," in rule 3, and that the Circuit Court had authority to determine this construction in the first instance. It is true that, under the decision of the Supreme Court, in *Texas Pacific Railway v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, the reasonableness of a rate or charge cannot be inquired into in an independent suit by court and jury, prior to action by the Interstate Commerce Commission, finding the established charge to be unreasonable. In the case before us, however, the court is asked to say, as a matter of law, what the schedule of rules in regard to charges for demurrage, filed by the defendant company, ac-



tually is, without regard to the reasonableness or unreasonableness thereof.

The contention of the plaintiff in error is, that, inasmuch as it is admitted that by the contract of carriage of the coal in question from the mines to tide water at Elizabethport, N. J., the defendant in error was bound to move the cars from its yard at Elizabethport onto the pier, and discharge the coal therefrom into the vessels provided by the plaintiff in error, the destination of each shipment of coal was the pier at Elizabethport, and not the adjoining railroad yards. From this admission, it is argued that, in computing the time of detention between the "date of arrival of each car and date released," under rule 3 of the filed schedule, the word "arrival" means the arrival of the car upon the pier, and not arrival in a general sense at Elizabethport, or in the yards of the defendant company.

It appears from the testimony, and it is not controverted, that the universal custom and practice in the conduct of this traffic was, that upon the arrival at Elizabethport of a shipment of coal from any shipper or consignor, the cars containing the same were placed in the yard of the defendant company, within convenient reach of its pier in the harbor, and that when notice was received by the company's agent, that the vessel provided by the consignor was ready to receive its cargo, said vessel was placed alongside the pier and the cars of coal were shunted thereon by the defendant and the coal dumped into the hold of such vessel. It sometimes happened that, upon the arrival of a shipper's coal at Elizabethport, his vessel had not arrived, or was not yet ready to receive the same. Or, it might happen that, though the vessel was at hand and ready to receive its cargo, there was no convenient berth or place alongside the pier to which such vessel could be moved, owing to the congestion of business and the occupation of such berths by other vessels. It appears that for such reasons as these, five free days were allowed by the rules, before the expiration of which no demurrage could be charged.

No bill of affreightment or of lading is exhibited in the record, and the precise wording of the contract of carriage is therefore not in evidence. It seems to be admitted, however, that the contract was generally for transportation of the coal from the mines to tide water at Elizabethport. We understand, therefore, that the word "arrival," as used in rule 3, refers to actual arrival at the company's yards, from which place they were to be shunted onto the pier for the purpose of dumping the coal from the cars into the vessel. Though the duty of the company was not fully performed until the cars had been moved onto the pier and dumped, the transportation from the mines to tide water, or to Elizabethport was accomplished upon the arrival of the cars at the company's yards, the usual place for their detention until a vessel was ready at the pier to receive the coal. The necessary movement onto the pier for dumping coal was a mere incident to the transportation and arrival of the car. The arrival of a car of goods at its destination is one thing; the delivery of the goods into the hands of the consignee is another and different thing. We think, therefore, that the words, "date of arrival of each car," in rule 3, necessarily means the date of arrival at Elizabethport, in the yards of the company, where it

is detained until the vessel of the shipper is ready to receive the coal contained therein.

Counsel for plaintiff in error further contend that, conceding that the word "arrival," as used in rule 3, means arrival in the yards of the defendant at Elizabethport, the date of such arrival, as the basis of the computation of demurrage charges, must mean the date upon which notice of such arrival is received by the shipper from the defendant—that at the date of the reception of such notice, there is what is called a "constructive arrival." As said by counsel for the defendant in error:

"No averment was made or evidence offered to prove that this postal card notice had not been mailed by the railroad company immediately upon the arrival of the cars in the yard, but complaint is made that the postal card did not reach the office of the plaintiff in error until the next day, or possibly several days thereafter, and in some cases never reached there at all."

But aside from this deficiency of proof, it is sufficient to say that there is nothing in the plain language of rule 3, which justifies such an implication of "constructive arrival." To say that such constructive arrival would be a convenient and reasonable qualification of the rule, cannot be considered by a court whose sole function is to construe the rule and extract its meaning from the language employed. To adopt the plaintiff in error's contention, would be to read into the rule a most important qualification thereof, and one which could hardly have failed to have been stated in express language, if such had been the purpose of the defendant in framing its schedule.

The remaining question is raised by the second assignment of error, and is as to the proper meaning of the word "released," in connection with the word "date," as used in the rule referred to, which we again quote in part:

"Rule 3. In computing time of detention, first ascertain the total number of days between the date of arrival of each car, and date released, from which total deduct the number of Sundays and holidays intervening."

The learned judge of the court below has found that the words, "date released," mean the day when the car is actually unloaded, and "the car becomes again available for transportation, when it is relieved from one service and is free to enter upon another." Counsel for plaintiff in error, on the other hand, insist that these words mean that the car is released from and after the time the consignee of the coal has tendered to the railroad company a boat, duly registered at its office on the piers, and has ordered the coal dumped into the vessel.

It is admitted that when a vessel of a consignee was in the port and ready to receive coal, he or his agent, or the master of the vessel, registered that notice at the office of the railroad company on the pier. It was then the duty of the company, as soon as a berth alongside the pier was available, to move the vessel into the same, and transport the cars to the pier side and dump the coal from them into the hold of such vessel. It is true that, in a certain sense, the cars are released when the coal is so dumped, as they then become available for other service, but the word "released" is not the most appropriate word to express this situation. The language would be more apt if we said, "when the car was discharged of its coal or relieved of its coal." "To

release" is a transitive verb. It connotes an actor, a releasor. The moving of the coal cars out onto the pier and dumping the coal into the hold of the vessel, is the act, as it is the duty, of the railroad company. To confine the word "released" to such dumping of the coal by the railroad company, would make the company both the releasor and the releasee, and would put it in the power of the company to extend, at the expense of the shipper, the period of demurrage, at its own will or for its own convenience, by delaying the moving of the cars onto the pier and the discharging of the coal therefrom. The only participation of the shipper in the whole transaction is to notify the company that the vessel is ready to receive the coal, and by such notice, and registering the same in accordance with the requirements of the company, he releases the cars designated from detention on his, the shipper's account, at the yards or pier of the railroad company. The shipper has released the railroad company from the duty or obligation of holding the coal in the cars, to await the convenience of the shipper or the arrival of a vessel. If the word "released" means unloaded, as contended for by the plaintiff in error, we naturally inquire why the word "unloaded" was not used in the third rule. No sufficient answer to this question has been suggested. It seems also apparent that, inasmuch as the subject-matter of rule 1 for demurrage charges is therein stated to be "cars of coal and coke held for transshipment by water more than five days," cars which the consignee has directed to be loaded on a boat (then furnished) could not be aptly described as cars "held for transshipment by water more than five days." They are not cars held for transshipment, but cars released. We think, therefore, that the words "date released," as used in rule 3 of the schedule filed with the Interstate Commerce Commission, refers to the time at which the shipper notifies the company that his vessel is ready to receive the coal from the cars, thereby releasing it from the duty of longer holding them on its tracks for the convenience of the shipper.

It is ordered, therefore, that the order of the court below, discharging the rule aforesaid, be reversed, and the case be remanded with directions for such further proceedings as may be in conformity with this opinion.

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WALTER A. WOOD MOWING & REAPING MACH. CO. V. VANSTORY.

(Circuit Court of Appeals, Fourth Circuit. June 9, 1909.)

No. 874.

1. BANKRUPTCY (§ 140\*)—TITLE AND RIGHTS OF TRUSTEE—PROPERTY HELD BY BANKRUPT AS BAILEE.

Petitioner, a manufacturer of farm machinery, shipped machines by the car load to the bankrupt, which was a hardware company, under a contract by which the bankrupt received and stored the same and from time to time shipped machines out on orders from petitioner. The machines were not charged to the bankrupt, nor invoiced as part of its stock, but it was paid an agreed price for storage and transfer. It had the privilege of selling any of the same to its own customers, and machines, when so sold, were charged to it. At the end of the year an inventory was

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

taken by petitioner of the machinery then on hand in storage. *Held*, that the transaction was a bailment, the title remaining in petitioner, and that on the bankruptcy it was entitled to reclaim possession of the machines on hand from the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

2. BANKRUPTCY (§ 140\*)—DEFINITIONS—"TRANSFER."

The definition of "transfer," in Bankr. Act July 1, 1898, c. 541, § 1a (25), 30 Stat. 544 (U. S. Comp. St. 1901, p. 3420), as including "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally as a payment, pledge, mortgage, gift or security," does not apply to a bailment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7064-7070; vol. 8, p. 7819.]

3. BANKRUPTCY (§ 140\*)—TITLE AND RIGHTS OF TRUSTEE—PROPERTY HELD BY BANKRUPT AS BAILEE.

Bankr. Act July 1, 1898, c. 541, § 70a(5), 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vesting a trustee with the title of the bankrupt to all "property which \* \* \* he could by any means have transferred or which might have been levied upon or sold under judicial process against him," does not undertake to vest the bankrupt with title to property to which he had no title prior to his adjudication, but only relates to property the title to which he had acquired to such an extent as to render the same liable to seizure and sale under execution for his debts, and does not include property which he held as bailee only, although he may have had an option to purchase any part of the same at any time.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

4. BANKRUPTCY (§ 140\*)—TITLE AND RIGHTS OF TRUSTEE—CONSTRUCTION OF CONTRACT.

A contract under which petitioner furnished certain machines to the bankrupt, and which provided that all goods on hand and the proceeds of all sales of goods received under the contract, whether consisting of notes, cash, or book accounts should be held by the bankrupt as collateral security in trust for the benefit of petitioner and subject to its order until all obligations due it thereunder should be paid in full, was not one of conditional sale, but one creating a trust for the benefit of petitioner, and on the bankruptcy it was entitled to reclaim the goods on hand from the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

Appeal from the District Court of the United States for the Western District of North Carolina, at Greensboro, in Bankruptcy.

This is an appeal from an order of the District Court sitting as a Court of Bankruptcy of the United States for the Western District of North Carolina, approving and confirming the report of the special master herein, and dismissing appellant's petition for the possession of certain machinery in the hands of the trustee in bankruptcy of the Wakefield Hardware Company.

The petition alleged: That, for a number of years and up to the filing of the petition of bankruptcy, the Wakefield Hardware Company acted as agent for the appellant for the storage and transfer of certain mowing and reaping machinery; that the Wakefield Hardware Company agreed to receive machinery belonging to the appellant, to store the same, and to ship the same out on the order of the appellant to parties whom appellant should designate; that it was agreed by the appellant that the Wakefield Hardware Company should receive a fixed compensation for this service; that, in accordance with this agreement, machinery was, from time to time, to be delivered by the appellant to the Wakefield Hardware Company to be held according to the terms of the said agreement; and that certain machinery now in the possession of the trustee in bankruptcy of the Wakefield Hardware Company, and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

easily capable of identification, was acquired by virtue of this contract to be stored and reshipped according to the terms thereof.

The petition further alleged: That, in September, 1906, the appellant entered into written contracts with the Wakefield Hardware Company, promising to sell and deliver to the said company certain machinery, but on the express condition and trust that all such machinery and the proceeds of all sales thereof, whether the same consisted of notes, cash, or book accounts, should be held by the Wakefield Hardware Company as collateral security in trust and for the benefit of and subject to the order of the appellant, until all indebtedness due said appellant by the Wakefield Hardware Company should be paid in full in cash; that certain machinery was delivered to the Wakefield Hardware Company in pursuance of the terms of this contract; and that certain pieces of the said machinery, described in the petition and easily capable of identification, are now in possession of the trustee in bankruptcy.

The petition prayed that the trustee in bankruptcy might be ordered to turn over to the appellant both the machinery which had been received by the Wakefield Hardware Company for the purpose of storage and transfer and also the machinery which had been received by the said company in accordance with the contracts of September, 1906, and which was described in said contracts, and which by the agreements in said contracts was held in trust for the benefit of and subject to the order of the appellant.

John J. Parker (David Stern, on the brief), for appellant.

Thomas S. Beall and Robert R. King (Scott & McLean and King & Kimball, on the brief), for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and DAYTON, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). In passing upon the question sought to be determined by this appeal, it will only be necessary to consider the third and fourth assignments of error.

The third assignment of error relates to the property described in the first section of the petition, which reads as follows:

"That for a number of years and up to the time of filing of petition of bankruptcy herein, the Wakefield Hardware Company acted as agent for your petitioner for the storage and transfer of certain mowing and reaping machinery. That the Wakefield Hardware Company contracted with your petitioner to safely and securely keep certain mowing and reaping machinery for your petitioner and deliver the same to your petitioner or its agent on request. That your petitioner under said agreement has stored with the Wakefield Hardware Company for safe-keeping, and the said Wakefield Hardware Company has received for storage and safe-keeping, the following mowing and reaping machinery, all manufactured by the Walter A. Wood Mowing & Reaping Machinery Company, to wit: 5 mowers; 5 self-dump rakes; 6 hand-dump rakes less 1 set teeth and 1 wheel; 2-8-18 disc harrows; 3-10-20 disc harrows; 3-8-20 disc harrows; 5-10-20 disc harrows; 3-3 horse attachments; 13-2 horse attachments; 14 spike-tooth harrows; a lot of machinery repairs, consisting of a large number of nuts and bolts, amounting in value to \$276.21, which said repairs are separated in boxes and bins in the store of the Wakefield Hardware Company. That all of the above-described machinery and repairs is on the second floor and in the basement of the store on North Elm street, Greensboro, N. C., formerly occupied by the bankrupt, and all is easily capable of identification as property of your petitioner. That your petitioner promised to pay the Wakefield Hardware Company as storage and transfer charges the sum of \$1 on each mower, and the sum of 50 cents on each rake, and the sum of 50 cents on each disc harrow, and the sum of 25 cents on each spike-tooth harrow, all of which your petitioner is willing and ready to pay as soon as its rights herein are determined."

The special master in his report, in dealing with the property described in the first paragraph of the petition, among other things, announced the following conclusions of law:

"First. It is contended by the petitioner: That the contract between it and the bankrupt in regard to the machinery described in the first finding of fact was one of bailment, and, at most, that of agency. That while the bankrupt could dispose of any machines described in the first finding of fact to its own customer at any time it saw fit without reporting the sale to the petitioner, that this was merely for convenience, and that the sale was made as the agent of the petitioner, and that the title had never passed to the bankrupt.

"In my opinion the facts do not bear such construction. The evidence is that the bankrupt was permitted by the petitioner to carry insurance in its own name, and for its own benefit, upon the machines. The bankrupt had a right to sell any machines at any time it saw fit to its own customer upon its own terms and use the proceeds as its own without reporting the sale or either remitting the proceeds to the petitioner. There is not evidence that it was allowed any commission upon such sale. It was not required to account for such machines so sold until the time of annual settlement. If it failed to account for the machines so sold, the only remedy of the petitioner would have been a civil action for debt. These facts, in my opinion, establish the relation of debtor and creditor and pass the title from the petitioner to the bankrupt."

This presents squarely the question as to whether the contract by which this property was transferred comes within the definition of a "bailment." Therefore it is essential that we should correctly determine as to what constitutes a "bailment." The following definition is to be found in the American & English Encyclopædia of Law (2d Ed.) vol. 3, p. 733:

"Bailment is the delivery of goods for some purpose, upon a contract, expressed or implied, that after the purpose has been fulfilled they shall be redelivered to the bailor or otherwise dealt with according to his directions, or kept until he reclaims them." 2 Blackstone, Commentaries, 451; Story on Bailments (9th Ed.) par. 2.

It is well settled that a bailment merely transfers the possession of the property, the absolute title of which is retained by the owner, who has the right to dispose of the same as he may see fit.

It appears from the evidence that the machines to which reference is made in section 1 of the petition were received from the petitioner by the bankrupt, with the distinct understanding that they were to be stored by it and held as the property of the petitioner, and as such were to be subject to the order of the petitioner at all times.

Mr. Starke, a representative of the Walter A. Wood Mowing & Reaping Machine Company, testified on behalf of the petitioner as follows:

"Q. State to the court the general course of business between Walter A. Wood and the Wakefield Hardware Company that you had as a personal auditor. A. I will try to make the method of business as clear as I can. We send out travelers as in this case, who call upon these men, and these dealers, and in this particular instance the Wakefield Hardware Company, they were approached by our traveling man as had been his custom for 18 or 20 years, representing us here in this same capacity. There is a contract drawn up with the Wakefield Hardware Company, in which they agree to purchase a certain number of machines, and years ago it was our custom for them to draw up what we called a 'transfer and storage agreement'; but in these latter years we have not gone to that trouble. Everybody

thoroughly understood it, and if the Wakefield Hardware Company for instance should have ordered, say, a half dozen machines, we would have shipped down there a car load of machines. The Wakefield Hardware Company appreciated the fact that in that car load were these half dozen machines which were theirs by purchase which was set forth in contract which will be taken up later. And the remainder of those machines were left with the hardware company on storage account to be used by the Walter A. Wood Company later on; that is to say, if a man over at Winston, which we call a local agent, was to write us to ship him a machine, rather than to ship it from Hoosic Falls, to furnish him quicker and save freight charges, then we would send an order to the Wakefield Hardware Company to ship the Brown, Rogers Hardware Company at Winston a certain machine out of the Walter A. Wood's stock held by them on storage account. When they did that, we furnished the Wakefield Hardware Company a pad, which I have a sample of here, and, as soon as the Wakefield Hardware Company would make that shipment, they would make out these three blanks in triplicate, and save this one (illustrating). These two (illustrating) come to us, and after the record is made in Richmond one of them is sent to Hoosic Falls and one sent to Brown, Rogers & Company, so the whole account checks. Now that is really about the sum of all that. The Wakefield Hardware Company are called upon later on to make settlement of their account. When the man comes here to make a settlement, he goes into the Wakefield Hardware Company and makes an inventory of what is there. He already has an inventory of what machines have been ordered out and what shipments have already been made, and he adds those things together, and, if he finds that they do not yet account for the total number of machines that have been shipped to the Wakefield Hardware Company, then he calls on the Wakefield Hardware Company to make a statement."

Also C. R. Hudson, a witness for the petitioner, who was secretary and treasurer for the Wakefield Hardware Company on the day of its adjudication as a bankrupt, testified, among other things, as follows:

"Q. Now, Mr. Hudson, was there any agreement either verbal or written between your company and the Walter A. Wood Company about storage and transfer? If the agreement was written, say so, and if it was verbal, say so. A. There was a verbal agreement.

"Q. There was a verbal agreement between your company and the Walter A. Wood Company as to storage and transfer of machines? A. Yes, sir.

"Q. Will you tell the court what the agreement was? A. That we fill orders when sent to us from Hoosic Falls or from Mr. Starke at Richmond, from anything we had in stock. We also had a list of customers of the Walter A. Wood Company for whom we filled any of their orders as those order blanks will show, reporting same to the Richmond office always.

"Q. Out of what machines would you ship orders under the storage and transfer account? A. From the stock account when we had it.

"Q. Now, is any of that stock account represented in the items charged on your ledger book? A. No, sir."

Thus we have clear and concise statements from a representative of the petitioner and from a representative of the bankrupt as to the nature of the contract, and these statements strongly support the contention of the petitioner as to the true intent and meaning of the contract.

It further appears from the record that from time to time the bankrupt, acting under the directions of the petitioner, shipped various kinds of machinery held under this contract to parties residing in different territories and made reports of such shipments to the petitioner, and that the only compensation the bankrupt received on account of such shipments was the several amounts paid him by the petitioner for storage and transfer. The sole record kept by the bankrupt of this ac-

count consisted of a triplicate report showing the transaction, a copy of which was transmitted to the petitioner, one to the consignee and the third retained by the bankrupt. It also appears, from the correspondence introduced as evidence in the court below, that the bankrupt was required to render to the petitioner at stated intervals reports showing the exact amount of machinery on hand, and that at the end of the year the petitioner's agent took an inventory of the machinery thus stored by the bankrupt, and it is clear that at no time was there any demand made for the payment of any sum on account of such stock.

It appears that the bankrupt made annual statements showing all the property and assets it owned at the time such statements were made, and it was shown that none of this machinery was included in any of these statements. It was also shown that the bankrupt occasionally disposed of these machines held under this contract, and, in each instance, the machines thus disposed of were charged to the bankrupt. In some cases, however, appropriations of this kind were not shown until the yearly inventory was taken, at which time the bankrupt was required to make settlement for the same.

A careful consideration of all the evidence in this case leads us to the conclusion: That, in this instance, the bankrupt entered into an agreement with the petitioner by which it agreed to store certain car loads of machinery and hold the same subject to the order of the petitioner, and, among other things, agreed to ship the machinery thus stored to the various customers which the petitioner might secure in the immediate section in which the bankrupt was engaged in business; that in addition to the making of these shipments, under the directions of the petitioner, the bankrupt was authorized to purchase from the petitioner such machines from this lot as it might be able to dispose of to its regular customers. This agreement went no further than to give the bankrupt an option to purchase, upon the happening of a contingency, the happening of which depended more or less upon the demand for such articles, in the course of trade in which the bankrupt was at the time engaged; a list of prices being adopted to cover the charges for storage and drayage, all of which charges were promptly paid by the petitioner in consideration of the services performed by the bankrupt in storing, handling, and transferring this particular lot of machinery.

In order to correctly determine as to whether title to property passes under a given contract, it becomes necessary to ascertain the intention of the parties, at the time the contract was made. In this instance it was evidently the intention of the parties that the petitioner should not part with the title to such property, and that the bankrupt was only to be given the right of possession in accordance with the terms specified in the contract. The title to the property being in the petitioner, and being held by the bankrupt as the agent of the petitioner, it necessarily follows that there was no transfer of the title to the bankrupt, and that it held possession of the property for the sole use and benefit of the petitioner, merely acting as his agent for such purpose, and none other. The fact that the bankrupt was given an option to purchase a portion of this property did not change the nature



of the contract, by virtue of which the property was stored with the bankrupt as hereinbefore stated; it having no more right to the property by virtue of its being in its possession than it would have had, had the property been in the hands of the petitioner or some other party, inasmuch as it was clearly the intention of the parties that the petitioner was to retain title to the property. Even if the bankrupt had an option to purchase the entire lot of machinery deposited with it, under the circumstances, with the conditions attached as in this instance, the granting of the option on the part of the petitioner could not have the effect of converting the bailment into a sale, nor could it vest the bankrupt with the title to the property.

In the case of *Foreman v. Drake*, 98 N. C. 311, 3 S. E. 842, Judge Merrimon, who delivered the opinion of the court, said:

"\* \* \* The mere fact that it is stipulated that the defendant Andrews might put an end to the term of hiring, if the compensation should not be paid at the several times specified, or for the causes mentioned, could not change the nature of the contract, nor does such a stipulation have the effect to render the transaction a conditional sale of the property. There is no reason why the contract of hiring should not have conditions, upon the happening of which it shall or may be terminated; nor does the stipulation that the feme defendant might purchase the furniture during the term of the hiring, affect the nature of the contract. We can see no reason why it should. It might be that the course of fortunes of her business would lead or enable her to do so—it might be otherwise. Moreover, this stipulation goes to show that the parties did not contemplate a sale by the contract of any kind or nature. By the terms of the agreement the feme defendant had the right at any time during the term of hiring to purchase the property for a price, substantially the sum of money agreed to be paid as compensation for the use of the property. This seems to be a singular stipulation, and suggests a want of good faith in some way; but of itself it cannot change the nature and defeat the purpose of the contract. There may be some reason for it that we do not see. It is not suggested, nor does it appear, that the whole transaction was a sham and a fraud. We pass upon the instrument as it appears by its face. A contract of 'conditional sale,' and a contract of hiring, conditional in its provision, are essentially different in their respective natures and purposes. The latter need not be in writing, and when it is it need not be registered. The former to be effectual against creditors and subsequent purchasers for value, must be in writing and registered. Code, § 1275." *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

In a note to *Sturm v. Boker*, 37 L. Ed. 1094, it is said:

"A bargain of sale or return, in the strict sense, which is subject to a condition subsequent rendering the contract defeasible after delivery of the chattel, is to be distinguished from a transaction which amounts to a mere bailment with the privilege of purchase."

Also, in the case of *Chamberlain v. Smith*, 44 Pa. 431:

"The delivery of cattle to be kept and used for a certain time and then to be returned, the hirer having the privilege of purchasing them at a stipulated price, is a bailment and not a conditional sale of the cattle."

In the case of *In re Columbus Buggy Company*, 143 Fed. 861, 74 C. C. A. 612, Circuit Court of Appeals for the Eighth Circuit, in an opinion delivered by Judge Sanborn, among other things, said:

"An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price and an agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale. The contract involved in this case has none of these characteristics. The power to require the restoration of the subject of the agreement is an indelible incident

of a contract of bailment. *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101, 108; 2 Kent's Com. 589; *Powder Co. v. Burkhardt*, 97 U. S. 116, 24 L. Ed. 973; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093. This contract contains a plain stipulation that the goods are at all times subject to the order of the Columbus Company until they are sold, and that at the expiration of the term of the contract the Washburn Company will return the goods which remain unsold. It was therefore a contract of bailment for sale, and it was not subject to the statute of Oklahoma regarding conditional sales. One of the most striking and familiar illustrations of its character is given by Chief Justice Gibson in *McCullough v. Porter*, 4 Watts & S. (Pa.) 177, 39 Am. Dec. 68, where he says: 'Were I to put my horse in the custody of a friend, to be sold for a designated sum, with permission to retain whatever could be got beyond it, it would not be suspected that I had ceased to own him in the meantime, or that my friend would not be bound to return him, even without a stipulation, should he have failed to obtain the prescribed price.'

"A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expense of insurance, freight, storage, and handling, and that he will hold the unsold merchandise subject to the order of the furnisher, discloses a bailment for sale and does not evidence a conditional sale. It contains no agreement of the receiver to pay any agreed price for the goods. It is not therefore affected by a statute which renders unrecorded contracts for conditional sale voidable by creditors and purchasers. The fact that such a contract provides that the receiver of the goods may fix the selling prices and may retain the difference between the agreed prices of the accounting and the selling prices to recompense him for insurance, storage, commission, and expenses does not constitute the contract an agreement of sale. It still lacks the obligation of the receiver to pay a purchase price for the goods and the obligation of the furnisher to transfer the title to him for that price."

It is contended by counsel for appellee that under the definition of the word "transfer," found in section 1 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), the title of this property passed to the bankrupt. The definition in question reads as follows:

"Transfer shall include the sale and every other and different mode of disposition of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

The definition thus given does not mean that a contract which constitutes a bailment comes within the meaning of the word "transfer" as defined in section 1 of the bankruptcy act. This definition of "transfers" was never intended to apply to a bailment, but only to cases where, from the nature of the contract, the title to the property had become vested in the bankrupt to such an extent as to render it as his property, and as such, liable for the payment of his debts.

Section 70a(5) of the bankruptcy law is relied upon by the appellee in support of its contention. The section in question reads as follows:

"\* \* \* The property, which, prior to the filing of the petition, he could, by any means, have transferred, or which might have been levied upon or sold under judicial process against him."

This section does not undertake to vest the bankrupt with the title to property to which he had no title prior to his adjudication as a bankrupt. It only relates to property, the title to which he had acquired to such an extent as to render the same liable to seizure and sale under execution for his debts, and the right to the possession of which could

be maintained by him upon the strength of such title in a proper proceeding for the recovery of the same. The definition of "transfer" in a legal sense as used here was never intended to apply to "bailment."

Suppose that the petitioner, prior to the adjudication of bankruptcy, had demanded possession of this property, and the bankrupt had refused to surrender it. Can it be reasonably contended that the petitioner, by the institution of proper proceedings, could not have recovered possession of the same? Also, suppose that this property had been destroyed by fire or other casualty while in the possession of the bankrupt and being held under this contract. Could the petitioner have recovered the value of the same from the bankrupt on account of its destruction? Most assuredly not, and why? Because the bankrupt held this property in storage as the property of the petitioner, and there would have been no valid ground upon which the petitioner could have instituted proceedings for the recovery of damages under such circumstances. The question presented is not as to whether, under the option, the bankrupt had a right to purchase a portion of the machines placed in his possession, and, after having purchased the same, transfer them to another; but it is as to whether, under the agreement in question, it was the intention of the parties that the title to the property should become vested in the bankrupt.

While it is true that the bankrupt, under the option which he held to purchase a portion of this stock of machinery, was afforded the right to sell and dispose of the same, yet there was nothing pertaining to the option which could be construed to mean that he had an option to purchase the entire stock, or any particular machines belonging to the stock; but, on the other hand, it clearly appears that, under the option, he only had the right to purchase from the petitioner such machines as he might need on occasions when there was a demand from a customer for machines which he did not have in his own private stock.

The fourth assignment of error reads as follows:

"Fourth. In approving and confirming in all respects the report of the special master herein the court erred, because that the special master held that the contract covering the machines described in section 2 of the petition gave the appellant no lien on the said machines as against the trustee in bankruptcy, and that the said machines passed to the trustee in bankruptcy at the time of the adjudication free from such lien."

The contract under which the machines described in article 2 of the petition were acquired by the bankrupt contained the following provision:

"All goods on hand and the proceeds of all sales of all goods received under this contract, whether such proceeds of sales consist of notes, cash or book accounts, the party of the second part agrees to hold as collateral security in trust and for the benefit of, and subject to the order of the party of the first part, until all obligations hereunder due the party of the first part from the party of the second part are paid in full in cash."

Inasmuch as this court, at the February term, 1909, in the case of *Walter A. Wood, Petitioner, v. H. M. Eubank, Trustee of the Implement and Supply Company, Bankrupt, Respondent*, 169 Fed. 929, determined the questions involved in this assignment of error, we do not deem it necessary to enter into a further discussion of them. In view

of our ruling in that case, we are of the opinion that the court below erred in holding that the title to the machinery referred to in the fourth assignment passed to the bankrupt.

For the reasons hereinbefore stated, the judgment of the District Court is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed.

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LYON v. McKEEFREY et al.

(Circuit Court of Appeals, Third Circuit. June 29, 1909.)

No. 50.

1. BANKS AND BANKING (§ 317\*)—INSOLVENCY—DISSOLUTION—STATE STATUTE—EFFECT.

Act Pa. Feb. 11, 1895 (P. L. 4), creating a state banking department, and providing (sections 6, 9) for the winding up of corporations doing a banking business in the state courts at the suit of the Attorney General in case of insolvency or interest of the public, did not impair the jurisdiction of the federal courts to entertain a suit by nonresident creditors of a Pennsylvania trust company doing a banking business and unable to pay its debts as they matured for the liquidation of its assets and an application thereof to its debts through the agency of a receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 317.\*]

2. EQUITY (§ 273\*)—BILL—AMENDMENT—NEW CAUSE OF ACTION.

Where, after the institution of a suit in a federal court to liquidate the assets of a Pennsylvania trust company and the appointment of a receiver to that end, the Attorney General instituted proceedings in a state court under a state statute and obtained a decree dissolving the corporation from which no appeal was taken, the federal court, after payment of all the corporation's debts, could not properly allow an amendment of the bill and an intervention on the part of stockholders to obtain a distribution of the surplus assets through the federal court's receiver, as the amendment constituted a wholly different and new cause of action.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 561-563; Dec. Dig. § 273.\*]

3. BANKS AND BANKING (§ 317\*)—TRUST COMPANIES—INSOLVENCY—DISSOLUTION—SURPLUS ASSETS—DISTRIBUTION.

Where, pending suit for the administration of the affairs of a Pennsylvania trust company unable to pay its debts as they matured, the Attorney General, under a state statute, obtained a decree dissolving the corporation and appointing a receiver, which was unappealed from, all purposes for which the federal court's jurisdiction was invoked having been subserved on the payment in full of all of the debts of the corporation, the federal court could not then return a surplus in the hands of its receiver either to the corporation or to its stockholders, but was bound to turn it over to the receiver appointed in the dissolution proceedings in the state court for distribution.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 317.\*]

4. CORPORATIONS (§ 609\*)—DISSOLUTION—EQUITY.

In the absence of a statute enlarging its powers, a court of equity has no jurisdiction at the suit of a shareholder or other private person to dissolve a corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2421; Dec. Dig. § 609.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

George H. Calvert, for appellant.

Willis F. McCook, for appellees.

Before GRAY, Circuit Judge, and LANNING and YOUNG, District Judges.

GRAY, Circuit Judge. The above-named complainants, citizens of the state of Ohio and partners under the name of McKeefrey & Company, on October 23, 1907, filed a bill in equity in the Circuit Court of the United States for the Western District of Pennsylvania, against the Iron City Trust Company, a Pennsylvania corporation engaged in the general banking business in the city of Pittsburgh, Pa. In their bill the complainants allege that their claims exceed the jurisdictional amount, and that the assets of the defendant consisted of about \$175,000 in cash, and other assets exceeding \$14,000,000, and that said assets were largely in excess of its liabilities, but could not be converted into cash in time to meet its liabilities as they matured. They further allege that, upon defendant's failure to meet its obligations, it will, unless its assets are properly protected by an officer of this court, be subject to vexatious and costly litigation, that its assets will be subject to attachment and execution, and at a forced sale would bring much less than their fair and reasonable value, to the great prejudice of the complainants and of all other creditors and of the stockholders of the defendant; and the complainants allege their belief that, unless the court would take defendant's property into its custody and deal with it as a single trust, such property would be sacrificed and the stockholders and creditors and all of the parties in interest would suffer irreparable damage and loss. They therefore pray:

First, for the appointment of certain named receivers, one of whom was president of the company, with the usual powers to take into their possession all the property of the defendant, its business, stocks, rights, assets and effects, of whatsoever nature and wheresoever situate, including its bills and accounts receivable, and all its contracts, rights, choses in action, corporate rights and franchises and its income and profits, and with the usual power to demand, sue for, collect, receive, and take into possession all property belonging to the said corporation, and to institute suits at law or in equity for the recovery of the same, and generally to perform all duties imposed upon them, or required by law.

Second, that the defendant and its officers be commanded to forthwith convey, turn over and deliver to the receivers all the real and personal property, assets and effects that they were empowered to receive.

Third, for other and further relief.

On the same day that the said bill was filed, the defendant, the Iron City Trust Company, filed its answer, admitting to be true all the statements and allegations in the said bill of complaint, and that, although having assets largely in excess of all its liabilities, it was not able to convert the same into cash as rapidly as said liabilities would

mature, and it avers that on that account it joins in the prayer of the bill for the appointment of receivers, as therein asked for, to the end that all the creditors of respondent may be paid in full, without loss and sacrifice of its assets, so as to preserve the same for its stockholders as well.

On the same day, on the bill and answer filed, and for the reasons stated therein, the court ordered that the persons named by the said complainants be appointed receivers of all and singular the property of the defendant, as set forth in the bill, and with the powers therein prayed for. The receivers thus appointed at once qualified and proceeded upon the execution of their office.

At the time of the filing of said bill and the appointment of said receivers, there was a statute of the state of Pennsylvania, passed February 11, 1895 (P. L. 4), and unrepealed, creating a banking department for the control and regulation of banking companies, trust companies, etc., the sixth and ninth sections of which were as follows:

"Whenever it shall appear from any report of the condition of any corporation made as hereinbefore provided to the Commissioner of Banking, or the said commissioner shall have reason to believe that the capital of any such corporation is reduced, by impairment or otherwise, below the amount required by law or the articles of incorporation, or below the amount certified to the proper authorities as paid in, it shall be the duty of the commissioner and he shall have power to require such corporation, under his hand and seal of office, to make good the deficiency so appearing; and to give effect to such requisition he shall have power to examine, or cause to be examined, any such corporations, books, papers, and affairs to ascertain whether such reduction or impairment of capital has been made good in compliance with his requisition; and if any such corporation shall neglect or refuse, for sixty days after such requisition has been made, to make good the reduction or impairment of capital existing, it shall be the duty of the commissioner to communicate the facts to the Attorney General, whose duty it shall then become to apply to the court of common pleas of the county of Dauphin, or in vacation, to any of the judges thereof, for an order requiring said corporation to show cause why their business should not be closed, and the court or judge, as the case may be, shall thereupon hear the allegations and proofs of the respective parties. If it appears to the satisfaction of the said court or judge that such corporation has neglected or refused to comply with such requisition, and that such capital stock is reduced or impaired, and that such corporation is insolvent, or that the interests of the public so require, the said court or judge shall decree a dissolution of such corporation and a distribution of its effects, or shall make such other orders, from time to time, in the matter as the interests of the parties and the public may require."

"If from any examination of the papers, books and affairs of any corporation, with or without capital, the Commissioner of Banking shall have reason at any time to conclude that such corporation is in an unsound and unsafe condition to do business, or that its business or manner of conducting the same is injurious and contrary to the interest of the public, the Commissioner of Banking shall forthwith communicate the facts to the Attorney General, who shall forthwith make application to the court of common pleas of the county of Dauphin, or to a law judge thereof, for the appointment of a receiver to take charge of such corporation's property and wind up its business. Such receiver shall proceed and wind up the business and affairs of said corporation under and subject to the orders of the court of common pleas aforesaid."

On November 20, 1907, in accordance with the foregoing statutory provision, the Attorney General of the state of Pennsylvania, acting

in pursuance of information submitted to him by the banking commissioner of that state, and alleging that the defendant company was in an unsound and unsafe condition, and was insolvent, began proceedings in the court of common pleas of Dauphin county, for the appointment of a receiver and the winding up of the business of the said company. On December 19, 1907, the Oklahoma Railroad Company, a corporation of the state of Oklahoma, moved to be allowed to file an intervening petition and "cross-bill" in the said suit of McKeefrey & Co. against the Iron City Trust Company, the said petition alleging that, by virtue of a certain contract between said corporation and the defendant company, dated June 17, 1907, it became, between July 1 and August 17, 1907, a creditor of said defendant company to a large amount, and that said defendant company was, at the date of the filing of the original petition for the appointment of receivers, temporarily embarrassed, and was still in such condition, and that it was necessary that said receivers should have been appointed, and was still necessary to have and retain said receivers for the preservation of the assets of said corporation and the protection of the creditors of the same, and praying that it have leave to prove its demand against the estate of the said defendant, and that such orders might be made as were equitable, as between the petitioner and other creditors of the said defendant, for a distribution of its assets; and that orders might be entered in said suit from time to time, requiring all creditors who should desire to participate in the assets of said defendant, in satisfaction of their respective demands, to exhibit the same to the court, or to the receivers, in such reasonable time as the said court might state, etc. On the 10th of December, 1907, the court below ordered that the foregoing petition to intervene in said cause be allowed.

On February 20, 1908, the court of common pleas of Dauphin county, Pa., filed its opinion in the said case of the Commonwealth of Pennsylvania ex rel. M. Hampton Todd, Attorney General, v. The Iron City Trust Company. In this opinion the court states the facts in regard to the bill in equity filed by McKeefrey & Co. against the Iron City Trust Company, reciting the allegations thereof, as the same were in evidence before it, and the answer of the said defendant company, and, after discussion of other evidence pertinent to the issue before it, finds and decrees as follows:

"From the testimony submitted to us, we find that the Iron City Trust Company of Pittsburgh, Pa., the defendant herein, was on October 23, 1907, according to its own admissions and acts, not in a safe and sound condition to do business, and was then, in contemplation of law, insolvent, and that this condition still continues.

"We therefore now order and decree that the Iron City Trust Company of Pittsburgh, Pa., the defendant herein, be and is hereby dissolved and its corporate existence ended, and that Mr. J. Denny Lyon of Pittsburgh, Pa., is hereby appointed receiver of all its property and assets of whatsoever nature and kind, and direct that he institute such proceedings in the Circuit Court of the United States for the Western District of Pennsylvania, as may be proper to procure the revocation of its decree appointing receivers for said defendant corporation, and upon its revocation to take possession of the property and assets of said defendant corporation, close its business and dispose of its property and assets in such manner as the law may require.

Bond with approved security to be given by said receiver in the sum of \$500,000."

On March 2, 1908, the appellant, as receiver of the state court, filed his petition in the court below, in which, after reciting the provisions of the said act of the Legislature of Pennsylvania, establishing a banking department, and his appointment as receiver of the Iron City Trust Company by the court of common pleas of Dauphin county, at the instance of the Attorney General of the state of Pennsylvania, in the proceedings above referred to, and the proceedings in the present suit in the Circuit Court of the United States, and the appointment of receivers thereby for the property and business of the said defendant company, and charging collusion, and that the Circuit Court of the United States was without jurisdiction in the premises, by reason of the action of the said state court, and for other reasons, prayed for a rule upon the complainants and upon the said defendant, and upon the receivers, to show cause why the appointment of the said receivers "should not be revoked, vacated and set aside, and why the said receivers should not account to the petitioner for the property and assets of the corporation received by them under and by virtue of their said appointment, and turn over and deliver the same to him, and why the said bill of complaint should not be dismissed." This rule having been granted, several answers were filed by the receivers appointed by the court below and by the Oklahoma Railroad Company, intervening complainants, denying the charges of collusion and any exclusive jurisdiction in the court of common pleas of Dauphin county, and asserting the plenary jurisdiction of the Circuit Court of the United States in the said suit, to deal with and distribute the assets of the said defendant company. The record discloses no action or order of the court below in the matter of the rule thus granted until the order of January 5, 1909.

The receivers, however, proceeded with the administration of the estate, business and assets of the said defendant company, and on the 14th of November, 1908, presented their petition to the court below, setting forth that all creditors of the trust company had been paid in full, and their claims discharged, and that nothing remained to be done in relation to the assets in their hands except their distribution to the stockholders of the trust company, and praying that they be discharged as such receivers and directed to pay and deliver over to the trust company all cash and other assets of said company then remaining in their hands.

On December 26, 1908, Lyon, the receiver appointed by the Dauphin county court, in the form of an answer to the above-stated petition of the receivers appointed by the court below, recites the proceedings in the court of common pleas of Dauphin county, and states that, by reason of the dissolution of the corporation defendant by said court, said corporation has no legal existence, and that the prayer of the receivers that the assets in their hands be turned over to the trust company should be denied, and joins in the prayer of said receivers that they be discharged, but prays that the court below may decree that they shall turn over the assets of said defendant corporation into his hands, as receiver of the state court.



On the same day, December 26, 1908, the said Lyon, as receiver appointed by the state court, presented to the court below his supplemental petition, in which, after reciting the said petition of the 14th of November, 1908, presented by the receivers of the court below, representing that all claims had been discharged and that nothing remained to be done in relation to the assets in their hands except their distribution to the stockholders of the defendant company, and praying that they be discharged as such receivers, and averring that, as shown by the petition of said receivers, the purposes of the bill filed in the court below had been entirely accomplished, and that nothing remained to be done except to distribute the assets of the defendant company, the petitioner prays that the said assets may be turned over into his hands, as receiver of the said defendant company, duly appointed by the court of common pleas of Dauphin county, in accordance with the provisions of the statute of the state of Pennsylvania above recited. To this petition an answer was filed by the receivers appointed by the court below, in which they admit that the decree of the state court dissolving the defendant company was final, and that the appointment of Lyon as receiver was made, as stated in his petition, and that they had executed their trust so far as to pay in full all the indebtedness of the defendant company, leaving in their hands a large amount of assets. They then aver that no one has any interest or right to the said assets so in their hands, other than the stockholders of the defendant company, that said assets are of the face or nominal value of \$2,850,000, and of about \$2,700,000 in value, if properly and conservatively administered. Then, after a statement of a certain agreement with the Attorney General of the state of Pennsylvania, as to a plan of liquidation by said receivers, from which it is averred the said Attorney General afterwards receded, they proceed as follows:

"Inasmuch as such assets must be liquidated and as the Iron City Trust Company is, under the decree of the court of Dauphin county, dissolved and rendered legally incapable of making contracts and otherwise transacting business, it is necessary that the said assets shall remain in the custody of the receivers appointed by this court for administration and distribution until the trust now in the hands of the court shall be fully performed.

"Your respondents further say that this court is competent, and having taken such assets into its control, it is proper that it proceed to their full administration and that, in accordance with such decree of dissolution of the company, it proceed with the distribution of such assets to the persons entitled thereto, being stockholders.

"Your respondents protest against the removal of such assets out of this court into the common pleas court of Dauphin county, Pa., but pray the court to retain the same, because it is unnecessary, it will involve increased expense and delay in their administration, and such proceeding is unwarranted in law and the circumstances and against equity and the best interests of the owners of the assets, and because no public good or rights of any other person will be subserved by so doing."

On January 2, 1909, 13 petitions were presented to the court by stockholders of the trust company, and an order or decree was thereupon made which, after reciting the names of the petitioners, directed that:

"The Glens Falls Insurance Company of the state of New York is allowed to intervene as party plaintiff in this proceeding pro interesse suo and as representative of a class composed of the above-named petitioners."

On January 5, 1909, the original plaintiffs in the said suit in the court below, members of the firm of McKeefrey & Co., filed their petition to amend and supplement the original bill of complaint, in which, after reciting the facts stated in the original bill of complaint and the appointment of receivers thereunder, and the payment in full of all liabilities, and the fact that assets remained in the hands of said receivers exceeding \$2,500,000 belonging to the stockholders of said company, including the petitioners, they proceed as follows:

"Third. That since the institution of said proceeding and the appointment of receivers therein, the common pleas court of Dauphin county, Pa., upon the petition of M. Hampton Todd, Attorney General of the state of Pennsylvania, decreed that the said Iron City Trust Company be and the same is dissolved and its affairs wound up, which decree unappealed from is now final.

"Fourth. That by reason of the facts hereinbefore recited and of the said decree of the common pleas court of Dauphin county, Pa., dissolving the defendant corporation, it is necessary that this court shall proceed to determine the ownership of the assets remaining in the hands of the receivers appointed by this court, and to distribute the same to the persons entitled thereto, who are your petitioners and the remaining stockholders of the Iron City Trust Company.

"Wherefore, your petitioners pray that this petition may be filed as an amendment or supplement to the original petition filed in this proceeding and they pray your honors to make a further order in said proceeding directing the receivers appointed by this court to proceed with the liquidation and distribution of the assets now remaining in the hands of said receivers and to distribute the same to your petitioners and other stockholders of said Iron City Trust Company in proportion to their interests therein."

Whereupon the court made the following order and decree:

"And now, January 5, 1909, the within petition being presented in open court, and the said defendant, Iron City Trust Company, being present by counsel, and assenting thereto, and J. Dennison Lyon, the receiver appointed by the court of common pleas of Dauphin county, Pa., being represented in court by counsel, it is now ordered, adjudged and decreed that said petition in this proceeding and the said original petition is amended accordingly.

"And it is now further ordered and decreed that H. S. A. Stewart, one of the receivers heretofore appointed by this court in this proceeding, having by order of this court been relieved from the further performance of this trust and all the powers and duties of the receivers having been committed to the co-receivers, Wm. L. Abbott, the said Wm. L. Abbott, as receiver, is ordered and directed to proceed as expeditiously as is advantageous to the trust with the liquidation of the assets remaining in his hands after the payment of creditors and the distribution of the proceeds derived from such assets to the persons entitled thereto, as hereafter determined and directed by this court."

On the same day, the court made the following order and decree upon the petition of the state receiver filed March 2, 1908, and his supplemental petition filed December 26, 1908:

"And now, to wit, January 5, 1909, this matter came on to be heard upon the petition and supplemental petition of J. D. Lyon, receiver of the Iron City Trust Company, appointed by the court of common pleas of Dauphin county, Pa., on which petition a rule was granted on W. L. Abbott and H. S. A. Stewart, receivers of the said Trust Company, appointed by this honorable court, to show cause why they should not be discharged from their trust and the assets in their hands turned over to the petitioner, and upon the answers thereto duly filed by W. L. Abbott and H. S. A. Stewart, receivers, upon consideration thereof, the rule to show cause is discharged and the petition and supplemental petition of J. D. Lyon, receiver, as aforesaid, are refused."

On February 6, 1908, Lyon, the receiver appointed by the Dauphin county court, appealed from the decree of January 2, 1909, and from the two decrees of January 5, 1909, and on the same day filed his specifications of error in relation thereto.

Afterwards, on February 13, 1909, the court below, on the petition of W. L. Abbott, as acting receiver of the trust company, made the following order or decree:

"And now, February 13, 1909, the foregoing petition having been presented in open court, it is ordered to be filed, and the receivers of the Iron City Trust Company are now granted leave to withdraw their petition for discharge filed in this proceeding on November 14, 1908. This order is made to take effect as of January 2, 1909."

On the same day, February 13, 1909, Lyon appealed from the last mentioned decree and filed his specification of error relating thereto.

The appellant now contends that the decree of January 2, the two decrees of January 5th, and the decree of February 13th, are erroneous.

No question as to the right of the court below to take jurisdiction of the cause presented to it by the bill and answer filed October 23, 1907, is here raised. In their brief the counsel for the appellant say:

"Our position is that for the purposes of this case we concede the jurisdiction of the circuit court and its receivers to administer this estate up until the time that all creditors had been paid in full and the rights of the complainants in the bill determined, and that the jurisdiction to this extent was not affected nor the proceedings abated by the subsequent dissolution of the corporation by the decree of the state court."

We are thus relieved from the duty of considering whether the Circuit Court's jurisdiction might have been successfully assailed either on the ground that the plaintiffs in the proceeding were mere simple contract creditors or for any other reason. The receivers of the court below have paid in full the claims of all creditors. The only question now to be considered therefore is, to whom shall the large surplus in the hands of the receivers, being assets worth over \$2,500,000, be delivered and paid. Shall it be to the stockholders of the dissolved corporation or to the receiver appointed by the state court?

Since the commencement of this suit, it has been decided by the Supreme Court of the state of Pennsylvania, in the case of Jones & Lincoln Savings & Trust Co., 222 Pa. 325, 71 Atl. 209, affirming the judgment of the court of common pleas of Philadelphia county, and adopting the opinion of Judge Wilson of that court as its own, that the statute of Pennsylvania of 1895, above referred to, does not confer such exclusive jurisdiction upon the court of common pleas of Dauphin county as to supersede and render void all other proceedings regularly and previously instituted in a court of competent jurisdiction, for the settlement of the affairs of a corporation. In the opinion referred to, Judge Wilson says:

"We have not been asked by the plaintiff to do anything which the statute above referred to authorizes. We are not asked to dissolve the corporation. We are not asked to give time for making good an impaired capital or to make a decree based upon proofs of unsafe or improper conduct of business. On the contrary, we are asked only to give a relief which is customary and often afforded, and which has no reference whatever to the remedies of a

public character that the statute affords. So far as we can see, there is nothing in any proper action which we have taken or may hereafter take in the case that will interfere with the commonwealth's effecting all that ought to be done, in any interest which needs to be regarded, without infringing upon the previously acquired jurisdiction of this court."

This is the construction given by the highest court of the state of Pennsylvania to the legislation of that state, with which we are here concerned. The jurisdiction of the court below in this suit is founded upon the diverse citizenship of the parties complainant and defendant in the original bill. Assuming the right of the court below to take jurisdiction of the cause, inasmuch as the appellant concedes that right, the court was exercising a jurisdiction concurrent with the courts of the state of Pennsylvania, and it was administering the law of that state. What a state court could have done, it could do. The decision of the Supreme Court of Pennsylvania, above referred to, sets at rest any doubt as to the jurisdiction of the court below to entertain a suit, unaffected by the proceedings in the Dauphin county court of common pleas, under the provisions of the state statute above referred to.

But the question arises, What was the end of the litigation in the court below? In considering this question, we cannot ignore or be indifferent to these proceedings in the state court instituted by the Attorney General under the authority of the state statute above referred to. We should regard it as a state court would be bound to regard it, if the jurisdiction of such a court had been invoked in this case instead of the concurrent jurisdiction of the court below.

The defendant corporation was a creature of the laws of Pennsylvania, and by those laws the rules governing its existence were prescribed. The measure of control to be exercised over its own corporations was determinable by the law and policy of the state to which they owed their being. By the legislation here in question, the state of Pennsylvania has seen fit to subject such corporations to supervision and administrative control and has ordained the proceedings, partly administrative and partly judicial, by which the life of such corporations may be determined and their affairs wound up and liquidated. The judicial proceeding is not one that may be instituted by private parties, but by the Attorney General of the state, acting on behalf of the commonwealth and in the interest of the public. Such a proceeding is not one of which a United States court can have concurrent jurisdiction. It does not involve a controversy between private parties, whether citizens of the same state or of different states.

The Supreme Court of Pennsylvania has decided, as we have seen, that such proceeding does not exclude the jurisdiction of the courts, state or federal, as regards the ordinary litigation in which the corporation as a party may be involved, growing out of controversies of a private and civil nature. But such litigation clearly does not exempt the corporation involved from the control of the state law or in any wise abrogate or suspend the proceedings instituted by public officers under the authority of the law, for ending the life of such corporation and liquidating its affairs. That the life of the defendant corporation was ended by the decree of the Dauphin county court, is admitted on all

hands, and the further proceedings in the court below were had with the recognition of that fact. But under these proceedings, and in pursuance of their character, as determined by the bill filed by the complainants, as creditors, the receivers appointed by the court below had proceeded to take possession of the assets and administer the same for the purpose of paying the debts of the corporation. This, as we have seen, it is conceded the court below was competent to do, notwithstanding the proceeding subsequently instituted in the state court.

But the court below has clearly exhausted its jurisdiction, so far as the purposes of the original bill are concerned. That bill did not contemplate a dissolution of the corporation and a winding up of its business, indeed, the court was without jurisdiction for that purpose. The most that it could have done was, after the payment of all claims and the conservation of the defendant company's assets, to order the balance thereof remaining in its custody to be returned to the defendant corporation. It is, however, not denied that, by due proceedings had in accordance with the requirements of the state law, the corporation defendant has been dissolved and it is legally dead, and that the receiver appointed by the state court is the legal representative thereof. The position of such receiver presents a not remote analogy to that of an administrator duly appointed by a probate court representing the estate of his intestate. If an intestate die pending a suit by a creditor against him, and there be a surplus remaining after the creditor has been fully satisfied, the court will direct that surplus to be paid, not to the distributees of his estate, but to the administrator duly appointed as his legal representative. Without pressing this analogy too far, it serves to throw some light on the position of the receiver\* of the state court, the appellant in this case, in the demand made by his supplemental petition, that the balance of the assets remaining in the hands of the court, after the accomplishment of the purposes of the said suit, be turned over to him as the legal representative of the defunct corporation. This petition in no wise assumed or required that the proceedings in the court below should be abrogated or suspended. It was merely an application that the funds in the hands of the court, and about to be distributed, should be paid to him in his representative capacity, and not directly to the stockholders.

We do not think the refusal of the court by its decree of January 5, 1909, to grant the petition of the state receiver, can be justified by the allowance of the amendment to the bill by the other decree of January 5, 1909, and the intervention allowed by the decree of January 2, 1909. These two decrees changed the whole character of the bill, as a creditor's bill, and allowed the original complainants and others to appear in the character of stockholders, asking for a winding up of the corporation and the distribution of its assets. The amendment amounted to a new cause of action. "To insert a wholly different cause is not properly an amendment." *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158. But, apart from the propriety of allowing the amendment (a matter largely within the discretion of the court), it is clear that the court could not grant the prayer of the bill, as amended. This court, as well as the court below, is administering the law of Pennsylvania, and

no statute of that state has been brought to our attention by which a court of equity is authorized to dissolve a corporation or wind up its affairs and sequester its property. 5 Pom. Eq. Jur. § 119. "It is well settled that, in the absence of a statute enlarging its powers, a court of equity has no jurisdiction at the suit of a shareholder or other private person, to dissolve a corporation." *Pearce v. Sutherland* (C. C. A. 9th Circuit) 164 Fed. 609; *Conklin v. U. S. Shipbuilding Co.* (C. C.) 140 Fed. 219. So far as appears, the only statute of Pennsylvania is the one above referred to, providing for the dissolution of the corporation, at the instance of the Attorney General of the state, and the winding up of its affairs by a receiver appointed by the court for that purpose. The Supreme Court of Pennsylvania in the opinion which we have already cited, while deciding that proceedings under this statute were not exclusive of the ordinary suits in which corporations might be involved in state courts other than the court of common pleas of Dauphin county, by no means decided that there was concurrent jurisdiction in any of those courts in a private suit to dissolve or wind up the affairs of the corporation.

There was no doubt convenience to all the parties concerned in the course adopted by the court below in this particular case, in ordering the funds in its hands to be paid directly to the stockholders, and we may admit that both time and expense would be saved thereby, but we cannot, on the score of convenience in this particular case, arbitrarily disregard the demand made by the state through its official representatives. The state of Pennsylvania has seen fit, in the exercise of its plenary control over its own corporations, to provide for their dissolution, and has created an officer through whose hands the assets of a defunct corporation must pass to its stockholders. This legislation controls us, as it would control a state court, and we are compelled to the conclusion that there was error in the decree of the court below denying the petition of the state receiver.

The decrees appealed from must therefore be reversed, and it is so ordered.

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**O'HARA v. BROWN HOISTING MACH. CO.**  
(Circuit Court of Appeals, Third Circuit. May 4, 1909.)

No. 13.

**1. MASTER AND SERVANT (§ 101\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DEFECTIVE TOOLS.**

A mere imperfection in a tool furnished by a master for the use of his servants, by reason of which bodily injury results to a servant, does not necessarily import actionable negligence on the part of the master, the extent of whose obligation is to exercise reasonable care to provide reasonably safe tools.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171-174, 180-184, 192; Dec. Dig. § 101.\*]

**2. MASTER AND SERVANT (§ 125\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DEFECTIVE TOOL.**

Plaintiff, employed by defendant as an iron worker, while holding a chisel which was being struck by another employé with a sledge, was

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

struck in the eye and injured by a fragment which broke from the face of the sledge. The sledge was purchased from a manufacturer of high standing and was not known to be defective, nor did it appear that there was any defect therein which could have been discovered by a reasonable inspection. *Held*, that such facts did not establish any negligence on the part of defendant which rendered it liable for the injury, which must be regarded as the result of an accident without culpable negligence on the part of any one.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-246; Dec. Dig. § 125.\*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

T. Mercer Morton, for plaintiff in error.

David Reed, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. In this case John O'Hara seeks by writ of error to reverse a judgment rendered against him by the Circuit Court of the United States for the Western District of Pennsylvania, in an action of trespass brought by him against the Brown Hoisting Machine Company, hereinafter referred to as the defendant. The judgment was entered on a verdict for the defendant returned by direction of the court and the substantial question raised by the assignments of error is whether the court erred in directing under the pleadings and evidence such verdict. O'Hara in his statement of claim, among other things, alleged as follows:

"The plaintiff on and prior to the 20th of November, 1906, was in the employ of the defendant as a structural iron worker, and on the date aforesaid, while attending to, and in the course of his duties as such employé, he was holding a certain steel cutter, or chisel, on a certain iron, or steel, rivet, while another employé of the defendant, in the performance of his duty, struck said cutter, or chisel, with a sledge of iron and steel weighing about eight pounds, when, by reason of said sledge being a defective, improper and dangerous tool, a piece of steel from off the face or surface of same, struck, penetrated and became imbedded in plaintiff's left eye, injuring it to such an extent that it was destroyed and had to be taken out. Plaintiff avers that the said injury was caused through the negligence and carelessness of the defendant aforesaid, not regarding its duty in that behalf, in failing to provide its employés safe and proper tools for the doing of their said work, viz.: in failing to provide said employé, using said sledge, with a good, perfect, safe and proper sledge with which to strike said cutter in the hands of the plaintiff; but, on the contrary, the same was so caused by reason of defendant furnishing said employé using said sledge with a tool which was dangerous, defective, cracked and improper, without the knowledge or consent of the plaintiff as to the condition of the same. And the plaintiff avers that the defendant well knew, or on the exercise of such reasonable care as it was its duty to exercise in the premises, should have ascertained, and known, of the defective and dangerous condition of said sledge."

That the plaintiff lost an eye through its penetration by a minute piece of steel detached from the face of the sledge or maul when, in the hands of another workman, it struck a chisel held by the plaintiff, is beyond doubt. No element of contributory negligence on the part of the plaintiff, or of negligence on the part of his fellow-servant who

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

used the sledge, is presented in the case. The only substantial question with which we have to deal is whether the defendant was guilty of actionable negligence in not ascertaining the imperfection in the sledge and preventing its use before the occurrence of the accident. A mere imperfection in an implement or tool furnished by a master by reason of which bodily injury results to his servant does not necessarily import actionable negligence on the part of the former. One of the duties of a master is to exercise reasonable care and circumspection to provide reasonably safe tools and implements to be used by his servants, and he owes this duty not only to those of his servants who are to use them, but equally to other servants in close proximity to those by whom they are to be used. But the master is not an insurer either of the absolute safety or reasonable safety of tools furnished by him. The extent of the obligation resting on him in this connection is to exercise reasonable care and circumspection to provide reasonably safe tools and when he has done this he has fully performed his duty and cannot be held liable for the consequences of any undiscovered defects or imperfections in them. It appears from the evidence that the sledge in question, together with many others, was obtained by the defendant from a tool manufacturing company of high standing, and there is nothing to indicate that when purchased it was not in all respects sound and perfect. It fairly may be inferred that whatever defect existed in it immediately before the accident was the result of use or wear. So far as a master is under an obligation to mend or repair tools his duty is to exercise reasonable care to keep them in reasonably safe and proper condition, and this duty is primarily that of the master, and is not discharged or affected by the selection or appointment of any particular person or persons to make or supervise such mending or repairing; the negligence of such person or persons in such case being the negligence of the master, and not merely that of a fellow-servant or fellow-servants for the consequences of which the master enjoys immunity. The cases have established a limitation on the duty of the master to inspect tools and implements used by his servants and to mend or repair the same with reasonable care. A distinction is drawn between common and ordinary tools used by ordinary workmen, who by the nature of their employment may fairly be considered competent to ascertain and remedy their defects resulting from use and wear, and tools of special construction which for their maintenance in safe and proper condition require the attention of men skilled in the inspection and repair of similar appliances. To fasten on the master the duty of inspection with respect to such common and ordinary tools would place an undue and frequently insupportable burden on his shoulders, unreasonable to require and forbidden by the exigencies of business. The master is entitled to rely on the presumption that servants using such tools will seasonably discover defects of which the master has no knowledge or notice. But with respect to tools of special construction requiring skilled and special knowledge for their proper maintenance the duty of inspection and examination cannot be shifted from the master to the servant, and the former will be held liable for injuries resulting from an omission of reasonable care in that regard. In this case there was much



discussion between counsel over the question whether the sledge used at the time of the plaintiff's injury was a common and ordinary tool not requiring inspection by the defendant, or a tool of special construction requiring such inspection. In view of the evidence we do not regard this contention as material. There is absolutely no proof showing or tending to show that the defendant, or any of its officers, agents or employes, had prior to the accident any knowledge, intimation or suspicion that the sledge was in any respect unsafe or defective. If it be considered a common and ordinary tool there was, therefore, no liability on the part of the defendant for the accident. On the other hand, if regarded as a tool of special construction, requiring inspection and examination with reasonable care by the defendant, through the custodian of its tools and implements, or any of its other servants or agents, we are equally unable to perceive any ground on which the defendant can be held liable. On the latter hypothesis the defendant was bound to an exercise of only reasonable care. It owed no duty to exercise extreme care or make a microscopic examination of the face of the sledge. Whatever crack or fracture it contained prior to the accident was so minute as not to be calculated to disclose itself to the eye of one either using it or looking at it with only ordinary attention. The sledge had been used before and nothing had occurred to suggest that it was in any respect unsound or dangerous. Under the circumstances the defendant cannot, we think, be held liable without requiring of it more than the law demands or would justify. The lamentable bodily injury suffered by the plaintiff must be regarded as the result of an accident without culpable negligence on the part of any one. The law unfortunately can afford him no reparation. The judgment of the court below, therefore, must be affirmed with costs, and it is so ordered.

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UNITED STATES v. MARTORANA.

(Circuit Court of Appeals, Third Circuit. May 25, 1909.)

No. 20.

**ALIENS (§ 68\*)—NATURALIZATION—SUFFICIENCY OF PETITION—AMENDMENT.**

Under Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 420), which requires a petition for naturalization to be verified by the affidavits "of at least two credible witnesses who are citizens of the United States," stating certain facts relating to the applicant, a petition not so verified by at least two persons who are citizens is not merely voidable but void, and cannot be amended.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 68.\*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 159 Fed. 1010.

Wm. S. Gregg, for appellant.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BRADFORD, District Judge. This is an appeal by the United States of America from an order or decree of the District Court of the United States for the Eastern District of Pennsylvania admitting Santi Martorana to citizenship. It appears from the record that Lorella S. Martorana, his wife, one of the two original witnesses verifying the petition for naturalization, was not at the time it was filed a citizen of the United States; that on the day fixed for final action on the petition a motion made on behalf of the United States for its dismissal on that ground was denied; that the applicant was permitted by the court below to amend his petition by having it verified by a competent witness in lieu of Mrs. Martorana and by reposting the names of the witnesses for the period of ninety days before another day fixed for final action on the petition; and that under these circumstances and after the expiration of such period of ninety days the court below by order or decree admitted the petitioner to become a citizen of the United States. Admission to citizenship is wholly a subject of statutory law or treaty stipulation. Aside from affirmative legislation or treaty provision by the state or nation whose protection and privileges are sought by a foreigner, there is no inherent right in him to enjoy such protection or privileges and no obligation on its part to permit him to do so. Of necessity every state or nation must determine for itself who shall enjoy the rights of membership in the body politic of which it consists, and before a right to such enjoyment can be acquired by an alien all the prescribed conditions must be fully satisfied. The act of June 29, 1906, c. 3592, relating to the naturalization of aliens, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 419) expressly declares, among other things, that there shall be at least two verifying witnesses to the petition who are "citizens of the United States," and that they shall state in their affidavits that they have "personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States." We think that compliance with these requirements is essential to the validity of the petition, and that there is no sound distinction between a petition sworn to by only one witness and a petition not sworn to by any witness. In either case the petition is not voidable, but void. It is a nullity, and as such cannot be amended, as in point of law there is nothing to amend by, and nothing to amend. The provision in section 6 for summoning other witnesses in case those named by the applicant can not be produced manifestly relates to the means of proving the material averments contained in a valid petition and has no bearing on the question of the validity or invalidity of a petition not duly verified before filing by at least two citizens of the United States. Any view of the operation of the act antagonistic to that now expressed would, we think, be not only unwarranted by the canons of statutory construction, but calculated to produce confusion in the administration of the law. Section 6 of the act provides, among other things, that "petitions for naturaliza-

tion may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition." If a petition having no or only one verifying witness, or no or only one competent witness, can be amended by its verification by two competent witnesses or an additional competent witness, as the case may be, for what period of ninety days shall the name or names of such witness or witnesses be posted? If the name of only one competent witness has already been posted will it be necessary to post his name for an additional period of ninety days together with the name of the substituted witness? It is unnecessary to multiply such suggestions to show that departure from the express provision of the act is calculated to lead to uncertainty and questions which should be avoided. It is much simpler and will, we think, involve no undue hardship to aliens seeking to acquire the rights and privileges of American citizenship to require them to conform to the plain mandate of the law.

For the reasons given the order or decree appealed from must be reversed, with costs, and it is so ordered.

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WHOLY v. BRITISH & FOREIGN S. S. CO., Limited.

(Circuit Court of Appeals, Second Circuit. May 25, 1909.)

No. 277.

SHIPPING (§ 84\*)—LIABILITIES OF VESSEL—TORTS—PERSONAL INJURIES.

Where a section of a hatch cover was so short as to require blocking to keep it in place, but the cover was not otherwise defective, the injury of a longshoreman by the tipping of such cover, which fellow workmen had failed to block when replacing it, is chargeable to the negligence of fellow servants, and the vessel is not liable therefor.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 349; Dec. Dig. § 84.\*]

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal to review a decree of the District Court (158 Fed. 379) dismissing the libel of libellant, a longshoreman, who was injured by the tipping up of a section of hatch cover, which caused him to fall into the hold of respondent's steamer *St Fillans*.

Alvin C. Cass (Avery F. Cushman, of counsel), for appellant.

Wing, Putnam & Burlingham (James Forrester, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The majority of the court are unable to distinguish this case from *McDonnell v. Oceanic Steam Navigation Co.*, 143 Fed. 480, 74 C. C. A. 500. In that case, as in this, the section of hatch

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cover, which was so short as to require blocking to keep it in place, gave way because it was not wedged, so as to bear properly on the flange. We held in the earlier case that the negligence was that of defendant's fellow servants in setting the cover without wedging it, and that there could be no recovery. In the case at bar the District Judge found that:

"There are but two explanations of the accident. Either the stevedore who chocked this particular hatch cover wedged it in such a position that it did not have sufficient purchase at the lower end, or, if he inserted the blocks properly and rendered the hatch cover immovable, its condition was thereafter changed through the actions of the stevedores themselves prior to the time of the action, and on neither theory can the vessel be held liable."

In these findings and conclusion we concur. This case is distinguished from *International Mercantile Marine Co. v. Fleming*, 151 Fed. 203, 80 C. C. A. 479, by the circumstance that in that case the appliances for covering the hatch "had become dangerous by the accumulation of débris which had so hardened in the slots that the strong-back which was, so to speak, the keystone of the structure, could not be properly set, thus rendering the entire covering unsuitable and dangerous." There is no testimony of any such condition here.

The decree is affirmed, with costs.

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ST. LAWRENCE TP. v. FURMAN.

(Circuit Court of Appeals, Eighth Circuit. June 3, 1909.)

No. 2,912.

**1. MUNICIPAL CORPORATIONS (§ 943\*)—BONDS—LIMITATION OF INDEBTEDNESS—CONSTRUCTIVE NOTICE.**

A purchaser of bonds of a municipality which is subject to a constitutional provision limiting its indebtedness to a certain percentage of its assessed valuation is bound to ascertain at his peril from the public records the amount of such valuation, and recitals in the bonds that they do not exceed the limitation afford him no protection in that respect.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1976; Dec. Dig. § 943.\*]

**2. MUNICIPAL CORPORATIONS (§ 943\*)—BONDS—CONSTRUCTIVE NOTICE OF ILLEGALITY.**

If municipal bonds disclose upon their face an issue in excess of the constitutional limitation, a purchaser cannot rely upon a recital to the contrary.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1976; Dec. Dig. § 943.\*]

**3. MUNICIPAL CORPORATIONS (§ 943\*)—BONDS—CONSTRUCTIVE NOTICE OF ILLEGALITY—"TENOR."**

Bonds of a municipality contained recitals as follows: "This bond is one of a series numbered from 1 to 23 inclusive of like tenor and date." The bonds in suit were Nos. 17 to 23, inclusive, and were for \$500 each. *Held*, that the use of the word "tenor" fairly imported that the other bonds were for the same amount, and that a purchaser was charged with notice of such fact, and that such bonds were the last of the series and

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index

consequently illegal, since the aggregate amount far exceeded the limit placed upon the indebtedness of the municipality by the state Constitution.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 943.\*

For other definitions, see *Words and Phrases*, vol. 8, p. 6915.]

Riner, District Judge, dissenting.

### In Error to the Circuit Court of the United States for the District of South Dakota.

This is an action brought by the plaintiff against the township of St. Lawrence, in Hand county, S. D., to recover the principal and interest on six municipal bonds for \$500 each. The bonds contain the following statement: "This bond is one of a series numbered from 1 to 23 inclusive, of like tenor and date." The entire series was put out in three separate issues. Nos. 1 to 6 for \$500 each were sold November 6, 1891. Nos. 7 to 16, combined into two bonds for \$1,000 each, one bond for \$2,500 and one for \$500 (making the aggregate of 10 bonds for \$500 each), were issued January 3, 1893. The last issue, the one here involved, embracing Nos. 17 to 22, inclusive, being six bonds for \$500 each, were issued November 4, 1894. The Constitution of South Dakota limited the indebtedness of the defendant to 5 per cent. of the assessed value of its property. At the time of the first sale of bonds in 1891, that value was \$86,905. At the time the bonds here in suit were sold, it had increased to \$112,033. At that time, therefore, the debt limit fixed by the Constitution was \$5601.65. The bonds contained the following recitation: "It is further certified that the amount of this issue does not exceed the limit prescribed by the Constitution and laws of the state of South Dakota." The bonds do not state specifically on their face the total amount of the issue. Their only reference on that subject is the statement contained in each bond that it is "one of a series numbered from 1 to 23, inclusive, of like tenor and date." The township bases its defense upon the constitutional limitation. The plaintiff claims an estoppel upon the recital of the bonds that they did not exceed that limit. By written stipulation the case was tried before the court without a jury, and resulted in a judgment in favor of the plaintiff for the full amount claimed.

A. K. Gardner (R. W. Stewart, on the brief), for plaintiff in error.

A. B. Fairbank (Crawford, Taylor & Fairbank, on the brief), for defendant in error.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

AMIDON, District Judge (after stating the facts as above). The validity of the bonds is conditioned by the Constitution upon two facts: The assessed value of the taxable property of the township, and the amount of its indebtedness. All the authorities agree that the purchaser of municipal bonds subject to such a limitation is bound to ascertain at his peril from the public records the assessed valuation of the property within the municipality. Recitals in the bonds afford him no protection upon that subject. *Suttliff v. Lake Co. Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; *Gunnison Co. Commissioners v. Rollins*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689. These authorities are equally emphatic that, if the bonds disclose upon their face an issue in excess of the constitutional limitation, a

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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purchaser cannot rely upon a recital to the contrary. In our judgment the bonds here sued upon, when properly construed, contain such a disclosure. Each bond stated that it was one of a series numbered from 1 to 23, inclusive, of like tenor and date. The bonds in suit also show upon their face that they were the last of the series, and fairly import that the preceding numbers had already been issued. Does the statement that all the series were of "like tenor" fairly indicate that the bonds were all for \$500 each? We think it does. The word "tenor" has a clear, legal signification. According to Bouvier it means "an exact copy of a writing, set forth in the words and figures of it. It differs from purport, which is only the substance or general import of the instrument." So far as we are aware, the term has never had any other meaning in the law. It is here used in a legal instrument, and, there being nothing to evidence a different intent, it should be given its ordinary legal significance. So interpreted, the bonds clearly informed the purchaser that their issue created an indebtedness of \$11,000, a palpable violation of the constitutional restriction. An estoppel cannot arise in favor of the purchaser of municipal bonds which thus bear upon their face the evidence of their invalidity.

The decision cited by defendant in error, *Town Council v. Union National Bank*, 75 Miss. 1, 22 South. 291, is not controlling. In that case a municipal corporation was authorized to issue refunding bonds. The act provided that the new bonds should be of like tenor with the old ones. The new bonds were issued in different denominations. They were, however, exchanged for the old bonds, which were destroyed, and the indebtedness was in no way increased by the change in the denominations. The suit was brought on the refunding bonds, and payment was resisted because they were not of like tenor with the old ones. The provision of the statute, however, was merely directory, and not a limitation upon the power of the municipality, and, the defendant having received the full consideration, the court very properly held that the defense was untenable. Here the question is presented in an entirely different form. We are asked to say what the fair and usual meaning of the words "like tenor" is when used in a municipal bond, and, for reasons already explained, we think it should receive its well-recognized meaning in the law.

The judgment is reversed, and a new trial granted.

RINER, District Judge, dissents.

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BRANDON et al. v. McCAUSLAND et al.

(Circuit Court of Appeals, Eighth Circuit. June 3, 1909.)

No. 2,923.

1. FRAUD (§ 58\*)—ACTION FOR DECEIT—BURDEN AND SUFFICIENCY OF PROOF.

A plaintiff, who seeks to recover damages for deceit, has the burden of proving by a preponderance of the evidence, not only the false representations, but the amount of damages which he suffered thereby.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 58.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## 2. FRAUD (§ 49\*)—ACTIONS—VARIANCE.

An action for deceit, based on allegations that defendants gave plaintiffs a mortgage on property which they represented to be free of incumbrance, whereas it was in fact either not in existence or incumbered for more than its value, is not supported by evidence showing that the defendants sold the property and diverted the proceeds to other uses.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 49.\*]

In Error to the Circuit Court of the United States for the Western District of Missouri.

Defendants in error were the plaintiffs below. Their complaint sets up a cause of action for deceit. It alleges that defendants executed a mortgage to them, purporting to cover 220 head of cattle, and containing a warranty that the cattle were free and clear from all other incumbrances. It is further alleged that defendants expressly represented that the cattle were in existence, and were free from all other liens. The fact is charged to be that the cattle either were never in existence at all, or were covered by other prior liens for more than their value. It is further alleged that plaintiffs, in reliance upon these representations, and without knowledge of their falsity, loaned to defendants the sum of \$9,420, of which amount they lost \$5,671.11, for which sum they claim damages.

On the trial, in support of this complaint, one of the plaintiffs testified that at about the time the mortgage matured he inquired of one of the defendants about the cattle, and was told by him that defendants never owned the cattle at any time. This evidence was squarely denied by the defendants, and evidence adduced showing beyond any doubt that they did own cattle corresponding to those mentioned in the mortgage, which were pastured during the summer, and prepared for market upon the farm where it was stated in the mortgage they were located, and that in the fall they were shipped to market, sold, and the proceeds paid to other creditors.

No evidence sufficient to support a verdict was offered by the plaintiffs as to the value of the cattle. The only testimony on that subject was vague and to the effect that the cattle were hardly worth as much as the mortgage indebtedness. It also appeared from the evidence that nearly all the consideration for the note secured by the mortgage was an antecedent debt, and no evidence was adduced by the plaintiffs showing what in fact was parted with in reliance upon the alleged false representations. At the conclusion of the testimony defendants moved for a directed verdict, which motion was denied, and the case submitted to the jury, resulting in a verdict and judgment in plaintiffs' favor.

Bruce Barnett and Ralph F. Lozier, for plaintiffs in error.

Denton Dunn (Henry D. Ashley and William S. Gilbert, on the brief), for defendants in error.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

AMIDON, District Judge (after stating the facts as above). Few things are more elementary in the law than that a plaintiff who seeks to recover damages for deceit has the burden of proving by a preponderance of the evidence not only the false representations, but the amount of damages which he suffered thereby. *Ming v. Woolfolk*, 116 U. S. 599, 602, 6 Sup. Ct. 489, 29 L. Ed. 740; *Stratton's Independence v. Dines*, 135 Fed. 449, 68 C. C. A. 161. This the plaintiffs in the present case wholly failed to do. They neither showed the value of the cattle upon which they thought they were obtaining a first mortgage, the amount of prior mortgages, nor the value of the con-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

sideration with which they parted. The debt being an old one, and, so far as the evidence discloses, being unsecured, the mortgage set up in the complaint, even if it was on fictitious property, left the plaintiffs in no worse plight than they were at the time it was given. It is not even alleged in the complaint that they might have made their debt had it not been for this renewal; but, if such a claim had been put forward, it would not support an action for deceit. *Bradley v. Fuller*, 118 Mass. 239; *Austin v. Barrows*, 41 Conn. 287. Because the plaintiffs failed to show that they were damaged in fact, or the amount of their damages, the defendants' motion at the close of the testimony for a directed verdict should have been granted.

Again, the court in its charge used the following language:

"If you find that the property was in existence, and not covered by other mortgages, and the defendant allowed the proceeds to be diverted to other channels, then that would be a fraud upon the plaintiffs, and they would be entitled to recover."

The defendants excepted to this portion of the charge. It was a clear departure from anything contained in the complaint, and therefore was an improper ground of recovery to submit to the jury.

The plaintiffs in this case sought to make out a cause of action for deceit for the purpose of saving their claim from being barred by proceedings in bankruptcy. In the pursuit of this theory they wholly disregarded the facts. The result is that their judgment is void, and must be set aside, and a new trial granted.

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#### BALLOT v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. April 28, 1909.)

No. 818 (2,050).

#### APPEAL AND ERROR (§ 125\*)—REVIEW—JUDGMENT BY CONSENT.

An appellate court will not take jurisdiction to revise a judgment entered by agreement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 883; Dec. Dig. § 125.\*]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

The Circuit Court affirmed without written opinion a decision by the Board of United States General Appraisers, which had been rendered on the authority of *U. S. v. Scruggs*, 156 Fed. 940, 84 C. C. A. 440.

Searle & Pillsbury (Everit Brown, of counsel, and Charles I. Searle, on the brief), for importer.

William H. Garland, Asst. U. S. Atty., and Asa P. French, U. S. Atty.

Before PUTNAM, Circuit Judge, and ALDRICH and DODGE, District Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



PUTNAM, Circuit Judge. This is a case touching classification under the customs laws, in which a judgment was entered against the importer in the Circuit Court. Thereupon the importer appealed to us.

It appears that the case was not judicially considered by the Circuit Court. On the other hand, the following is shown by the record in that court:

"Counsel for the respective parties hereto consent to the entry of an order of affirmance herein without further notice; the said consent being given to expedite the final decision of the issue at bar in the United States Circuit Court of Appeals, and said order to be without prejudice to the right of appeal of the importers therefrom."

This was followed by an order of the court, to wit:

"Now, after reading and filing the foregoing consent of the parties hereto by their respective counsel, the decision of the Board of General Appraisers is affirmed in accordance therewith."

Thereupon the appeal was allowed, accompanied with an assignment of errors which opens:

"The above appellant hereby assigns error to the decision and judgment," etc.

As there was no judgment of the Circuit Court in a just sense of the word, there was no error; but we do not leave the matter on this technical statement. If we hear this appeal, we disregard the statute establishing this court, which constituted it for this purpose an appellate tribunal; and substantially we would act as a court of first instance. This is not only not allowable according to the rules of law, but, if accepted as a precedent to be followed, would naturally result in a constantly widening departure from what the statute contemplates, throwing on this court a burden which it is not proper for it to assume. Therefore the appeal must be dismissed. We are at liberty to state that our conclusion in this respect is in harmony with the informal opinions of the two Circuit Judges who did not sit on this appeal.

We have, however, while considering the question of dismissal, incidentally opened the record on the merits. The question presented here is between paragraphs 369 and 387 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedules K, L, 30 Stat. 184, 186 [U. S. Comp. St. 1901, pp. 1667, 1669]). The United States rests on paragraph 369 and the importer on paragraph 387; the former being in the wool schedule and the latter in the silk schedule. As stated by Judge Adams, who delivered the opinion in *United States v. Scruggs Company*, in behalf of the Circuit Court of Appeals for the Eighth Circuit, passed down on November 6, 1907 (156 Fed. 940, 84 C. C. A. 440), the issue there was precisely the same as it is here. It was decided in favor of the United States. Upon an issue so doubtful as this appears to be, if we passed on the merits, having regard to our usual practice, we would follow the decision in the Eighth circuit, even though we did not concur in all the reasoning of the opinion leading up to the final conclusion. That court had before it our opinion in *United States v. Walsh*, 154 Fed. 770, 83 C. C. A. 472, and

it contains nothing inconsistent therewith; but, so far as it observes upon it, it correctly interprets it.

The appeal is dismissed for want of jurisdiction, without prejudice, and without costs.

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HARRISON SUPPLY CO. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. April 28, 1909.)

No. 801 (1,756).

1. CUSTOMS DUTIES (§ 26\*)—CLASSIFICATION—IRON SAND—EJUSDEM GENERIS—"MANUFACTURES OF IRON."

In construing the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 124, 30 Stat. 159 (U. S. Comp. St. 1901, p. 1636), for "all iron in \* \* \* forms less finished than iron in bars, and more advanced than pig iron," *held*, that the test is the degree of advancement in manufacture, rather than in refinement or quality, and that iron sand, a finished manufactured article, is not within said provision, but is dutiable as "manufactures of iron," under paragraph 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.\*

For other definitions, see Words and Phrases, vol. 5, p. 4361.]

2. WORDS AND PHRASES—"ARTICLE."

The term "article" is commonly accepted, in trade and elsewhere, as something different from bulky and heavy commodities.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 511-515.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

The provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, pars. 124, 193, 30 Stat. 159, 167 (U. S. Comp. St. 1901, pp. 1636, 1645), referred to in the opinion herein, read as follows:

"124. \* \* \* Provided, that all iron in slabs, blooms, loops, or other forms less finished than iron in bars, and more advanced than pig iron, except castings, shall be subject to a duty of five-tenths of one cent per pound.

"193. Articles or wares not specially provided for in this act, composed wholly or in part of iron, \* \* \* and whether partly or wholly manufactured, forty-five per centum ad valorem.

Searle & Pillsbury (W. Wickham Smith and Walter F. Welch, of counsel, and Charles P. Searle, on the brief), for importers.

William H. Garland, Asst. U. S. Atty., and Asa P. French, U. S. Atty.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judges.

ALDRICH, District Judge. We think the decree of the Circuit Court in this case should be affirmed.

The collector assessed a duty upon the importation in question under paragraph 193 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]). This

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

classification was sustained by the Board of General Appraisers, and upon appeal to the Circuit Court the decision of the Board of Appraisers was affirmed. The opinion of the Circuit Court is reported in 164 Fed. 155, and fully describes the character of the importation, and sufficiently sets out the material part of the various paragraphs of the tariff act which require consideration in connection with the questions raised before us by the importer.

It is quite unnecessary, therefore, to dwell much upon the history of the case. The article in question was known as "iron sand." It is perfectly clear, and, indeed, it is admitted by the importer, that this product was wholly manufactured, finished, and ready for the ultimate use for which it was intended. It was manufactured or put in shape for use through melting iron and steel scraps, and through subjecting a thin stream of the molten metal to a blast of steam which scatters it into small particles varying in size, which, dropping into water, are chilled and shaped. They are then sifted, whereby the various sizes are segregated, and, being ready for use, are placed in burlap bags for shipment to the markets and to the trade. Although some parts of the scraps are steel, and although the point in the earlier stages of this proceeding was taken that the articles in question were not composed wholly of iron, that point is not urged, and it is understood that it is abandoned. Therefore, we have to deal only with a finished manufactured article composed wholly of iron.

In view of the sense in which the term "article" is commonly accepted, in trade and elsewhere, as something different from bulky and heavy commodities, if we were only to look at paragraph 193, it would seem quite clear that the manufactured article in question was covered by that paragraph; but the contention of the importer is that this particular article is not specially provided for in that paragraph, or anywhere in the tariff act, and that it properly belongs to the proviso to paragraph 124, because it is iron less finished than iron in bars, which are specified in paragraph 124. The argument in support of this contention is chiefly based upon the idea that it is less advanced in quality than iron in bars, and that the test is the degree of advancement in refinement or quality, rather than the degree of advancement in manufacture.

The consideration of a question of this kind, of course, necessarily involves statutory construction and the intention of the lawmaking power. It is difficult for us, and we think it would be unreasonably straining a point, to hold that Congress intended to place the infinitesimal particles of iron in question, in a perfect state of manufacture so far as intended use is concerned, and which, as said by the Circuit Court, belong to a manufacture aside from the ordinary line of development of iron, into comparison with the bulky iron slabs, the iron in bars, the pig iron, and the other kinds of bulky iron products in various stages of development which are specified in paragraph 124. Upon the particular question whether Congress intended to place a manufactured article of the character in question into a class with the forms of iron dutiable under the proviso of paragraph 124, it is quite significant that iron sand, according to the undisputed testimony, was not a product known to the iron and steel trade.

The argument of the importer is that his contention as to quality as the test is supported by the phrase, "other forms less finished than iron in bars," used in paragraph 124, and that, as the article in question is less advanced in the direction of refinement than iron in bars, it is within the proviso of paragraph 124; in other words, that it is in a more crude state in respect to quality than iron in bars. Under this particular contention as to quality, considerable reliance is placed upon *Roessler & Hasslach Chemical Company v. United States* (C. C.) 94 Fed. 822. It seems to us, however, that quality became the test in that case, because the words "article in a crude state" were used in the statute, and because the importation in question was "crude" in the tariff sense of that particular statute.

The argument of the importer apparently gets some support through analogy from the case of *United States v. Binney*, 82 Fed. 992, 27 C. C. A. 347. The decision in that case, upon a question treated as a doubtful one, was by Judge Townsend in the Circuit Court, and was affirmed by the Court of Appeals upon the opinion below. The case upon casual examination would seem to be quite close to the one we are considering. We think, however, on the whole, that it may be fairly distinguished from this case, because it would seem that the paragraphs in the two cases are somewhat different and that Judge Townsend's decision to some extent turned upon the exceptionally broad terms of paragraph 122, which was there in question, and which covered "steel ingots and steel in all forms and shapes," and because the article of importation in that case, although changed in form, remained steel.

The decree of the Circuit Court is affirmed, without costs.

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#### AMERICAN SURETY CO. OF NEW YORK v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909.)

No. 1,502.

#### POST OFFICE (§ 21\*)—TRANSPORTATION OF MAILS—BONDS.

Where a contract for transportation of mail provided that the contractor should account for and pay over all money of the United States which might come into his possession, he being only required to carry mail, and not to carry money as such, his surety was not liable, on his bond for the faithful carrying out of the contract, for the loss by robbery of money belonging to the United States, placed in his mail bag without his knowledge or acquiescence, even though he was an insurer of the safe delivery of money delivered to him for transportation with knowledge.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 21.\*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

For opinion below, see 155 Fed. 941.

The facts are stated in the opinion.

Brode B. Davis, for plaintiff in error.

Edwin W. Sims and Seward S. Shirer, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GROSSCUP, Circuit Judge. The judgment that this writ is brought to reverse is upon a verdict of a jury returned in pursuance of a direction of the judge that the jury should find the issues in favor of the defendant in error upon a certain count of the declaration hereinafter referred to.

The action was upon a bond given by the plaintiff in error to secure the performance of a contract between one George G. Travis and the United States, wherein the said Travis, in consideration of the sum of five hundred eighty-eight dollars per annum, beginning the 15th day of February, 1900, and ending the 30th day of June, 1903, agreed to transport the mails of the United States between the post office in Chicago, and the Masonic Temple station, the Stock Exchange station, and the Crilly station, in the same city. The contract, among other provisions, contained a provision that Travis should "account for and pay over all money belonging to the United States, which might come into his possession." And it is upon this provision that the judgment is based; for though the original declaration alleged negligence in the performance of the contract, whereby the government suffered injury, those counts were dismissed by the Circuit Court for want of evidence to support them.

The action grows out of the fact that on the 12th day of March, 1902, while transporting the mails, the wagon was robbed of a pouch containing fourteen hundred dollars and ten cents, postal funds, and two hundred twenty-eight dollars and twenty-five cents, money order funds, and some other sums, money belonging to the United States. The money thus lost had been enclosed by the Stock Yards post office station, in an envelope, addressed by the post master of that station to the cashier of the Central post office in Chicago, which envelope was enclosed in a pouch known as an inner pouch, enclosed, in turn, in the ordinary mail bag carrying first class matter. The contractor had no knowledge that the mail bag contained such sums of money, nor any money at all. Nor was he guilty of any negligence, either in the way of failure to put proper protections upon his mail wagon, or in his supervision thereof, or in any other respect, to which the robbery is chargeable. The liability of the contractor, and, in consequence, the liability of his surety, if any liability exists, rests wholly upon the provision of the contract above quoted, that he shall account for and pay over any money belonging to the United States that might come into his possession—in other words, the liability relied upon is that of insurer that any money belonging to the United States that may find its way into the mail bags will be delivered to its destination.

The contract between Travis and the government, was to carry the mails. The contract contained many provisions, some of them relating to the character of the wagons to be used, some of them relating to the prompt and proper performance of the service contracted, some of them making him accountable for the faithful performance of such service, not only to the United States, but to any other person aggrieved—provisions, one and all, looking to the safety and secure carriage of the mail—but all of them adjuncts to a mail carrying contract only. If the money lost through the robbery was in the mail thus carried, it must be dealt with so far as Travis's liability goes, as any oth-

er mail matter, viz.: that he shall be "accountable and answerable in damages to the United States, or to any other person aggrieved, for the faithful performance, by the said contractor, of all the duties and obligations herein assumed, or which are now or may hereafter be imposed upon him by law in this behalf"—a provision that does not include, of course, loss by robbery through no fault of the contractor; or it must be dealt with, not as mail, but as money of the United States entrusted to Travis for safe transportation—a view of the case that would not make Travis responsible, for the money was not delivered into his hands as money, and he had no knowledge that he was being made the carrier of money as such. Nor is there anything in the contract requiring him to carry money as money. Indeed the clause referred to has no place in the contract unless it was contemplated, that in addition to the carrying of the mails, the contractor might be entrusted at times with the carriage of post office funds—a possible additional duty under the contract, under which he could not become liable except in cases where he was consciously charged with the additional duty; for certainly the carrier of mail cannot be made liable for the loss of money, even under a provision making him an insurer of the safe delivery of such money, that has been slipped into his mail bag without his knowledge or acquiescence.

The judgment of the Circuit Court is reversed with instructions to grant a new trial, and to proceed further in accordance with this opinion.

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#### HUTCHINSON v. NORFOLK & W. RY. CO.

(Circuit Court of Appeals, Fourth Circuit. June 9, 1909.)

No. 862.

#### RAILROADS (§ 278\*)—INJURY TO PERSONS WORKING ON SWITCH TRACK—NEG-LIGENCE OF PERSON INJURED.

Plaintiff's intestate and another, who were employes of a coal company, were engaged in mending a broken rail on a switch track extending from the main line of defendant's railroad to the coal mine, when a freight train approached on the main line, and a brakeman told the workmen that they wished to place some empty cars on the switch. Deceased and his companion left the track while three cars were backed on the switch, and the train again pulled onto the main track, when they again went to work; the deceased sitting on the track with his back toward the nearest car, which was only six feet away. The engine, having left some intermediate cars, shoved three more on the switch, which struck those left before and pushed them ahead and over the deceased, causing his death. Deceased and his companion, being immediately behind the standing cars, were not seen by the trainmen. *Held*, that such trainmen were not negligent, but that the injury resulted from the negligence of deceased in going back on the track without first learning whether more cars were to be switched or observing the movements of the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 891-900; Dec. Dig. § 278.\*]

In Error to the Circuit Court of the United States for the Southern District of West Virginia, at Huntington.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This action was originally brought in the circuit court of Mingo county, W. Va., by the plaintiff in error against the defendant in error to recover damages in the sum of \$10,000 for the alleged wrongful killing of W. C. Little, the intestate of the plaintiff. Subsequently, upon the petition of the defendant, the case was removed for trial into the Circuit Court of the United States for the Southern District of West Virginia. The declaration was in trespass on the case, alleging generally that intestate was killed through the negligence of the defendant by and through its servants and employés. The defendant entered a plea of not guilty, and thus the issue was raised. The case was tried at Huntington in April, 1908, and after all the evidence, both for the plaintiff and defendant, had been introduced, the defendant demurred to the plaintiff's evidence, in which demurrer the plaintiff joined. The case was permitted by the court to go to the jury, and a verdict was returned in favor of the plaintiff for \$7,000 damages, subject, however, to the opinion of the court, thereafter to be rendered on the demurrer to the evidence. The court subsequently sustained the demurrer to the plaintiff's evidence and entered judgment in favor of the defendant. This action of the court constitutes the basis of plaintiff's exception and assignment of error upon which the case is before us for consideration.

#### Statement of Facts.

The Camp Branch Coal Company operates a mine near the town of Dingess, in Mingo county, W. Va., which mine is located near the main line of the Norfolk & Western Railway Company, the defendant in this action. The defendant owns a spur track, called the "Camp Branch switch," extending from its main line to the mine of the coal company. The coal company, however, keeps the switch in repair. The defendant company, when requisitions were made, would place empty cars from its main line upon and along the switch, and when the cars were loaded with coal would then pull them out on the main line and transport them to market. The Camp Branch coal mine is situated on the right hand side going eastward of the defendant's railway, and the switch or spur connecting the tipple thereof with the main line runs eastward from the tipple along the main line approaching nearer until a connection is effected.

W. C. Little, the intestate of plaintiff, was employed by the Camp Branch Coal Company, and on the morning of July 1, 1901, between 6 and 7 o'clock, the day he was killed, was working together with a man by the name of Green, also employed by the coal company, engaged in repairing a rail on the switch. The rail had been broken, and Little and Green were drilling holes to put in fresh plates, or angle bars, as they are sometimes called, to mend it. While the two were thus engaged, a train of freight cars pulled up and stopped on the main line, and a brakeman standing on top of one of the freight cars in the train called out to the two men and asked how the track was, that they were going to put some empty cars in. Little replied: "A rail is broken, and the track is not fit to go over; but I think you can put empties in above." The train, which was composed of 25 or 30 cars, had 6 empty cars to shift onto the switch. These 6 cars, however, were not all together; 3 of them being at one place in the train, and then, after some other intervening cars, were the other 3. When Little and Green were notified that empties were to be placed on the switch, they quit work, gathered up their tools and left the track in order that the empty cars might be moved in. The train then backed in upon the switch and left three freight cars standing, the end of the last one within about six feet of the place where Little and Green had been working. It then pulled out again onto the main line, moved about, and dropped the cars of the train until the other three empties to be moved upon the switch were in position. The train then moved back onto the switch again and pushed the three remaining empties up against those that had theretofore been put upon the switch; the time elapsing between the placing of the first three upon the switch and when the train moved back with the other three being variously estimated by the witnesses at from 5 to 20 minutes. In the meantime Little and Green, immediately after the placing of the first three cars, without notice to the operators of the train, and without being seen by any of them, went back to work upon

the track. Green sat down with his face towards the rear end of the last car of the first three, and Little, the intestate, sat astride the rail with his back towards the standing cars, and within about six feet of the end of the one in the rear.

The operators of the train did not give any signals or notice that they were coming in on the switch the second time, and the conditions were such that those handling the train could not see Little and Green, nor could the latter see the moving cars on the switch from where they sat. The empty cars last moved in ran up against the three standing cars, and these were shoved back sufficiently far for the rear one to run over and crush Little so that his death ensued shortly thereafter. Green, who was sitting, as before stated, facing Little, escaped unhurt. The evidence in the case further shows that the point at which Little was sitting when he was killed is about 90 feet in a direct course from the main line of the defendant, and that there were cars which belonged to the train standing on the main line at this point of distance when the second three empty cars were moved onto the switch.

It may be stated further that Green, who was the principal witness for plaintiff as to what occurred at the time of the accident, upon cross-examination, was somewhat more explicit than on the direct. He said that Little and himself had a ratchet drilling a hole at the place the rail was broken when the freight train moved up on the main line and stopped, that the brakeman called out to know if the track was all right, and that Bill (meaning Little) replied, "It is for empties, but not for loads." He said, "You can put empties in, but you cannot take any loads out until this rail is mended." Green said further: "They put in three cars and pulled out on the main line, and we put our ratchet back on the rail when they pulled out. We thought that they were going and that the train was not coming in. They were on the main line switching around."

Lace Marcum and Marcum & Marcum, for plaintiff in error.

John H. Holt (Theodore W. Reath and Holt & Duncan, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge (after stating the facts as above). The action of the Circuit Court in sustaining the demurrer to the evidence was in effect to direct a verdict for defendant, or in other words, to hold that taking the testimony in support of plaintiff's declaration to be true, together with all reasonable inferences to be drawn therefrom, it was not sufficient in law to establish plaintiff's contention.

We see nothing in the evidence upon which a jury would be warranted in finding that the defendant was negligent. There was nothing unusual in the operation of the train on the occasion of the accident; but, on the other hand, the spur track, or "switch," as it was called, was being used by the defendant in the ordinary manner and for the purpose for which it was constructed and maintained. The intestate had ample notice of the presence of the train on the main line and the intention of the operators thereof to run in and upon the switch with empty cars to be left for the use of the coal company.

When the train stopped upon its arrival and notified intestate and Green that the empty cars were to be placed upon the switch, they picked up the tools with which they were at work, left the track clear until the first three empty cars were moved in, then without making any inquiry or investigation whatever to ascertain if the train was coming upon the switch again, or even looking to see if the train had depart-



ed, and in face of the fact, as stated by Green, that the train was still "switching around" on the main line, they went back onto the track, and intestate sat down within six feet of the end of the rear car which had been moved in, with his back toward the car, in which situation he could not see the train moving, nor could those operating the train see him, and this action on his part was immediately after the placing of the first three cars on the switch. We think that intestate not only failed to use the care and precaution under the circumstances which prudence would have dictated, but that his conduct was careless to a degree bordering on heedlessness. This in our opinion was the sole cause of his death.

As we have stated, intestate went back upon the track and practically concealed himself from the operators of the train without any notice whatever to them that he was there. He did not know the number of empty cars that were to be placed upon the switch, and it was therefore his duty to wait at least a reasonable time in a place of safety and find out if more cars were to come in, especially in view of the fact that, as testified by Green, the train was still engaged in switching on the main line. If intestate had used his senses of sight and hearing, he could have known what was going on. The action of both Green and intestate is probably explained by Green's testimony, in which he says, "We thought the train had gone." It was not enough, however, to merely think, nor to act upon the thought; but the further duty devolved upon intestate under conditions of apparent danger to look and see, and if he had done this he would have discovered that the train was still there, was in motion, and was proceeding to use the switch again.

We conclude therefore that there was no error in the judgment of the Circuit Court sustaining defendant's demurrer to the evidence, and the judgment is therefore affirmed.

Affirmed.

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LEUNG JUN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 15, 1909.)

No. 295.

**ALIENS (§ 32\*)—DEPORTATION OF CHINESE—JUDGMENT—CONCLUSIVENESS.**

A United States commissioner, after hearing a charge against a Chinese person for alleged unlawful residence in the United States, rendered a judgment reciting that "upon a full hearing" it was ordered and directed that he be "discharged" on consent of the assistant United States attorney appearing in its behalf. The return of the writ also showed that the evidence proved that the defendant was born in the United States. *Held*, that the judgment was on the merits, and constituted a conclusive adjudication of the Chinaman's right to remain in the United States.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.\*]

Appeal from the Circuit Court of the United States for the Northern District of New York.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

For opinion below, see 160 Fed. 251.

This cause comes here upon appeal from an order of the Circuit Court, dismissing a writ of habeas corpus.

R. M. Moore, for appellant.

George B. Curtiss, U. S. Atty. and H. E. Owen, Asst. U. S. Atty.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Leung Jun, a Chinese person, applied for admission into the United States on November 18, 1907, presenting a judgment of discharge by a United States commissioner dated December 17, 1903. The only question presented upon this appeal is whether such judgment of discharge was rendered upon the merits. It is conceded that if it were the petitioner is entitled to entry, and the order dismissing the habeas corpus should be reversed. No question of identity is raised, although there is a slight variance in the spelling of the Chinaman's name. The judgment reads as follows:

United States Commissioner's Court, Northern District of New York.

United States of America v. Loung June, alias Leung Jun.

Before me, Benj. L. Wells, a commissioner of the District Court of the United States within and for said district, complaint was presented by F. W. Berkshire, of N. Y., N. Y., a Chinese inspector for said district, charging in substance that on or about the 11th day of August, 1903, at Burke, N. Y., in said district, one Loung June, in violation of the Chinese exclusion acts, statutes of the United States, did unlawfully come into and was found to be not lawfully in the United States, from the Dominion of Canada, and was then and there found within the United States, he being a Chinese person and laborer, and not a diplomat or other officer of the Chinese or any other government, and without producing the certificate required of Chinese persons seeking to enter the United States; and on the 4th day of December, 1903, said defendant was brought before me, the said commissioner, and the proceedings adjourned from time to time, and upon a full hearing upon said charge, Hon. H. E. Owen, the assistant district attorney of the United States of America, being present, Hon. R. Moore appearing for defendant.

And I hereby order and direct that said defendant be and he is hereby discharged, on consent of Assistant U. S. Attorney H. E. Owen.

I also certify that the photograph hereto annexed is a true likeness of said defendant.

Given under my hand and seal at Malone, in the Northern district of New York, this 17th day of December, 1903.

[L. S.]

Benj. L. Wells,

United States Commissioner, Northern District of New York.

It will be observed that this is not, on its face, an order of discontinuance or dismissal. It provides specifically that the defendant be "discharged." Moreover it recites that the defendant was brought before the commissioner and that action was taken "upon a full hearing." The mere statement that the United States Attorney consented to the discharge is not sufficient to overcome the presumption arising from these facts. He may have been satisfied, when the evidence was all presented, that defendant had proved his right to enter so clearly that further objection before the commissioner would be futile. Moreover, we are not left to mere presumptions. The return to the writ shows that the testimony which was produced before the com-

missioner, and after hearing which he discharged the prisoner, showed that Loung June (Leung Jun) was born in this country.

We are of the opinion that the judgment discharging petitioner, filed December 17, 1903, was upon the merits, and that the order appealed from should be reversed, and Leung Jun discharged.

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ROWLEY v. J. F. ROWLEY CO.

(Circuit Court of Appeals, Third Circuit. June 25, 1909.)

No. 48.

APPEAL AND ERROR (§ 1207\*)—REVERSAL—PROCEEDINGS AFTER REMAND—DECREE.

In a suit for unlawful competition in the use of the name "Rowley," the court restrained defendant from making or selling goods on which the address, covering, or appearance was such as would be likely to deceive the public or prospective purchasers, and from using the name "Rowley," with or without initials, in any manner whatever in the manufacture or sale of his goods. This decree was reversed solely on the ground that defendant was entitled to use "Rowley," which was his own name, provided an explanation was added, whereupon, on remand, the court entered a new decree restraining defendant from using the name "Rowley," without initials, in any manner whatever in the manufacture and sale of artificial limbs, and from using that name with initials in any manner whatever, unless accompanied by explanatory words sufficient to distinguish defendant's goods from those manufactured by complainant. *Held*, that such decree was a compliance with the instructions of the Circuit Court of Appeals in remanding the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4696-4699; Dec. Dig. § 1207.\*]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For former opinion, see 161 Fed. 94, 88 C. C. A. 258.

John H. Roney, for appellant.

Frank Ewing, for appellee.

Before GRAY, Circuit Judge, and LANNING and YOUNG, District Judges.

GRAY, Circuit Judge. This case came before this court on appeal, as No. 44 March term, 1908. In the court below, the appellee filed a bill, in which it charged the appellant with unfair competition in the use of the name "Rowley" upon articles manufactured by him. The court in its decree, after the usual injunction restraining the defendant (the appellant here) from making and selling any goods on which the dress, covering or appearance is such as would be likely to deceive the public or prospective purchasers; and from using samples or mailing letters or circulars, such as would deceive the ordinary purchaser into believing that the defendant's goods were the plaintiff's goods, also enjoined the defendant from the use of the name "Rowley," with or without initials, in any manner whatever, in the manufacture or sale of his goods. This court, on the appeal referred to, re-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

versed the decree of the court below, "solely upon the ground that there was error in restraining the appellant from using his own name, 'in any manner whatsoever,' instead of 'allowing the use, provided that an explanation is added.'" The cause was therefore remanded to the court below for further proceedings, to be there taken in accordance with the opinion of this court.

The court below thereupon entered a decree, the pertinent portion of which is as follows:

"And now, November 7, 1908, this cause having been remanded to this court by the United States Circuit Court of Appeals, Third Circuit, with instructions to modify the former decree entered herein and upon hearing and argument of counsel, upon consideration thereof, in accordance with the mandate of said Circuit Court of Appeals, it is ordered, adjudged and decreed that a perpetual injunction be granted in this cause against the said defendant, his agents, employés, servants or by any one acting in his behalf, restraining him and them from making and selling any artificial limbs in imitation of the goods made and sold by the plaintiff in which the dress, covering or appearance is such that it would likely deceive the public or prospective purchasers; from mailing letters or circulars such as would deceive the ordinary purchaser into believing that the defendant's goods were the plaintiff's goods; from the use of the name 'Rowley' without initials, in any manner whatsoever in the manufacture or sale of artificial limbs; from the use of the name 'Rowley' with initials in any manner whatsoever in the manufacture or sale of artificial limbs, unless in each and every instance in which the name is so used it is accompanied by explanatory words sufficient to clearly distinguish the goods manufactured from the goods of the complainant."

From this decree, the appellant has again taken an appeal to this court, in the present case, and in substance complains that the court below, in making the decree, has not conformed to the letter or spirit of the former decision of this court. We do not think that a discussion of this contention would serve any useful purpose. The decree of the court below, as above set forth, speaks for itself, and we content ourselves with the expression of the opinion that the court below in said decree has conformed to both the letter and the spirit of the instructions given by this court, in remanding the former case, and the same is hereby affirmed.

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#### SEEGER REFRIGERATOR CO. v. AMERICAN CAR & FOUNDRY CO.

(Circuit Court, D. New Jersey. June 21, 1909.)

1. PATENTS (§ 234\*)—INFRINGEMENT—CHANGE IN FORM OF PARTS.

Infringement is shown where the alleged infringing device operates on the same principle as that of the patent, and accomplishes the same result in substantially the same way by equivalent means; the only difference being in the form or proportions of the parts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 370; Dec. Dig. § 234.\*]

2. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—REFRIGERATOR.

The Quinn patent, No. 539,009, for a combined refrigerator and freezer, the important feature of which is a series of ports in the partition between the ice bunker and food chamber, which by siphonic action causes a continuous circulation of air in the refrigerator, was not anticipated,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and discloses invention; nor is it limited by a change in the wording of the claims made at the suggestion of the examiner in the Patent Office the effect of which was merely to more specifically define the invention; also *held* infringed by the refrigerator of the Ames patent, No. 625,309, which adopted the principle of the Quinn invention, with only some changes in form of the ventilating ports.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

8. CORPORATIONS (§ 428\*)—EQUITABLE ESTOPPEL—NOTICE TO CORPORATION.

Notice of matters to create an estoppel may be imputed to a corporation where the facts were known to all of the corporators, but not because they were known to some of them only.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1751; Dec. Dig. § 428.\*]

In Equity. On final hearing.

Wetmore & Jenner, Edmund Wetmore, and Oscar W. Jeffery, for complainant.

Betts, Sheffield, Bentley & Betts, Samuel R. Betts, and Paul Bakewell, for defendant.

CROSS, District Judge. The patent involved in this case was issued May 7, 1895, to Gilbert T. Quinn, assignor, to the G. F. Quinn Refrigerator Company. It is for a combined refrigerator and freezer, and is numbered 539,009. The inventor, describing his invention says:

"My invention relates to improvements in a combined refrigerator and freezer, and more particularly to certain principles of construction which tend to increase the refrigerating and freezing power and to regulate the degree of temperature.

"It consists in a containing case constructed with suitable air spaces and nonconducting walls and arranged and constructed interiorly as follows: Between the ice bunker and the refrigerating or freezing room is a partition formed by a series of angular sections arranged one above the other and forming between each two sections an open space leading from the refrigerating or freezing room into the ice bunker, the apex of each section extending above the lowest point of the section immediately above it, thus forming between each two sections an inverted V-shaped open space, the object of which will be hereinafter more fully set forth. Between the bottom of the ice bunker and the bottom of the refrigerator case is a series of ice supporting bars placed at short distances apart, and extending from the lower section of said partition over said ice bars, and thence to the wall of the ice bunker, is a wire netting to hold small particles of ice and salt. Underneath the ice bunker are an inclined drip pan and a trap leading down through the refrigerating case, and a partition which prevents the water from passing through into the refrigerating or freezing room. At the top of the refrigerating room is a ceiling inclined downwardly away from the ice bunker. The walls of the ice bunker have a shield with inclined openings therein leading to a cold air space between the partition and refrigerator case."

The three claims involved are Nos. 1, 3, and 7, as follows:

"1. In a combined refrigerator and freezer, a suitable outside case, a refrigerating room and an ice bunker therein separated by a partition, inverted V-shaped ports in said partition leading from the refrigerating or freezing room into said ice bunker and ports leading through the bottom of said ice bunker and thence into the bottom of the refrigerating room, substantially as and for the purposes set forth."

"3. In a combined refrigerator and freezer, a suitable outside case, a refrigerating or freezing room and ice bunker therein separated from each other by a partition, inverted V-shaped ports in said partition leading from the re-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

refrigerating or freezing room into said ice bunker, the bottom of said ice bunker being perforated and in communication with the refrigerating or freezing room, the floor under said ice bunker inclining downwardly toward the refrigerating or freezing room, substantially as and for the purposes set forth."

"7. In a combined refrigerator and freezer, a suitable outside case, a refrigerating or freezing room and an ice bunker contained therein separated from each other by a partition formed by a series of angular sections placed one above the other and at some distance apart, forming inverted V-shaped ports leading from the refrigerating or freezing room into said ice bunker, the apex of one section being higher than the lower extremities of the section next above it, the bottom of said ice bunker being perforated and in communication with the refrigerating or freezing room, substantially as and for the purposes set forth."

Some question has been made in reference to the complainant's title to the patent in suit. It is sufficient to say, however, upon this point, that upon examination I find that after numerous mesne assignments the title finally vested in the complainant. The important feature of the invention is found in the form of the partition in the refrigerator between the ice bunker and the food chamber, which, as set forth in the specifications and claims, contains a series of inverted V-shaped ports, by means of which a continuous circulation of air in the refrigerator is provided. The colder air in the ice bunker, proceeding downwardly, passes through the open bottom thereof, and thence across and under the partition into the lower part of the provision chamber, whence it ascends through the provision chamber, but at the same time moving laterally toward the ports in the partition into the ascending legs of which it enters, and, passing through them and also the descending legs, re-enters the ice chamber. The circulation of the air thus maintained causes it to be frequently subjected to the cooling effects of the ice, whereby its temperature is not only lowered, but the vapors and volatile matters carried into the air from the food are separated therefrom and precipitated upon the ice before the air is returned to the provision chamber. It is claimed on behalf of the complainant that the inverted V-shaped ports in the partition act as air siphons, and that, as the air in the legs of the siphon which extend downwardly into the ice bunker becomes cold and is precipitated to the bottom thereof, it is necessarily and instantly replaced by the warmer air from the provision chamber which is sucked through the legs of the siphon, extending upwardly from that chamber, and thus a free, constant, and rapid circulation is provided. It is the adaptation of these ports to convey upwardly on the one side the warmer and ascending currents of air, and to facilitate on the other side the drop of the cooler and descending currents of air, without unnecessary delay or friction, that constitutes one of the chief merits of the patent. Before leaving this point, it would be well to quote at length a passage from the testimony of the complainant's expert, in which, explaining the theory of refrigerating food products, and the action of the complainant's refrigerator in connection therewith, he says:

"As I understand the matter, perishable articles of food are best preserved by keeping the same in an atmosphere which has a suitable low temperature, and which does not contain an objectionable degree of humidity, or odors which the air can communicate to the articles to be preserved. If

the temperature is too high, the articles will decay or spoil. If the air is moist or humid, the same result follows, and, if the air contains odors foreign to the articles to be preserved, they are liable to be contaminated by absorbing such odors. In a refrigerator in which the described circulation of air is maintained the air passes upwardly through the provision chamber, and during that passage it absorbs from the articles contained in the chamber vapors, moisture, and odors. The air laden with these absorbed matters passes from the refrigerating chamber into the ice bunker, and is cooled by the refrigerating effect of the ice, and also parts with all condensable matters which it deposits upon the ice and the cold surfaces of the ice bunker. The water resulting from the melting ice takes up these condensation products and carries them off through the trapped discharge provided in the bottom of the refrigerator. The air in flowing down through the ice bunker in its path to the lower portion of the provision chamber is so cooled and at the same time dried and purified, and this dry, purified air then enters the lower portion of the provision chamber in a fit condition for again absorbing moisture, vapors, odors, and other volatile matters exhaled by the contents of the provision chamber. This circulating body of air which is confined in the refrigerator therefore is not only a cooling medium in its action upon the contents of the provision chamber, but also a vehicle for conveying the matters exhaled by the contents of the provision chamber over into the ice bunker, and causing the same to be condensed or precipitated in the ice bunker from which they are discharged from the refrigerator.

"An ordinary ice chest of the kind which are still in use and on sale and which comprises a box into which the ice and the articles to be preserved are placed from the top, which box is closed by a cover or lid, does not operate upon this principle, although so far as mere refrigerating effect is concerned a given amount of ice may produce in such an ice chest the same effect as in any other style of refrigerator. In such a chest the air would stratify, the strata ranging from the coldest at the bottom to the warmest at the top, and the air would be stagnant. In the Quinn refrigerator and in defendant's refrigerator the wall or partition separating the ice bunker from the provision chamber is provided with a series of superposed air ports or passages leading from the provision chamber to the ice bunker, and it follows from this that the flow of the air upwardly through the provision chamber cannot take place in a vertical direction, but must take place to greater or less extent in an oblique direction toward the receiving ends or mouths of these ports. Each of these ports produces a suction effect at its inlet end, and the suction at that point causes a flow of air particles in the vicinity of the end of the port toward the same. Whenever an air particle moves out of its position another air particle must take its place, and the movement is so transmitted from one particle to another, each moving particle making room for the next following particle. The suction of the numerous ports, one above the other, in the Quinn partition, therefore, causes a flow of air toward the partition throughout its extent, from the top to the bottom of the same, and the direction of this flow can neither be horizontal nor vertical because the tendency of the air to rise is modified by the suction action of the ports which tends to draw the rising air sidewise in the refrigerator toward the slat partition."

There is absolutely nothing in the prior art which shows this so-called siphonic system of ventilation and refrigeration, although it is true that similar ports or passages are found in patents in the nonanalogous art of house ventilation. None of these, however, was cited by the patent examiner against the patent in suit, and a cursory examination of them would seem to disclose sufficient reason for the omission. The ventilation of sleeping apartments and staterooms, of sheds for storing coal, and other like compartments are too remote to be considered in connection with the art under review. The defendant's expert admits that none of the patents cited directly anticipate the Quinn patent, but claims, nevertheless, that in view of what the prior patents dis-

close there was nothing new in siphon ports as arranged and combined in that patent; but, the closer the prior art is studied, the clearer will it appear that the patent in suit discloses an inventive advance over all that preceded it. Counsel for the defendant was understood to say upon the oral argument that there was little, if anything, of benefit or advantage in the form or arrangement of refrigerating ports, and that one kind was after all about as good as another. This argument, however, proves too much, and carried to a logical conclusion would not only nullify scores of patents, but completely wipe out an art which has long been thoroughly well recognized and established. Looking for a moment at the prior art, let us first consider the Player patent, No. 503,772, which, among others, was cited by the examiner against the allowance of the claim of the patent in suit. It disclosed a slatted partition composed of single slats inclined downwardly into the ice bunker, but omitted entirely the leg of the siphon ascending from the provision chamber; in other words, it had no siphonic appearance or effect. All that it showed was a series of slanting ports extending through the partition between the ice bunker and the provision chamber, arranged at an angle of about 45°; the upward end of each port being located on the provision side and the lower end on the ice side. Reynolds, No. 305,019, is the only other cited patent that will be specifically referred to. It discloses a solid partition with two openings therein, one above the other, which openings have inserted in them movable slats like those of a window blind. These movable slats could obviously be set in any desired position, but even then the one set of the slats would have to be turned upward and the other downward, and hence could not be united as are the legs of the siphon in the Quinn patent, and as they must be in order to have any siphonic effect. It is unnecessary, in view of the above admission of the defendant's expert, to consider in detail several other patents cited as anticipations. Moreover, the two just referred to were perhaps more than any of the others relied upon by the defendant at the argument as anticipations of the Quinn patent; but, however that may be, that patent in my judgment shows a distinct advance, not only over them, but over all of the other alleged anticipations. Again, it is urged on behalf of the defendant that, in view of the disclosures of the file wrapper of the Quinn patent, the claims of that patent are limited by certain amendments to the claims imposed in the Patent Office and accepted by the patentee. The claims as originally drawn characterized the ports as "angular" or "vertically angular." This characterization was objected to by the examiner as conflicting with the Player and other patents, which he cited. To obviate this objection, Quinn amended his claim by describing the ports as "inverted V-shaped." The Player patent disclosed, as has already been remarked, oblique or angular passages in the partition between the ice bunker and the provision chamber. It is plain, therefore, that the claims of the patent in suit so long as they contained the words "angular" and "vertically angular" might be held to conflict with refrigerator partitions, showing ports or passages of the Player design. Those passages were "angular" and in a sense "vertically angular." Notwithstanding this, it is apparent that Quinn in amending his claim did not limit his invention, but only defined it



more explicitly. The expression "inverted V-shaped ports" more clearly defined the siphonic principle of his invention than did the expression "angular." He was not called upon to do more than differentiate his invention from Player's and others of that class. So far from limiting or abandoning the siphonic principle therefore, he, by the use of the "inverted V" expression, gave it added emphasis. The examiner did not question his invention, but rather his characterization of it, and this was amended accordingly.

In substance, the reasons alleged by the defendant to show that it does not infringe the patent in suit are that the ports or passages adopted by it are not of an inverted V-shape, and that the leg of the siphon extending downwardly into the ice bunker is longer than that extending upwardly from the provision chamber. In these respects the defendant's device does differ from the complainant's. The defendant's refrigerators are manufactured under what is known as the Ames patent, No. 625,309, issued May 23, 1899. This patent has adopted the siphonic principle, which is expressly referred to in the specifications, as it was also in those of the Quinn patent. Ames says:

"As will be evident from the foregoing description, the ports which constitute the wall separating the food chamber and ice bunker are of siphon shape, with the short conduits extending downwardly into the food chamber and the long conduits extending downwardly into the ice bunker adjacent to the ice."

The question as to whether or not claim 1 of the Quinn patent is tied down to the inverted V-shaped port is of controlling importance. If it is not, and I do think it is, the defendant's device in my judgment unquestionably infringes it. In considering this question it should be noted that the obtuse angled ports shown on figure 1 of the printed copy of the patent little resemble the black-faced V-shaped ports appearing in the specifications and claims. In the drawing the angle shown in the ports is apparently from  $50^{\circ}$  to  $60^{\circ}$ , while in the specifications the inverted V design shows an angle of  $20^{\circ}$  or less. It is notorious that V's in type form are of various shapes and angles. Some may be found with arms of equal length, some with one arm longer than the other, and some, particularly in italics, with a rounded, instead of an angular, base. The amendments in the specifications and claims shown by the file wrapper were made, as they usually are, in script, and in some cases the V there appears in the true siphon shape. The above remarks are made merely to show that the patentee ought not to be held down to that particular form of V which a type setter happened to use in making a printed copy of the patent. It would be unfortunate, moreover, if the defendant by simply changing the shape of its port into that of a U, or other curved design, and lengthening or shortening one leg thereof, could appropriate the principle of the Quinn invention, and yet escape infringement. It is quite possible that it is better to have the top of the port curved than angular, but, be that as it may, it is entirely true of both that the air flows through the port in substantially the same way in obedience to the same law, and accomplishes the same result. The siphonic principle is common to both, and consequently whether the top of the port be curved or angular is not a matter of substance, but of degree. It is merely a mechanical change which does not alter the character or prin-

ciple of the invention, or relieve the defendant of the charge of infringing. As to the difference in the length of the legs of the siphon ports, that also would seem to be but a matter of degree and of little consequence. Quinn did not say that the legs of the ports of his device were to be of equal length, and it can only be inferred, if at all, from the use of the phrase "inverted V-shaped." It would well-nigh frustrate the purpose of the patent law if its provisions could be evaded by so inconsequential a modification of a patented device as that. At the most, such a change is merely an addition to or subtraction from one of the legs of the port of the complainant's patent. It is a matter of size or dimension only. As already stated, both the Quinn and the Ames patents do the same work in substantially the same way, and achieve the same result. The same principle is apparent in both, and is worked out on the same lines. When this situation is disclosed, infringement is disclosed. *Machine Company v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935; *Cantrell et al. v. Wallick*, 117 U. S. 689, 695, 6 Sup. Ct. 970, 29 L. Ed. 1017. In the case of *Winans v. Denmead*, 15 How. 330, 342, 14 L. Ed. 717, Judge Curtis says:

"Where form and substance are inseparable, it is enough to look at the form only. Where they are separable, where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention—for that which entitled the inventor to his patent, and which the patent was designed to secure. Where that is found, there is an infringement; and it is not a defense that it is embodied in a form not described, and in terms claimed by the patentee. \* \* \*

"The exclusive right to the thing patented is not secured if the public are at liberty to make substantial copies of it, varying its form or proportions. And therefore, the patentee, having described his invention, and shown its principles, and claimed it in that form which most perfectly embodies it, is in contemplation of law deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms."

It is elementary to say that the Ames patent may be an improvement upon the Quinn patent without that fact relieving the Ames patent from contribution to the other and earlier. *Cantrell v. Wallick*, *supra*; *Columbia Wire Co. v. Kokomo Steel & Wire Co.*, 143 Fed. 116, 123, 74 C. C. A. 310, and cases cited. Notwithstanding the disclosures of the file wrapper of the Quinn patent, the complainant is entitled to a reasonable application of the doctrine of equivalents, and in my judgment even a comparatively restricted application of that doctrine shows that the defendant's device is an infringement. In this connection it is proper to refer to the fact that the White Enamel Refrigerator Company manufactured under the Ames patent the alleged infringing devices for the defendant herein, and is defending this suit. This company at one time complained to the Merchants' Dispatch Transportation Company, one of the largest customers of the complainant, that it was infringing the Ames patent by the use of refrigerator cars made in accordance with the Quinn patent. Mr. Bohn, the president of the White Enamel Refrigerator Company, in explanation testifies that the foregoing complaint was made because the refrigerators of the Merchants' Dispatch Company were constructed, as he understood, with one leg of the siphon longer than the other.

As a matter of fact, however, the evidence shows that the legs of the siphons in the refrigerator cars complained of were, if not exactly of equal length, very nearly so; it appearing that such variation in length, if any, existed in but a few instances, and did not at the utmost exceed three-eighths of an inch. It may be assumed that variations in length of so slight a character in a car refrigerator would hardly be discernible by the unaided eye. Whatever the fact, however, as to the existence of any discrepancy in the length of the legs of the siphons in the refrigerator cars in question, there is no suggestion that the ports in the partitions in the refrigerators therein were curved at the apex. On the contrary, it unquestionably appears that they were of the inverted V-shape, and that the complainant never made any refrigerators having ports other than of that type. The complaint of infringement made under the circumstances above detailed by the White Enamel Refrigerator Company therefore becomes significant. A defendant, and such that company really is, will not be permitted at the dictation of self-interest to assume inconsistent and contradictory positions. In view of its above-mentioned complaint, that company cannot urge with any great vigor or consistency that the Ames U-shaped ports are totally different from the Quinn inverted V-shaped ports.

Reference ought also to be made at this point to another matter as possibly revealing the origin and animus of the Ames patent. It is this: On August 27, 1897, the Quinn Refrigerator Company, the then owner of the patent in suit, assigned to Gebhard Bohn, George W. Bohn, John A. Seeger, and John H. Ames the right to manufacture refrigerators under the Quinn patent in several of the states. The contract was so drawn as to permit the assignees to surrender their rights and privileges thereunder almost at pleasure. As a matter of fact, the license was surrendered February 9, 1899, and it is worthy of remark that such surrender was made only about three months after the Ames patent was issued, the application for which was filed by Ames, one of the licensees, on December 23, 1897, within four months after the license was granted. It should also be remembered that the patent when issued was issued to Ames as assignor to Gebhard C. Bohn, who, with his father, Gebhard Bohn, also one of the licensees, on March 3, 1899, started the business of manufacturing refrigerators under the partnership name of the White Enamel Refrigerator Company. Furthermore, the above-named licensees were at the time their license was granted all directly interested in the Bohn Manufacturing Company, and upon the execution of the license that company immediately began the manufacture of refrigerators thereunder. The licensees had not up to that time ever manufactured refrigerators of any kind. Moreover, it appears that after the license was granted the Quinn Company in compliance with its terms sent sample refrigerators made under the patent in suit to the Bohn Company to aid and instruct it in the manufacture of like refrigerators. The Bohn Manufacturing Company, however, only constructed between 75 and 150 refrigerators under the license; but did make refrigerators of the kind subsequently covered by the Ames patent as early as the latter part of 1897, or just about the time Ames filed his application for a patent. Enough has been said to establish with some degree of probability, if not of certainty, the origin of the Ames

patent. But, if more were needed, there is testimony directly tending to show that that patent was conceived for the very purpose of escaping the payment of royalties under the Quinn patent. Again, Ames at the time the Quinn patent was cited against his application in effect admitted that his invention was but an improvement upon that patent. The evidence all tends to show that the Ames patent was conceived and the business of the White Enamel Refrigerator Company built up, in no inconsiderable degree, upon the foundation of the Quinn patent. Both the complainant and the White Enamel Refrigerator Company have, according to the evidence, established large and successful businesses in the manufacture and sale of refrigerators. Both patents have proved to be commercial successes, and if, as claimed, the Ames patent has proved the better, the fact remains that it is but an improvement upon the patent in suit, the leading principle of which it has adopted and used, and for which it should pay tribute. The defendant has set up the defenses of laches and equitable estoppel in bar of the complainant's relief. I have carefully considered them both. As to the question of laches, the evidence does not clearly show that the alleged infringement of the Quinn patent was brought home to the complainant and its predecessor in title as claimed by the defendant, and hence that defense is not sustained. As to the alleged equitable estoppel, there is nothing in the evidence which satisfies me that the complainant corporation, and its innocent stockholders, should be charged with knowledge or notice of the matters set up by way of estoppel. Some of the corporators may have had notice, but not all. Where all of the corporators of an incorporation have notice, such notice may be imputed to the corporation, and it was so held in *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 436, 12 Sup. Ct. 239, 245, 35 L. Ed. 1063, where the court said:

"Reference to the appendix to the acts of the Legislature of West Virginia of 1885 (pages 446, 447) shows the certificate of incorporation of the company, from which it appears that the agreement required under the statute in order to form a corporation was delivered to the Secretary of State of West Virginia on the 16th of January, 1885, on which day the company, as the Secretary certifies, became a corporation. The subscribers to the agreement were P. H. Rorer, I. A. Welch, N. L. Reynolds, A. W. Reynolds, and George W. Belcher; and the agreement states that these five corporators had subscribed the sum of \$250, being one \$50 share each, and had paid on the subscriptions the sum of \$25. It is through these corporators that the company claims title and the record discloses that Welch was its president. Associated together to carry forward a common enterprise, the knowledge or actual notice of all these corporators and the president was the knowledge or notice of the company, and, if constructive notice bound them, it bound the company."

The case here presented is not within the principle thus declared, which could not, as it seems to me, be wisely broadened.

Upon the whole case, I have reached the conclusion that the defendant has infringed claims 1, 3, and 7 of the patent in suit. The usual decree will accordingly be entered in favor of the complainant, with costs.

FOUNDATION CO. et al. v. O'ROURKE ENGINEERING CONST. CO.

(Circuit Court, S. D. New York. June 28, 1909.)

1. PATENTS (§ 310\*)—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL.

In a bill for infringement of a number of patents, copies of which are attached, an allegation that defendant "has made, used, and sold, or caused to be made, used, and sold, structures and processes containing, employing, and embodying the inventions described and claimed in the specifications of said letters patent, thereby infringing the exclusive rights of your orators," is sufficient to charge the defendant with having infringed all the inventions described in all of the specifications of all the patents.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 511; Dec. Dig. § 310.\*]

2. PATENTS (§ 310\*)—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL—ALLEGATION OF CONJOINT USE.

An allegation, in a bill for infringement of two or more patents, that the inventions covered thereby are capable of conjoint use, and have been conjointly used, by defendants, is sufficient on demurrer, although it is not specifically stated that they were used in the same structure, which is implied from the words "conjoint use" and "conjointly used."

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.\*]

3. PATENTS (§ 310\*)—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL.

That a bill for infringement of a number of patents, containing a large number of claims, does not specify which of such claims are relied on as having been infringed, is not ground for demurrer.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.\*]

4. PATENTS (§ 290\*)—SUIT FOR INFRINGEMENT—MULTIFARIOUSNESS OF BILL.

A part owner of certain patents, who has not granted any license, and a licensee of the other part owners, which license also includes other patents, in which their co-owner has no interest, have not such a unity of interest as entitles them to join in a bill for infringement of all of such patents.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 470; Dec. Dig. § 290.\*]

In Equity. On demurrer to bill.

Domingo A. Usina, for complainant.

Edmonds & Peck, for defendant.

MARTIN, District Judge. This case now stands before the court upon a demurrer to the complaint. Briefly stated, the complaint alleges that Daniel E. Moran and John W. Doty were the inventors of certain structures and modes of constructing foundations for high and heavy buildings in the city of New York, and letters patent were duly issued therefor; that a two-thirds interest in two of the applications for letters patent were conveyed by Daniel E. Moran to Edwin S. Jarrett and Franklin Remington; that the said Moran, Jarrett, and Doty granted to the defendant Foundation Company the exclusive right and license to make use of and sell the said inventions described in all of said letters patent; that said inventions and letters patent were of great value, and—

"the defendant, well knowing the premises, but with intent to injure your orators, to interfere with their business, and to deprive them of the profits

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

derived and to be derived from making, using, and vending the said inventions, has within the Southern district of New York, subsequent to the grant of said letters patent, and of said rights and licenses, and without the license and consent of your orators, or any of them, made, used, and sold, or caused to be made, used, and sold, structures and processes containing, employing, and embodying the inventions described and claimed in the specifications of said letters patent, thereby infringing the exclusive rights of your orators; but how many such structures the defendant has made, used, or sold, or caused to be made, used, or sold, and to what extent it has practiced the processes of the said inventions, your orators are ignorant, and cannot set forth, and therefore pray a discovery thereof; but your orators, upon information and belief, aver that the said defendant has so made, used, and sold a number of such structures, and has practiced the processes of said inventions a number of times, and has derived large gains and profits therefrom, and has instigated the manufacture, sale, and use of said apparatus and the practice of said processes by others, and is preparing yet more extensively to infringe said letters patent, and to inflict injury, damage, and loss upon your orators, but to what amount the defendant has so profited by reason of said infringement your orators are ignorant, and cannot set forth, and therefore pray an account thereof. And your orators further say that the subject-matters of all said letters patent are capable of conjoint use, and are in fact conjointly used, in the forming or sinking of foundations for buildings, and that defendant has conjointly used the same in making and using the structures and practicing the processes hereinbefore complained of."

It is unnecessary to refer to the other allegations, as the pleadings raise no question relating thereto. Copy of the letters patent, with sketches of various figures exemplifying the claims of the same, are attached to said bill of complaint. The defendant claims by his demurrer that there are several separate and distinct causes of action, there being 7 patents and 95 claims on different subject-matters set out in the bill; that some of the patents are incapable of conjoint use with other of the patent devices; and that some of the processes are not patentable.

The complainant avers in his complaint that the defendant—"has made, used, and sold, or caused to be made, used, and sold, structures and processes containing, employing, and embodying the inventions described and claimed in the specifications of said letters patent, thereby infringing the exclusive rights of your orators."

This averment seems to be broad enough to charge the defendant with having infringed all the inventions described in all of the specifications of all of said letters patent. The defendant contends that, by an examination of the letters patent, it is self-evident that there is such a conflict in the different patents, and the different specifications thereof, that the court should hold that this averment is in conflict with facts made apparent by the letters patent. If this was an application for a bill of particulars, as to the claims of the various patents that the orators insist have been infringed, I should be inclined to hold, from an examination of the patents, that such an application should be granted; but, without the aid of evidence, the defendant's contention on this ground does not well enough appear.

Another ground of demurrer is that the allegation that all the patented improvements are susceptible of conjoint use, and have been so used by defendant, is insufficient. As to this ground of demurrer, I think the allegations of paragraphs 7 and 8 sufficient. It

is true that paragraph 8 of the bill does not aver that said letters patent are capable of conjoint use in a single structure; but it does allege that it is capable of conjoint use, and has been conjointly used by the defendants, in the forming or sinking of foundations for buildings. If the defendant has not infringed all the processes of the several patents set out in the complaint in a single structure, he can readily meet this allegation by denial. The allegation is that all the patents are susceptible of conjoint use, and the defendant is charged with conjoint use of them all. These patents relate to a mode of construction—a way of doing the work. The words "conjoint use" and "conjointly used," in clause 8 of the bill, fairly construed, mean "used together." These inventions are not conjointly used, if a part only are used in one structure and a part in another. This objection is too technical to be sustained in equity, especially in view of the fact that the defendant can squarely meet it by an answer.

Another ground is the failure to specify which of the 95 claims in the 7 patents are relied on by the complainants as having been infringed by the defendants. The rights of the defendant can be fully protected in this regard by a bill of particulars.

The defendant further insists that there is a misjoinder of parties and an insufficient unity of interest. I cannot escape the conviction that this ground of demurrer is well taken. The complainant Remington is the owner of one-third of patents No. 759,388 and 759,389. He is not a copartner, but an absolute owner of one-third interest in those patents. The bill avers that the complainants Moran, Jarrett, and Doty "did grant to the said Foundation Company the exclusive right and license to make, use, and sell the said inventions described in all the aforesaid letters patent"; but it is apparent upon the face of the pleadings that this averment is not according to the fact. Remington never granted his interest in said two letters patent to said Foundation Company or any one else. Remington has no interest in five of the patents which the orators claim the defendants have infringed. The Foundation Company has no interest in Remington's one-third ownership of two of the patents. Doty owns the patent granted February 14, 1905, No. 782,383. The orators Jarrett and Remington have no interest in that.

The mere setting out of more than one letters patent in a bill does not of itself render the bill multifarious. A demurrer for multifariousness will not lie to a bill founded on several patents, where all of the inventions are set out as constituting a cause of action, and where a single defense, "We do not make such a machine," meets the whole bill in its allegations and prayer, though several parties and several patents are joined; but, where the averments are such that the defendant cannot safely meet them by answer, it presents a different question. Here the bill alleges that the Foundation Company has the exclusive use of all these patents and all the rights under all the patents, and at the same time shows a state of facts that contradicts this averment, in that one man owns one-third interest in two patents that the Foundation Com-

pany have no right to use. This puts the defendants in an inequitable position for answer. Does the orator Remington claim damages for that the defendant has deprived him of his present use of his interest in these two patents? The bill is silent as to that. What rights in each of the orators have been infringed, and what damages each has suffered, are so inadequately pleaded that the defendant, in view of his demurrer, should not be compelled to answer.

Counsel for the complainant has cited *Chisholm v. Johnson* (C. C.) 106 Fed. 191. In that case the question as to misjoinder of parties was first brought to the attention of the court after the evidence had been taken. The learned judge, near the close of his opinion, on page 214, uses this language:

"The objection of misjoinder of parties, had it been taken by demurrer or plea, possibly would have been entitled to greater weight. The joinder of patent owners as complainants, where some of them have no legal ownership of or legal interest in some of the patents sued on, is a course which generally should not be encouraged. But the objection having been first raised by answer, and not having been brought to the attention of the court until final hearing, it cannot, in view of the particular circumstances of this case, be sustained."

There are a large number of cases in which it is held that the doctrine of multifariousness should not be applied, though numerous claims of several patents are alleged to be infringed; also cases in which several parties are joined as complainants in the same bill, where by the bill a common interest of each complainant appears. But in all such cases the facts constituting such interest must be averred clearly and consistently, that the defendant may be apprised of just which that interest is.

In the case at bar the bill fails in this respect, and on this ground the demurrer is sustained, with costs.

### JUENGST v. GULLBERG et al.

(Circuit Court, S. D. New York. June 7, 1909.)

#### 1. PATENTS (§ 240\*)—INFRINGEMENT—IMPROVEMENT PATENT.

Where a patent does not embody a primary invention, but only an improvement on the prior art, and the defendant's machine can be differentiated, the charge of infringement is not sustained.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 240.\*]

#### 2. PATENTS (§ 328\*)—INFRINGEMENT—SIGNATURE GATHERING MACHINE.

The Juengst patent, No. 761,496, for a signature gathering machine, discloses patentable invention but is an improvement patent, limited by the prior art to the single novel feature of the adjustability of the gripper jaws. As so construed, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On final hearing.

Fenelon B. Brock, for complainant.

Wm. E. Warland, for defendants.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



MARTIN, District Judge. The complainant alleges that the defendants have infringed his letters patent No. 761,496, issued on the 31st day of May, 1904, covering a signature gathering machine. Printed sheets, as they come from a printing machine, are usually folded once or more. These folded sheets are known to the trade as "signatures." They may be in pamphlets or simply sheets. They are gathered to form a book or magazine. A signature gathering machine takes these several sheets or pamphlets automatically and assembles them for the book or magazine. As these sheets or pamphlets called "signatures" are frequently imperfect, by leaves being missing or too many present, it is essential that the machine be so constructed that it shall gather only perfect signatures, and that imperfect signatures may be detected in such a manner that the error may be readily corrected. The machine must be adjusted for a predetermined thickness of the signatures, and if there is a deviation from that it must be detected. The complainant claims that his patent covers such a machine, and this the defendant does not deny, but asserts that prior patents involve the same principles, and, therefore, the complainant's machine is nonpatentable. The defendant further asserts that, if the complainant has a patentable machine, it exists only in the adjustability of the gripper jaws, which device he has not infringed.

The complainant offered no machine as an exhibit, but used in argument certain drawings from the figures of the patent, and a small model, which model to my mind was of little practical benefit. As I understand the patent in suit from figure 1, the gripper lever is marked D and is secured on a rock shaft, A<sup>6</sup>. Lever D contains a pair of jaws, D<sup>2</sup>-D<sup>12</sup>, which work on a pivot, 13. The lower jaw is connected with a rod, D<sup>3</sup>, and at the end of this rod is a screw cap, D<sup>7</sup>, upon which is nut, D<sup>8</sup>, over the screw cap in the rod D<sup>4</sup>, and threaded into rod D<sup>8</sup>. These parts are adjustable by the nut, D<sup>7</sup>, so that the jaws may be opened to a greater or less distance, whereby they are to take signatures of predetermined thickness. Arm D<sup>15</sup> connects with rod D<sup>4</sup>, and at the end of this arm is a point, D<sup>16</sup>. When the machine is adjusted for work and signatures are taken by the gripper jaws that are of correct thickness, the detector finger, D<sup>16</sup>, at the end of the arm, D<sup>15</sup>, passes through a gate on the lever, B, which is formed by plates B<sup>3</sup> and B<sup>4</sup>. If a signature is reached which is either too thick or too thin—varies from a predetermined thickness—finger D<sup>16</sup> on the end of the arm D<sup>15</sup> will fail to pass through the gate. When this occurs, D<sup>16</sup> comes in contact with one of the plates, B<sup>3</sup> or B<sup>4</sup>, throws down the lever, B, which contacts with lever, C, and stops the motion or disconnects. It seems unnecessary to describe the machine further as to the manner of giving the signal, etc.

The complainant's patent seems to rest upon the adjustability of the gripper jaws, as the same are connected with detective and signaling mechanism. While this principle may be found in prior patents in use in different kinds of machines, the complainant seems to have been first to apply it to a signature gathering machine. So

well developed, however, was the prior art, that his patent must be limited to this device. If we were to broaden it to equivalents sufficient to cover the defendant's device, and apply a like doctrine of equivalents to prior patents, said prior patents would embody every element of the complainant's claimed invention.

Does the defendant's machine infringe this device of the complainant's machine?

The defendant produced as an exhibit a machine, the working of which was plain and simple. In his machine the gripper lever, D, is attached to a rock shaft, A<sup>6</sup>. It has two jaws, marked in the drawings D<sup>2</sup> and D<sup>12</sup>, which always open the same width—about half an inch. They are opened and closed by a pin marked 4, which slides through the lever, D, and abuts against toggle D<sup>17</sup>. The other end abuts against stop 2 and in the opposite side of gripper lever, D. When the sliding pin, 4, strikes stop 2, it is forced against the upper part of toggle D<sup>17</sup>, and in connection with spring D<sup>5</sup> serves to bring the jaws together on the signature. Lever B is hung on pin 26 and has two prolongations pivoted on different centers. At the end of these prolongations are fastened adjustable dogs, B<sup>3</sup> and B<sup>4</sup>. In the defendant's machine the gripper jaws always open to the full extent. No adjustment of these jaws is essential. In setting the defendant's machine for predetermined thickness of signatures, the adjustment is made by these dogs being moved a greater or less distance apart further up or down on members B, as necessary to permit the detector finger, D<sup>16</sup>, to pass between parts B<sup>3</sup> and B<sup>4</sup> when the machine is working normally. When the signature grasped by the jaws of the defendant's machine is too thick or too thin, the finger, D, contacts with either the dog B<sup>3</sup> or B<sup>4</sup>, and throws part B with the dogs B<sup>3</sup> and B<sup>4</sup> into a position whereby rod C is connected with bar K<sup>7</sup> and contacts with link or dog 10, and thus connects the bar K<sup>4</sup> and handle 20 and rod 11, which throws the machine out of gear and stops.

The defendant's expert very aptly described the operation as follows:

"At this point I wish to call attention to the fact that in the machine of the patent in suit all the mechanism is mounted on a single rock shaft, A<sup>6</sup>; that is to say, the gripper lever, the arms C, which actuate the stop mechanism, and the arm B, which has a curved extension on which the adjustable plates are secured. This is not at all the case in defendant's machine. In the defendant's machine there is a rock shaft, and means are provided for rocking the shaft, and that shaft carries nothing, absolutely nothing, but the gripper lever. The means that are tripped by the grippers when the machine operates abnormally are not supported by this rock shaft, nor have any connection with it, but are carried by two rigid rods or bars which have no movement whatever. The arms which are thrown by the tripping device when the machine operates abnormally are mounted on another entirely independent rock shaft, having no connection whatever with the rock shaft which carries the gripper lever. It is an absolute and fundamental difference between the construction of defendant's machine and what is set forth in the patent in suit. \* \* \*

"The adjustment of the dogs in defendant's machine permits of a much finer adjustment than the adjustment of the jaws (of the complainant's machine). It permits of a much safer adjustment, as the engagement between the dog and the finger during the movement of the parts becomes an abso-

lutely positive one, and accidental mistakes in the slipping and consequent disengagement of the finger and dog is precluded. It is much simpler in construction. It is more easily made; that is to say, the operator can make this adjustment with greater facility. The adjusted or adjusting parts are not subjected to the wear and tear caused by the violent opening and closing of the jaws and the concussion caused by the closing of the jaws on paper. In defendant's machine the jar or concussion incident to the opening and closing of the jaws, which takes place with considerable force, does not affect the parts carrying the dogs, on which part the adjustment is made. In the machine of the patent in suit the adjustment is made by means of the parts D<sup>3</sup> and D<sup>4</sup>—I mean the adjustment of the jaws—which parts, D<sup>3</sup> and D<sup>4</sup>, are the ones which transmit the motion of opening and closing the jaws, and hence these parts are subjected to all the shock and vibration and concussion incident to the constant, forcible, and sudden opening and closing of the jaws. In the defendant's machine such opening and closing of the jaws under greater or less force cannot loosen or change the adjustment of the dogs carried by an entirely independent member and in no way whatever connected with the shaft supporting and operating the jaws. In the machine of the patent in suit, and as there claimed, and as there distinctly pointed out, the entire motion for opening and closing the jaws is imparted to the jaws through and by means of the members D<sup>3</sup> and D<sup>4</sup>, and by these means only. These means are adjustable, and it stands to reason that this adjustment, or the parts causing the adjustment, are subjected to the concussion, jars, and vibrations produced by the opening and closing of the jaws, and hence are much more apt to get out of adjustment than the dogs of defendant's machine, which are in no way subjected to these particular concussions, jars, and vibrations to which the jaw-adjusting parts in the machine of the patent in suit are subjected during the operation of the machine. These are some of the reasons why I consider the adjustment of the dogs on separate and independent members mechanically far superior to the adjustment of the jaws themselves."

It is claimed by the complainant that the adjustment of the defendant's machine can be made by D<sup>3</sup> and D<sup>4</sup>, and that this adjustment comes squarely within the complainant's patent. I am satisfied, however, from the evidence, that the defendant's machine was not intended to be adjusted in that manner. It surely is not practicable thus to do. The adjustment is by the dogs. No operator would ever undertake to adjust the defendant's machine in any other manner than by the dogs, and such adjustment was intended by the constructor of the machine. If the complainant's machine involves a new principle at all, it is the adjustability applicable to the gripper jaws.

It appears from the evidence that, prior to the application of the complainant for the patent in suit, there were signature gathering machines on the market involving the same principles in their detective devices as are involved in the complainant's patent and also in the defendant's machine—a mechanism consisting of one member passing between two other members, and when an abnormal condition arises the moving member comes in contact with one or the other of the detector members, which stops the machine. The complainant is not a pioneer in the adjustable calibrating means for controlling the stop mechanism of paper handling machines. In view of this known art, the complainant's patent is necessarily limited. As I view this case, both the complainant and defendant are improvers in an advanced art, each accomplishing the same final result, and as inventors they are each limited. It is a well-settled principle of law that:

"Where the patent does not embody a primary invention, but only an improvement on the prior art, and the defendant's machine can be differentiated, the charge of infringement is not sustained." *Kokomo Fence Machine Co. v. Kitselman*, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689, cited with approval by Justice Day in *Cimioti Unhairing Co. v. American Fur Refining Co.*, 198 U. S. on page 414, 25 Sup. Ct. 697, 49 L. Ed. 1100.

Such claims of the complainant's patent as may be construed broadly enough to cover the defendant's machine must be held invalid for lack of novelty.

The defendant may have decree.

### KAISER et al. v. GENERAL PHONOGRAPH SUPPLY CO.

(Circuit Court, S. D. New York. May 13, 1909.)

#### 1. PATENTS (§ 290\*)—SUIT FOR INFRINGEMENT—PARTIES.

The owner of a patent, who has granted an exclusive license thereunder, with a reservation of an interest in damages recovered from infringers and the right to cancel the license under certain conditions, may properly be joined with the licensee as complainant in a suit for infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 470; Dec. Dig. § 290.\*]

#### 2. EQUITY (§ 118\*)—AMENDMENT OF PLEADINGS—BRINGING IN NEW PARTIES.

A court has jurisdiction to allow an amendment of a bill to bring in a necessary party complainant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 534; Dec. Dig. § 118.\*]

#### 3. PATENTS (§ 290\*)—SUIT FOR INFRINGEMENT—PARTIES.

The fact that a person is by contract entitled to a share of money recovered for infringement of a patent does not give him an interest in the patent, nor make him a proper party complainant in a suit for an injunction to restrain its infringement; and the same reason applies to a licensee, who has assigned his license, although he may have an interest in the damages recovered.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 470; Dec. Dig. § 290.\*]

In Equity. On demurrer to amended bill.

C. V. Edwards, for complainants.

Delos Holden, for defendant.

NOYES, Circuit Judge. At the outset of his argument counsel for the defendant contends that permission to file the amended bill should not have been given, because it sets up a new cause of action. But the propriety of allowing the amendment cannot be reviewed here. The sufficiency of the bill as tested by the demurrer is the only matter now to be considered.

The seven grounds of demurrer may be thus summarized and restated: (1) The complainant Kaiser has not sufficient interest in the patent to be joined as a party complainant. (2) The complainant Cunnius has not sufficient interest in the patent to be joined as a party complainant. (3) The complainant the Excelsior Drum Works had no interest in the patent at the commencement of the suit and has not been

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rev'r Indexes

properly brought into the suit. (4) The complainants Pepper and Soistman have no interest in the relief prayed for jointly with the other complainants.

It appears, from both the original and amended bills, that the complainant Kaiser, by assignment from the assignee of the patentees, became the owner of the patent in suit. He granted an exclusive license to Pepper and Soistman, but retained an interest in damages recovered from infringers, and also—what is more important—the right to terminate the license contract under certain conditions. In view of the interests retained, he is, in my opinion, properly joined as a party complainant in the amended bill.

There is no merit in the contention that the allegations concerning the license given by Kaiser in the amended bill show that the court was without jurisdiction of the original bill for want of a proper party complainant. If this were true, a court would never have power to allow the substitution or change of parties in a case apparently brought by a proper party, but who was subsequently shown to have disposed of his interest in whole or part.

The situation with respect to the complainant Cunnius is, however, different. It does not appear that he has any interest whatever in the patent. He has merely the right to share in moneys collected from infringers. I perceive no principle upon which he can join in the prayer for the injunction; and if he cannot he should not be permitted to remain as a party complainant. His rights under the contract can be protected in other ways.

The Excelsior Drum Works—the corporation—is a proper party complainant as assignee of the license contract. But it acquired its interest after the commencement of the suit, and should properly have been brought in under a supplemental, rather than an amended, bill. Still this objection is technical, and I think the amended bill may be regarded, so far as the averments concerning said corporation are concerned, as in the nature of a supplemental bill, speaking from the date of its filing.

The complainants Soistman and Pepper, having disposed of their interests in the patent to the corporation, the Excelsior Drum Works, have no standing to pray for an injunction. As said with respect to the complainant Cunnius, their interest in the moneys to be recovered from infringers gives them no standing to pray for injunctive relief. This objection is not specifically taken in the sixth ground of the demurrer; but I think that that ground may be construed to embrace it.

The demurrer is sustained, with costs, upon the fourth ground, and also upon the sixth ground so far as it relates to the complainants Pepper and Soistman, but with the privilege to the other complainants, upon the payment of costs, to amend within 20 days by striking out the names of said parties complainant, Cunnius, Pepper, and Soistman.

## BASCH v. BERNSTEIN et al.

(Circuit Court, S. D. New York. May 13, 1909.)

## PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—GARTER.

The Dreyfus patent, No. 546,420, for a garter having a rubber lining with small protuberances thereon to engage the meshes of the fabric on which it is placed, was not anticipated and discloses invention; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On final hearing.

Chapin & Hayward, for complainant.

Hauff & Warland, for defendants.

NOYES, Circuit Judge. This is a suit to restrain the alleged infringement of letters patent No. 546,420, granted September 17, 1895, to Bernhard Dreyfus, for an improvement in garters, and acquired through mesne assignments by the complainant. The patentee thus states the object of his invention:

"The object of my invention is to provide a new and improved garter, which is simple in construction and holds the article which it surrounds—such as a stocking, sleeve, etc.—firmly and securely in position without exerting undue, inconvenient, or unpleasant pressure on the leg, arm, or other part of the body on which said garter is applied."

The patent contains but a single claim, which follows:

"In a garter, the combination, with a body piece, of elastic end pieces and fastening devices attached thereto, and a soft rubber lining on said body piece, which lining is provided on its exposed surface, throughout, with small protuberances, substantially as herein set forth."

The function of the "protuberances" of the claim—the real feature of the invention—is thus stated in the specifications:

"The projections, such as the teats or ridges, on the rubber strip, engage the meshes of the stocking or other article on which the garter is applied, and are pressed a greater or less distance into the same, and thus hold the said article in place on the limbs or body."

The defenses are:

- (1) Want of invention in view of the prior art.
- (2) Noninfringement.

The device of the patent is a simple one—a slight advance over previous uses. As stated in the patent itself:

"Rubber surfaces provided with projections have been used with rubber boots and shoes."

But I think this must be regarded as a nonanalogous use. The projections upon the soles of rubber boots help to prevent slipping; but they cannot be said even figuratively to engage the meshes of the ground, and soon wear off. In the absence of all testimony, I am unable to say that it involved no invention to place the projections of the rubber boot upon the lining of a garter, and thereby accomplish the new result of holding a garment by engagement, as well as by pressure; and, if I cannot say this, I certainly cannot

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hold that any of the earlier patents cited against the patent in suit anticipate or show want of invention. In my opinion they cover devices much less like the device of the patent than the projections upon the soles of rubber shoes. Upon the proof as it stands I deem it my duty to sustain the validity of the patent.

The remaining question is one of infringement. The defendants' structure, like that manufactured by the complainant, is exactly in accordance with the drawings and specifications of the patent. They both have the longitudinal ridges shown in Figure 4. The defendants, however, claim that the complainant is not entitled to the structure so illustrated and described, because the ridges are not "small protuberances" within the meaning of the claim. Great stress is laid upon the presence of the word "small" in the claim. It is pointed out that the original claims presented to the Patent Office simply called for "protuberances," and that only after repeated rejections was the word "small" inserted; and attention is called to the rule that where a patentee has claimed something which has been rejected by the Patent Office, and he has acquiesced in such rejection, he cannot afterwards successfully contend that the claim as allowed should be construed to include that which was rejected. But this contention loses some force in the present case, for the reason that it does not appear that the patent was rejected at all because the word "small" was absent, or allowed because it was present. The patentee's application was rejected repeatedly by the examiners in the Patent Office, and he made several amendments, among which was the insertion of the word "small." Notwithstanding these amendments, the patent was rejected. The patentee then appealed to the Examiners in Chief, who allowed the patent; but it does not appear that they allowed it because the word "small" was in the claim, or would have rejected it if it had not been there. It is true that the patentee, in his argument before the Examiners in Chief, pointed out that the protuberances must be small enough to engage the meshes of the garment; but that was nothing more than was necessarily implied from the statement of the function of the projections in the patent.

I see nothing in the proceedings in the Patent Office to show that extraordinary emphasis should be laid upon the word "small." In my opinion it means projections of a size capable of engaging the fabric upon which the garter is placed. They must necessarily be relatively small. Indeed, I am inclined to think that the complainant is right in his contention that the patentee used the qualification "small" to distinguish the protuberances which he claimed from the comparatively large projections shown in the Latham patent (cited against him in the Patent Office), and which obviously could not engage the meshes of a garment.

The patent is adjudged to be valid and infringed, and a decree may be entered in favor of the complainant for an injunction, an accounting, and costs. The case is not, however, free from doubt, and if the defendants desire to appeal, and will do so promptly, the operation of the injunction will be suspended, pending appeal, upon filing a bond, the amount of which will be determined upon application.

## HALL SIGNAL CO. et al. v. GENERAL RY. SIGNAL CO.

(Circuit Court, W. D. New York. June 18, 1909.)

No. 284.

## PATENTS (§ 317\*)—SUIT FOR INFRINGEMENT—INJUNCTION.

In a suit for infringement of a patent for a railway signaling apparatus and system, consisting of the use in a combination of old elements, which expired pending the suit, the complainant *held* not entitled to a provision in the final decree enjoining the defendant from selling any apparatus made during the life of the patent; it appearing that the parts were capable of use in noninfringing systems.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 317.\*]

In Equity. On settlement of final decree.

See, also, 168 Fed. 62.

Kenyon & Kenyon and Henry D. Williams, for complainants.  
Macomber & Ellis and J. William Ellis, for defendant.

HAZEL, District Judge. The patent in this action has expired, and the mandate of the Circuit Court of Appeals affirming the decision of this court, holding claim 1 of the patent valid and infringed, directs that further proceedings be had in accordance with the decision of this court, and the opinion of Judge Coxe, writing for the court, says:

"The patent having expired, the paragraph of the decree providing for an injunction should be modified by the Circuit Court."

Accordingly the decree submitted by complainant enjoins the defendant from dealing in any signaling apparatus or systems embodying the invention, or any part thereof, which were constructed before the expiration of the patent. The defendant objects to the entry of the proposed decree on the ground that in the circumstances of this case such an injunction should not be granted after the monopoly has expired. The cases cited in complainant's brief (American Diamond Rock Boring Co. v. Rutland Marble Co. [C. C.] 2 Fed. 356; American Diamond Rock Boring Co. v. Sheldon et al. [C. C.] 1 Fed. 870; N. Y. Belting & Packing Co. v. Magoon et al. [C. C.] 27 Fed. 111; Toledo Mower & Reaper Co. v. Johnston Harvester Co. [C. C.] 24 Fed. 739) as authoritative of the proposition that the defendant should be enjoined in the final decree from using any part of the signaling apparatus and system are not believed, in view of the peculiar facts of the case, to be decisive. In the cases cited the infringing devices were machines which had been manufactured before the expiration of the patent, and the defendants were actually using and vending such infringing machines at the time of the expiration. In the present case we are concerned with a combination of old elements, consisting of signaling circuits, circuit openers, and circuit breakers, tracks, batteries, relays, posts, and signaling blades, which, to infringe claim 1 of the patent in suit, must be first assembled, combined, and posi-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



tioned in a certain manner, and then by the movements of a passing train upon one of the rail circuits the signaling circuit broken and the signal blade actuated. The independent elements or parts producing the result have not been patented. The defendant could not be prevented from manufacturing such independent elements or parts for use in signaling apparatuses or systems which are not infringements of the complainant's patent. In other words, the different parts are usable in a railway signal system which is not an infringement of complainant's system.

It might be that in certain circumstances a court of equity would enjoin the use of different parts or independent elements designed to be used in a patented combination to produce a new and useful result, which elements or parts were made prior to the expiration of the patent; but I do not think that the peculiar facts of this case call for such interference. It is not shown that the defendant has manufactured any elements or parts of the signaling apparatus prior to the expiration of the patent with a view of putting them, singly or in combination, on the market. Besides, the defendant does not infringe claim 1 of the Wilson patent, No. 470,813, save by installing a so-called normal danger system of circuits embodying the patented combination, which by reason of the method adopted in combining the elements produces a new result, as distinguished from a familiar method of signaling. I think the principle of *Johnson v. Brooklyn & C. R. Co.*, 37 Fed. 147, 2 L. R. A. 489, and *Vermilya v. Erie Railroad Co.* (C. C.) 89 Fed. 96, which are decisions by Judge Lacombe, is more nearly in point.

The objectionable portions of the proposed decree must be eliminated.

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FERRY-HALLOCK CO. v. HERMAN.

(Circuit Court, S. D. New York. June 12, 1909.)

PATENTS (§ 328\*)—INFRINGEMENT—HAT RING.

A preliminary injunction granted to restrain threatened infringement of the Ferry patent, No. 574,894, for a hat ring.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On motion for preliminary injunction.

Gifford & Bull, for complainant.

John L. Bernstein, for defendant.

NOYES, Circuit Judge. The orderly administration of justice in patent causes requires me to disregard any personal inclination and to follow the decision of this court in *Ferry v. Waring Hat Mfg. Co.*, 129 Fed. 389. In that case it was held that the patent now in suit was valid and infringed; the infringing device being held to possess the "hollow bead" of the patent.

Giving the phrase "hollow bead" the meaning given it in that opinion, I think it the better view that the structure (Exhibit A) possesses such bead, as well as the petticoat of the patent, and infringes. It

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

can hardly be said that this ring has merely a turned-down edge. I think it may be said to have a superabundance of material. It is not entirely clear whether the defendant manufactures the particular structure (Exhibit A). I understood, however, upon the argument, that it was the desire of the defendant that this motion should be determined upon the theory that he was making and using such ring, and anyway, upon the affidavits presented, I should hold that a case of threatened infringement was made out.

A preliminary injunction may be issued with respect to the structure Exhibit A; but if the defendant desires to appeal from this order, and will do so promptly, the issuance of the injunction will be stayed pending the appeal. The parties may, if they desire, submit affidavits upon the question whether any security—and, if any, the amount—should be required upon such stay.

### BROWN BAG-FILLING MACH. CO. v. DROHEN.

(Circuit Court, W. D. New York. February 23, 1909.)

No. 253.

#### 1. PATENTS (§ 318\*)—SUIT FOR INFRINGEMENT—MEASURE OF PROFITS.

In computing the profits realized by a defendant from the use of an infringing bag-filling machine, the master *held* to have properly taken as the basis the saving as compared with the cost of hand labor, and that the work was even then done at a loss is immaterial.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.\*]

Accounting by infringer for profits, see note to *Brickill v. Mayor, etc., of City of New York*, 50 C. C. A. 8.]

#### 2. PATENTS (§ 322\*)—SUIT FOR INFRINGEMENT—REFERENCE FOR ACCOUNTING.

The question whether a defendant, after an interlocutory decree finding infringement of a patent, further infringed by the use of machines not before the court, is one which may properly be determined by the master on an accounting.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 322.\*]

#### 3. PATENTS (§ 319\*)—SUIT FOR INFRINGEMENT—RIGHT TO DAMAGES.

Where there is not sufficient evidence to establish a uniform license fee or royalty for the use of a patented machine, a master is justified in refusing to award damages for the use of an infringing machine.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 319.\*]

In Equity. On exceptions to master's report.

See, also, 140 Fed. 97.

Nathan Heard, for complainant.

Herman J. Westwood, for defendant.

HAZEL, District Judge. The complete and able report of the master, who has awarded the complainant profits in the sum of \$8,016.39, sets forth the facts, and also contains such a full discussion of the various questions of law involved that perhaps it is entirely unnecessary for me to add anything thereto; but I will nevertheless notice briefly several of the important exceptions.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer

The principal contention was that the master was in error regarding the standard of comparison adopted by him to establish the gains and profits. In view of the evidential facts, however, I think the master correctly based his finding upon the cost of hand labor, and rightly adopted it as a standard of comparison. *Turrill v. Illinois Central (C. C.)* 20 Fed. 912; *Knox v. Great Western Mining Co.*, Fed. Cas. No. 7,907. That the defendant performed the work of filling the bags with seed, using a patented machine at a loss, is immaterial upon the question of ascertaining the gains and profits. The proofs show that the defendant entered into a contract with the United States government to fill with seed a large number of small paper bags after this action for infringement was instituted, and with actual knowledge of the complainant's patented invention. Although in carrying out the contract the defendant made no actual profit, yet the master applied the correct rule in holding that the complainant was entitled to recover what the defendant actually saved in filling the bags under his contract by appropriating the patented structures. *Mevs v. Conover* (1877) 125 U. S. 144, note; *The Cawood Patent*, 94 U. S. 695, 24 L. Ed. 238; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664. This court also concurs in the finding that the Tracy and Bolgiano machines were infringements of the patent in suit. Such machines not having been before this court when the defendant was found to infringe the patent in suit, any subsequent infringements were questions properly before the master to be decided by him (*Wooster v. Thornton [C. C.]* 26 Fed. 274; *Westinghouse Electric & Mfg. Co. v. Sangamo Co. [C. C.]* 128 Fed. 747; *Edison Co. v. Westinghouse Co. [C. C.]* 54 Fed. 504); and accordingly the profits made by the infringing machines were rightly included in the award to the complainant.

Regarding the exceptions filed by the complainant, it is claimed that the master was in error in not allowing an item of \$71.12 for paste. A careful reading of the report convinces me that in computing the cost of filling the bags the master considered all elements in relation to which the testimony offered was satisfactory. The remaining exceptions relate to the failure of the master to award damages as well as profits. The true measure of damages would be an established license fee or royalty. *Birdsall v. Coolidge*, 93 U. S. 64, 23 L. Ed. 802. The master was of the opinion that the complainant had failed to prove a uniform license fee upon labor such as the patented machine was able to perform, and as there was competent evidence merely of a single license fee he decided on the authority of *Adams v. Bellaire Stamping Co. (C. C.)* 28 Fed. 360, and *Walker on Patents*, § 557, that no royalty or uniform license fee had been established. No sufficient reason is shown why this finding should be disturbed.

The exceptions filed by the defendant and by complainant are overruled. The fees of the master, whose report is confirmed, may in the usual way be paid by complainant, and be taxed against the defeated defendant.

## SIROCCO ENGINEERING CO. v. B. F. STURTEVANT CO.

(Circuit Court, S. D. New York. June 12, 1909.)

## 1. PATENTS (§ 312\*)—SUIT FOR INFRINGEMENT—REISSUE.

A delay of seven years before applying for a reissue raises a presumption of laches, and imposes the burden upon the complainant, in a suit for infringement of the reissue, to allege and prove facts in excuse.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 312.\*]

## 2. PATENTS (§ 310\*)—REISSUES—CONSTRUCTION OF CLAIMS.

On demurrer, claims in a reissue patent should not be regarded as the same as those in the original patent, although in identical words, where the specifications are different, and the bill does not show that the changes in the specifications make no material change in the scope of the claim.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.\*]

In Equity. On demurrer to bill.

Arthur C. Fraser, for complainant.

Omri F. Hibbard, for defendant.

NOYES, Circuit Judge. Whether the reissues enlarge or restrict the claims of the original patent, it is my opinion that the delay of more than seven years in applying for them requires explanation upon the part of the complainant. Such delay, unexplained and unexcused, would I think, constitute laches and prevent a recovery.

The complainant, however, points out that several of the claims of the original patent appear unchanged in the reissued patents, and urges that the validity of these original claims is not impaired by any invalidity in the new claims. This would undoubtedly be true if the claims in legal effect, as well as in language, remained the same. But the claims, although in the identical words, might be essentially different in scope, when read in connection with materially different specifications.

Now the specifications in the reissued patents are different from the specifications in the original patent. The complainant itself contends that in the absence of expert testimony it is impossible for the court to determine just what effect the changes in the specifications have upon the scope of the claims. Accepting this contention as well founded, I think it clear that claims in a reissued patent should not, upon demurrer, be regarded as the same as those in the original patent, although in the identical words, where the specifications are different, and where the bill of complaint wholly fails to show that the changes in the specifications make no material change in the scope of the claims.

If the complainant relies upon the new claims in the reissued patents, it should explain the delay in applying for them. If it relies upon the claims of the original patent as being unchanged by the reissues, it should allege and show that they were unchanged by the alterations in the specifications.

The demurrer to the bill of complaint is sustained, with costs; but the complainant may within 30 days from the date of this decision, and upon the payment of such costs, amend its complaint in the particulars pointed out in the preceding paragraph.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## HABICHT, BRAUN &amp; CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 4, 1909.)

No. 5,190.

**1. CUSTOMS DUTIES (§ 78\*)—ABANDONMENT—GOODS DESTROYED BEFORE IMPORTATION.**

Where portions of an importation were so damaged by sea water on the voyage as to be entirely valueless, there was nothing left to abandon, under the provisions of Customs Administrative Act June 10, 1890, c. 407, § 23, 26 Stat. 140 (U. S. Comp. St. 1901, p. 1930).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 78.\*]

**2. CUSTOMS DUTIES (§ 78\*)—BOND FOR RETURN OF UNEXAMINED PACKAGES—NONIMPORTATION.**

Breach of a bond given under section 2899, Rev. St. (U. S. Comp. St. 1901, p. 1921), for the return of goods not examined by customs officials, does not affect the right of the importer to an allowance for damaged merchandise. No other or different penalty is contemplated by the bond or by said section than the damages provided by the bond.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 78.\*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, reported as G. A. 6,700 (T. D. 28,651), affirmed the assessment of duty by the collector of customs at the port of New York.

McLaughlin, Russell, Coe & Sprague (Edward P. Sharretts, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

LACOMBE, Circuit Judge. The importation was of glacé fruit. The Board finds that there were 29 cases, and 59 boxes out of other cases, which were so damaged by sea water on the voyage as to be entirely valueless. These cases and boxes were condemned by the health officers and destroyed. The testimony sustains this finding. Upon this state of facts there was nothing left to "abandon" under section 23 of the customs administrative act (Act June 10, 1890, c. 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1930]). The case is on all fours with *Lawder v. Stone*, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178, where it was held that importations which have been so damaged on the voyage of importation as to be entirely worthless should be treated as if no importation of them had been made. No duty should be assessed upon them. I do not see how this rule can be affected by the circumstance that, as to the cases in question, there has been some breach of the bond given under section 2899, Rev. St. (U. S. Comp. St. 1901, p. 1921), assuming that there were such a breach. The bond itself provides what shall be the damages recoverable when a breach is proved (*United States v. Dieckerhoff* [C. C.] 103 Fed. 789); and no other or different penalty is contemplated by the bond or by the section under which it is exacted.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The decision of the Board of General Appraisers and of the collector is reversed, and cause remanded, with instructions to remit the duty on the worthless cases and boxes.

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THE MONTEREY.

THE UNITED STATES.

(District Court, S. D. New York. June 3, 1909.)

**COLLISION (§ 39\*)—OVERTAKING VESSEL.**

Collision in the Lower New York Bay near the junction of the Main Ship Channel and the Swash Channel between two steamers proceeding to sea. *Held* that the collision was due to the suction of the United States, which resulted from a too close approach in passing the Monterey and that the former was solely liable.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 39.\*]

Overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.

(Syllabus by the Judge.)

Convers & Kirlin, for the Monterey.

Wing, Putnam & Burlingham, for the United States.

ADAMS, District Judge. These actions arose out of a collision which occurred in the Lower New York Bay, near the junction of the Main Ship Channel and the Swash Channel, between the steamships United States and Monterey, on the 16th of April, 1908. The libel of the owner of the United States alleges the facts and the faults of the collision to have been as follows:

"First: The libellant is a corporation of the Kingdom of Denmark, which owns and operates various ocean steamship lines, including a regular service between Copenhagen and ports in the United States known as the Scandinavian-American Line. Among such vessels is the United States, a twin-screw passenger and freight steamship of over 10,000 tons, measuring 501 feet long, 58.3 beam, and 39.3 depth of hold. She carries the flag of Denmark, and hails from Copenhagen, where she is regularly registered and documented.

Second: On Thursday, April 16th, the United States had left New York bound on her eastward voyage, with cargo and 509 passengers. She was fully manned and equipped, with the usual corps of officers, under command of Captain Wulff, a master of long experience, and with a Sandy Hook pilot in charge. Until the collision hereinafter mentioned, she was tight, staunch and strong, and in all respects seaworthy.

Third: In going out of the channel, below New York Narrows, the United States and the Monterey were in close company, the Monterey being ahead and on the United States' starboard bow.

The weather was clear, wind light from N. N. E. and the tide at the last of the ebb. When approaching the junction of the Main and Swash channels, those on the United States saw a schooner on the port bow, apparently heading to cross the channel. The engines of the United States were stopped, but it was soon seen that the schooner would not interfere with the passage of either steamship. The United States was drawing 27 ft. 6, the Monterey only about 20 feet, and the two vessels were approaching the widest part of the channel, where ocean steamers are accustomed to meet, overtake, and pass in entire safety.

Fourth: While the United States was thus forging ahead, with stopped engines, the Monterey was heard to give two short blasts of the whistle. The

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

United States gave two short blasts on her whistle, and then telegraphed to put her engines ahead, and proceeded to come up on the port side of the Monterey at a lateral distance of about 500 feet or upwards. Just after these two blasts, the Monterey again gave two short blasts, consenting to let the United States pass. A tugboat with mudscows was ahead of the Monterey, but close to the starboard side of the channel. As the Monterey was abreast of the United States, and the two vessels were apparently passing in safety, the Monterey appeared to starboard her helm on account of overtaking the tug boat, or for some other cause. As her bow was abaft the beam of the United States, the Monterey was observed to swing towards the United States. Soon after an officer in uniform was seen to run on the Monterey's bridge to give some orders as to her helm; but evidently it was too late to break her sheer, and the Monterey swung towards the United States, so that her port bow struck the United States at the engine-room compartment, breaking in her frames and plating, and opening the hull below the load-line.

The collision was at 1:29 P. M., according to the time of the United States, and took place near the junction of the two channels. As the United States was sinking she was put over towards the West Bank, where she took the ground, the engine-room filled up with compartments No. 3 and No. 4 leaking more or less, so as to seriously damage all cargo therein.

Fifth: The United States had to employ salvors to patch the wound and pump her out and bring her back to New York, and then to hire a special pier, and discharge her cargo, part of which she has had to reship. All her passengers had to be forwarded by other vessels. She has to be dry-docked and undergo repairs, which are grave and serious, so that the full extent of libellant's collision damages and the injury to her cargo are not yet known. As far as libellant can now state, the same will amount to Two hundred and fifty thousand dollars, or upwards.

Sixth: Said collision and damage were not due to any fault or neglect on the part of the libellant, or of those navigating the United States; but were wholly due to the faults of those on the Monterey; in that she had no proper lookout, or competent navigator on the bridge; that she did not obey Rule VIII of Article 18th of the Act of June 7th, 1897; that she did not give proper whistles; that she did not adhere to the whistle signals which she did give; in that she did not keep her course, but crowded upon the course of the United States; in that she failed to keep out of the course and track of the United States, the draft of which required her to navigate only in a narrow path, whereas with the draft of the Monterey there was ample room on her starboard side, where Article 25 of the Inland Rules required her to be, and in other faults, which libellant will show upon the trial hereof."

The libel of the owner of the Monterey alleged the facts and the faults to have been as follows:

"First: At all the times hereinafter mentioned the libellant, New York & Cuba Mail Steamship Company, was and it still is a corporation, duly organized and existing under and pursuant to the laws of the State of Maine. The libellant owns and operates a number of steamships running in what is known as the Ward Line between the port of New York, ports in Cuba and ports in Mexico. One of the steamships so owned and operated by the libellant is the steamship Monterey, a twin-screw passenger and freight steamship of 4702 gross and 2948 net tons register, 341 feet in length, 47' 7" beam, and of 16' 9" depth of hold. Until the collision hereinafter mentioned, the Monterey was tight, staunch, strong and in all respects seaworthy and fully manned, equipped and supplied.

Second: On April 16, 1908, shortly after noon, the Monterey left her pier No. 13, East River, New York, with a full cargo and about forty passengers bound on a voyage to Havana, Cuba, and to ports in Mexico. The weather was fair and clear and the tide was the last half of the ebb. The Monterey carried a full complement of officers and crew properly stationed in their respective positions. The navigation of the vessel was in charge of a licensed Sandy Hook pilot. The pilot, master, third officer and quartermaster were on the

bridge, a lookout was stationed forward, and the chief officer and other members of the crew were on the forward deck.

Third: After passing through the Narrows, the Monterey steered on the starboard side of the main channel, passing close to the West Bank. The United States was coming down astern and somewhat to the eastward of the Monterey, and was seen to be shortening the distance between the vessels. The United States was a large vessel, 500 feet or more in length, and was drawing 27 feet 6 inches of water.

After the Monterey had passed the Bell Buoy at the tail of the West Bank, a schooner heading about W. N. W. on the starboard tack was seen near the upper end of the Romer Shoal. It was not, however, necessary for the Monterey to make, and she did not make, any manœuvre with regard to the schooner, as the steamer was well over on the western side of the channel, and there was plenty of room to pass ahead of the schooner.

The Monterey proceeded on her course passing close by buoy No. 9 on the western side of the channel. Shortly before reaching the mouth of the Swash Channel, the Monterey overtook a tugboat towing a mud scow. The tug and tow were heading to the southward and westward and were on the western edge of the channel. The pilot of the Monterey blew a two blast signal to the tug to indicate that he wished to pass on the port side of the tug. The tug acquiesced in this manœuvre and the steamer accordingly proceeded on her course to pass the tow, leaving the scow on her own starboard hand. Shortly afterward, the United States coming up astern of the Monterey likewise gave the tug a two blast signal indicating that she also desired to pass the tug and tow to port. The United States passed to the eastward of the scow, leaving it on her starboard hand.

Fourth: At about the entrance to the Swash Channel, the United States, proceeding at a much higher rate of speed than the Monterey, began to overlap the latter's stern in an effort to pass at the place. The Monterey was heading down the channel, well over on the western side of it, and had the ranges of the Conover Beacon and Chapel Hill Beacon lighthouses open to the westward. The United States appeared to be hauling a little to the westward and converging slightly on the course of the Monterey in order to pass well to the westward of the junction buoy which divides the southerly side of the Swash Channel from the Main Channel.

When the United States first began to overlap the Monterey, the former appeared to be passing quite close, and when she got abeam, she appeared to be somewhat nearer and not more than 100 feet off. The Monterey maintained her course and speed. As the United States drew ahead, it was noticed that she was very close to the bottom, and was stirring up the mud with her propellers. It was then low tide, and the water was very low. When the stern of the United States reached a point from a third to a half of the length of the Monterey forward of her stern, the suction of the United States began to draw the bow of the Monterey to port and notwithstanding the fact that the helm of the Monterey was ported, and hard ported, her bow was drawn in steadily towards the United States. As soon as the effect of the suction of the United States was shown on the Monterey, and danger of collision was thereby threatened, the latter's starboard engine was immediately stopped and put full speed astern with a view to assisting the port helm, and the port engine was kept going slow ahead. A moment or so later, when it was seen that the bow of the Monterey continued to be drawn steadily in towards the starboard side of the United States, and collision was unavoidable, the port engine was also reversed and both engines continued to reverse until the vessels came together at about 1:34 p. m., the port bow and stem of the Monterey coming in contact with the starboard side of the United States in the region of her engine room.

The forward plating and stem of the Monterey were broken and bent round to starboard, and the violence of the blow caused her to roll violently to starboard. As she righted herself her port bow came again in contact with the starboard side of the United States, and she scraped along aft until the United States finally drew ahead and clear. In consequence of the damage sustained by the Monterey water entered the vessel, causing damage to a part of her cargo.



Fifth: The United States did not give any whistle signal to the Monterey prior to her attempt to pass as above stated, and she attempted to pass without first securing an agreement of signals as required by Article 18, Rule 8. No whistle signals of any kind were blown by either vessel to the other prior to the collision.

Sixth: The Monterey sustained such damage that she was obliged to return to New York, discharge her cargo, and go into dry dock for repairs. The detention of the Monterey in consequence made it necessary to forward her cargo and passengers by other steamers. The repairs made necessary by the collision have not yet been completed, but the damage suffered by the libellant on account of repairs, and loss of use of the vessel, forwarding of the cargo and passengers, with the consequent loss of freight and increased expense, will be very serious. The libellant is also entitled as bailee to recover the loss suffered by the cargo. The full extent of the libellant's damages as aforesaid is not yet known, but as nearly as libellant can now estimate, it will amount to less than eighty thousand dollars (\$80,000.00).

Seventh: The collision and the damage resulting therefrom were not caused nor contributed to by any fault on the part of the Monterey but were caused solely by the faults of the United States in that:

1. She did not maintain a good and proper lookout.
2. She was not properly manned and her navigation was in the hands of careless or incompetent persons.
3. Being an overtaking vessel, she failed to keep out of the way of the Monterey as she was required to do by Article 24 of the Inland Rules.
4. Being an overtaking vessel she attempted to pass on the port side of the Monterey in contracted and shallow waters without first signalling her desire and intention, and obtaining an agreement hereto as she was required to do by Article 18, Rule 8, and without otherwise complying with the requirements of that rule.
5. She attempted to pass too closely, and converged and crowded upon the course of the Monterey while passing.
6. She omitted to give the whistle signals required by law.
7. Being a vessel bound under Article 24 and Article 18, Rule 8 to keep out of the way of the Monterey, she disobeyed Article 23 in failing on approaching the Monterey to slacken her speed, or stop and reverse."

The statements of the answers were in conformity with those of the libels and it is not necessary to repeat them.

The weather and tide were as stated in the pleadings. The official tide observer stationed at Port Hamilton testified that on the day in question it was dead low water at five minutes after 2 p. m. and on that day at 1 p. m. it was .6 of a foot below mean low water; at 2 o'clock it was 1 foot below mean low water, therefore at the time of the collision, about 1:30 p. m., it probably was about .8 of a foot below normal. This was doubtless due to a heavy northwest wind which had been blowing the day before.

The United States left her pier in Hoboken at 12:10 p. m. and the Monterey left her pier on the East River about 12:30 p. m. On passing the Statue of Liberty, the latter was about a mile ahead of the former. The United States was the faster vessel and was proceeding at about 15 miles an hour. She would have overtaken the Monterey before she did had not her navigation been so much interrupted by other vessels. The speed of the Monterey was 12 miles an hour. She was also somewhat interfered with by other vessels but kept ahead until after the vessels had passed the West Bank Lighthouse.

The course of the Monterey, after passing Craven Shoal Buoy, was S. by W.  $\frac{1}{4}$  W., which she kept until immediately before the colli-

sion, as stated by her pilot. It is to be remarked that the pilot said in another place that he was steering S. by W.  $\frac{3}{4}$  W., a half a point to the starboard of the channel course, but this was an evident error and further the compasses of the Monterey were affected by iron cargo on board to the extent of 2 degrees westerly and were not entirely reliable. It is perfectly clear that below Craven Shoal Buoy she was well on the starboard side of the channel. She was steering by the range of Conover Beacon and Chapel Hill Beacon, which shows the course down the Main Channel, keeping it slightly open to the westward.

The course of the United States after backing out from her pier was a little on the starboard side of the river. She saw the Monterey coming out of the East River and slowed to let her pass. When she got under way again, the Monterey, pilot Heath said, was about 1000 feet ahead. The latter gained so that the pilot judged there was a half a mile's distance between them. At the Narrows, the Monterey was ahead, having the United States on her port quarter. Below the Narrows, a schooner sailing on the eastern side of the channel, appeared to be in the way of the United States, which stopped her engines for three or four minutes. Notwithstanding such a stoppage, she remained not very far behind the Monterey.

At this time, while the Monterey was well on the starboard side of the channel, the tug M. Moran was about a quarter of a mile ahead. The tug was bound down with a mud scow, on a hawser of 200 fathoms, intending to go through the Swash Channel. The usual course for such tows was through that channel and the Monterey blew a signal of two blasts, indicating that she desired to pass on the port side of the tug and tow. It does not appear that the tug answered the signal but it was understood by her navigator and he hauled his tug and tow to the westward out of the channel and of the Monterey's course.

The United States at this time was still above Buoy No. 10 and somewhat to the eastward of the Monterey. She heard the two blast signal given to the tug and understood it to be a permission or invitation given by the Monterey to the steamer to pass her to port. Accordingly the United States sounded a two blast signal, which is recorded in her log to have been an answer to the signal of the Monterey. It is claimed by the United States that the Monterey blew another signal of two blasts after the signal of the United States. I think that this contention may be true, but it does not appear to what vessel the signal was given. The Monterey denies the giving of any signals to the United States.

It seems to be fairly well established that the Monterey was proceeding about as far on the westerly side of the channel as she could prudently go, and that the United States was, until shortly before the collision, rather on the easterly side of the channel. At the time the United States sounded her two blast signal she was, her pilot said, "heading across the channel S. by W.  $\frac{3}{4}$  W.," in order to pass to the westward of the Junction Buoy, which indicates the separation of the Main Channel and the Swash Channel. She was thus, assuming that the Monterey was on the channel course of S. by W.  $\frac{1}{4}$  W.,

converging on her course to the extent of half a point. Treating the signals as an invitation or permission to pass ahead, the United States proceeded to pass the Monterey to port between Buoy No. 9 and the Junction Buoy. When the former attained her full speed, she would go about 300 feet per minute faster than the Monterey.

There is a great divergence in the testimony as to the distance the vessels were apart when the United States began to overlap the port quarter of the Monterey. The libel of the United States claims it was a good ship's length (515 feet) and her witnesses gave estimates varying from 300 to 800 feet. The witnesses on behalf of the Monterey said when the United States came up alongside she was distant from 75 to 150 feet.

The United States came nearer to the Monterey as she drew ahead. This was no doubt due to the converging of the courses, because I do not think there can be any reasonable doubt that the Monterey was proceeding on a course of S. by W.  $\frac{1}{4}$  W., as testified to by her master. He did not state it was so from his observation of the compass but no doubt it was from his knowledge of the compass course and what he saw his own vessel was doing.

The Monterey during the approach of the United States maintained her course and speed. The log of the United States records that "the Monterey kept, however, her course unchanged parallel with ours."

With reference to the distance between the vessels before anything occurred which created apprehension of collision, I think the difference should be decided in favor of the Monterey's contention and that the United States attempted to pass when the vessels were apart a distance of about 100 feet. As she drew up abreast, the helm of the Monterey was kept "steady aport," a caution to the wheelsman to keep her perfectly straight and counteract any tendency of the vessels to veer together. When the United States was from one-third to one-half past and the bow of the Monterey was opposite a point about 2 points abaft the beam of the United States, the Monterey turned in the direction of the United States, notwithstanding a hard-aport helm and the starboard engine being put full speed astern and the port engine being kept going ahead to assist the port helm. Upon its being found that these precautions did not have the desired effect, both engines were reversed at full speed, but the collision occurred, the bow of the Monterey striking the starboard side of the United States at an angle of about two points. There were two blows, one succeeding the other almost immediately.

The collision occurred near the junction of the Swash Channel with the Main Ship Channel, about abreast of the Bell Buoy and well over to the westerly edge of the channel.

The United States was damaged in the region of her engine room to such an extent that it was necessary to beach her on the mud, near Buoy No. 7. Her engine room subsequently filled. A day or two later she was pumped out and brought back to New York. The Monterey was also seriously damaged. Water entered her in considerable quantities, but she remained afloat and returned to the city under her own steam.

The faults alleged against each vessel are set forth in connection with the pleadings, supra.

Each vessel claims that the other violated the overtaking rule, which provides:

"Rule VIII. When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam-whistle as a signal of such desire, and if the vessel ahead answers with one blast she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

It was evidently incumbent upon the United States as an overtaking vessel to obtain the consent of the Monterey to pass ahead, and the United States claims that such consent was obtained, which the Monterey denies. Great stress is laid by the United States upon the necessity for the consent and the claim that it was obtained, but I am unable to see that it was of much importance in this case. The Monterey expected the United States to pass and though she claims she did not consent by signal, her movements were in conformity with the duty that would have been imposed upon her by a consenting signal, that is, she kept well on the starboard side of the channel, where she belonged, and she did not attempt to cross the bow or crowd upon the course of the United States until she was drawn towards her. There was no movement of the Monterey's helm which would turn her towards the United States and when she found she was being drawn in that direction, she did everything that seemed to her proper to avoid the collision. If she did not do everything she should, and there was fault, it was evidently in extremis.

The United States blew a signal of two blasts to the Monterey which the latter treated as a signal to the Moran. The navigators of the United States emphatically state that her signal was intended for the Monterey. I think that is probably true. The Monterey was the vessel she had to deal with. It was not necessary that the United States should secure co-operation from the Moran, which was entirely out of her way and it was necessary that she should, in compliance with the rule, notify the Monterey of her intention, which she did. She supposed that she had received a consent from the Monterey and acted upon it. It may be assumed that the rule with respect to signals was complied with by both vessels and it leaves the question where it was with regard to signals, i. e., which vessel encroached upon the course of the other? Of course the Monterey did, at the end, turn into the United States and if that was the result of any fault on her part, she should be held for the results of the collision, but she claims exemption from any liability because the United States approached

her so closely in passing that she became subject to the influence of the suction of the United States.

Suction is a force that has existed a long time and been recognized as a danger in close navigation especially in shallow waters. No instances have been given of a collision due to it at this particular place but many have occurred in the Lower Bay and have always resulted from a too close approach. That seems to have been the cause here. The United States, the larger vessel, and navigating without much water under her keel, in passing the Monterey, approached too close to her, with the result that the Monterey lost all power over herself and turned into the United States, with the disastrous result of causing damages to the two vessels, said to have been in excess, of \$300,000. I cannot see any cause for this collision except the fault of the United States in endeavoring to pass the Monterey when the vessels were on slightly converging courses in close proximity, due to the United States getting over in the waters to which the Monterey was primarily entitled. It has been recognized by the United States that if she was guilty of this error she should respond for the results in the claim that the Monterey was navigating in the eastward part of the channel and caused a collision "out of her own water by 600 or 700 feet." It is quite evident that the Monterey was, until she felt the force of the suction of the United States, well to her starboard side of the channel, to the westward of a line of the beacon range in the channel, and that the result of the suction did not have the effect of removing her therefrom, when the collision took place.

There will be a decree in favor of the Monterey, with an order of reference. The libel in behalf of the United States is dismissed.

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SANBORN v. WRIGHT & COBB LIGHTERAGE CO. (two cases).

(District Court, S. D. New York. May 28, 1909.)

Nos. 1, 2.

1. SHIPPING (§ 132\*)—LOSS OF CARGO—LIABILITY OF VESSEL.

Where a loss of cargo occurred through the sinking of the carrying boats and it was found that no adequate cause appeared for the sinking, *held* that the boats should be deemed to have been unseaworthy and that their owner was liable to the shipper of cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 482-484; Dec. Dig. § 132.\*]

2. SHIPPING (§ 121\*)—CARRIAGE OF GOODS—LOSS—SEAWORTHINESS.

The contract provided that the respondent company should furnish "good, sound, insurable" boats and look to one of the libellant companies for the loss in case of a marine disaster. *Held*, that where unseaworthy boats were supplied, the respondent company was not entitled to resort to the agreement.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 449-451; Dec. Dig. § 121.\*]

3. SHIPPING (§ 141\*)—LOSS OF CARGO—LIMITING LIABILITY.

A contention on the part of the respondent company that its liability should be limited to the value of the boats, not sustained because the re-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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sponsible agent of the company neglected to avail himself of an opportunity to ascertain the condition of the boats.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 141.\*]

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

#### 4. SHIPPING (§ 132\*)—LOSS OF CARGO—RIGHTS OF SHIPPER.

A claim by the respondent company that the libellant Trading Company was not entitled to recover because it was not the owner of the goods rejected, it being held that the Trading Company having obtained possession of them, with the right to sell and collect the proceeds, was entitled to bring the action here.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.\*]

(Syllabus by the Judge.)

Kneeland & Harison, for libellant.

Wray & Callaghan, for respondent.

ADAMS, District Judge. The first of the above entitled actions was brought by Albert W. Sanbern, the assignee of the New York Glucose Company, and of the General Trading Company, to recover the damages caused by the loss of 250 barrels of glucose and of 380 bags, 400 boxes and 50 barrels of starch, the result of the capsizing of the lighter *Star*, owned by the respondent, on the 12th day of September, 1905, while being towed from Edgewater, New Jersey, to Pier 21, North River. The fault alleged by the libellant was the defective and unseaworthy condition of the lighter. The losses were said to have amounted respectively to \$3,387.38 and \$1,667.49, amounting altogether to \$5,054.87. After various admissions and denials, the respondent alleged:

"Further answering said libel, respondent alleges:

Seventh: That on September 12th, 1905, at about 2 o'clock A. M., the steam lighter 'Leonard J. Busby' took said lighter 'Star' in tow at Edgewater, N. J., as aforesaid, alongside on her starboard side, and, at the same time, took another barge in tow alongside on the port side. The tide was highwater slack at the time and rain was falling, with little or no wind. After leaving Edgewater, N. J., the wind blew from the southeast and when said steam-lighter, with her tow, reached a point about off Pier 50, North River, the wind increased to a gale and the sea became rough. About in this neighborhood said tug and tow ran into floating debris in the river, consisting of logs, spiles and other timber. The said steam-lighter slackened her speed more than once in order to prevent damage to her said tow, and proceeded cautiously for her destination. Shortly afterward it was discovered that said lighter 'Star' was making water very fast. Her pump was set to work and was worked continuously but the water continued to gain. The said lighter's pump was worked continuously and said steam-lighter continued with said tow. When said steam-lighter and tow reached a point about abreast of Pier 23 and were preparing to land said barge 'Star' at Pier 21, said barge, without any warning, or premonition, listed over to port, dumped her cargo and then turned bottom side up. Those on said steam-lighter cut loose from said lighter 'Star' and landed the remainder of her tow and returned to get the 'Star,' but it was found that she had drifted into Pier 21, North River. She was thereafter righted and towed to a dry dock.

That at the time said lighter 'Star' left Edgewater, N. J., she was tight, staunch and strong and seaworthy, properly manned, fitted and equipped and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that said disaster was not caused through any fault or negligence on the part of the respondent, its servants or employes.

Further answering said libel, and as a separate defense, respondent alleges:

Eighth: That on or about the 5th day of February, 1903, your respondent and the New York Glucose Company, above mentioned, entered into a contract in writing whereby it was, among other things, agreed that the respondent should lighter the output of the factory of said New York Glucose Company at Shady-side, N. J., upon the terms and conditions in said agreement named. That said agreement was in full force and effect at all the times mentioned in the libel herein and thereafter. That said cargo so taken aboard said lighter 'Star,' as aforesaid, was shipped by said New York Glucose Company and received by respondent for lighterage pursuant to, and in compliance with the terms and conditions of said agreement, and not otherwise. That said agreement contained the following clause:

'It is further understood that we are to give and take receipts at both points of loading and unloading, and any discrepancies in quantities, in case of shortage as taken on board and as delivered, to be paid for by us, except in the event of a loss or damage by fire or marine disaster, in which case your company would look for compensation to the underwriters who might have insured the cargo; it being understood that your company will effect the insurance on all cargoes lightered, yourselves, and that the lighterage company shall not be held responsible in any way should such an accident chance to occur.'

Ninth: That all of said cargo was delivered to respondent and shipped by said New York Glucose Company, and by no other person. That the damage to said cargo, set forth in the libel herein, was caused by a marine disaster, and that said loss and damage came within the terms of said agreement between said New York Glucose Company and respondent; that by reason of the premises, respondent was not liable for any loss of or damage to said cargo.

Respondent further answering the libel herein, and for a further and separate defense, alleges:

Tenth: That respondent is the owner of said lighter 'Star'; that said lighter was tight, staunch and strong and seaworthy, properly manned, tackled, apparelled and equipped at the time she started upon said voyage; that said damage, sinking and loss occurred without the privity or knowledge of respondent, and if respondent shall be held responsible for said damage, sinking and loss, or any part thereof, by reason of the acts or things done or omitted by those in charge of its said property, respondent prays leave to limit its liability herein to the value of said lighter 'Star,' her tackle, etc., at the time of said sinking, as she then lay, and her pending freight, which value and pending freight amounted to nothing whatever.

Respondent therefore claims the benefit of sections 4283 and 4284 of the Revised Statutes of the United States, and the acts amendatory thereof and supplemental thereto and of all other acts limiting the liability of ship-owners."

The second of the actions was also brought by Sanbern, as assignee of the same companies, to recover the damages, caused to his assignors, by the sinking of the lighter Eagle, owned by the respondent, at Pier 49, North River, on the 31st of December, 1905, and the consequent injury to 7 barrels of glucose and 16 barrels of grape sugar, a part of 100 barrels of the former and of 70 barrels of the latter, the property of the Glucose Company, and a part of 14 barrels and 50 bags of starch, and of 150 bags of dextrine, the property of the Trading Company and for injury to the remainder of the shipment. The losses were said to have amounted respectively to \$1,287.14 and \$1,213.58, altogether to \$2,500.72. The fault alleged by the libellant was the defective and unseaworthy condition of the said lighter.

After various admissions and denials, the respondent alleged:

"Further answering said libel, respondent alleges:

Seventh: That said barge 'Eagle' was made fast to the South side of the pier at 49th Street, on the last of the flood tide, lying with her starboard side next to the dock; that when she was so made fast, said lighter was tight, staunch and strong and seaworthy, and that she rested properly and floated easily, and her cargo was so placed on board thereof as to properly trim said lighter; that as the tide receded said lighter settled upon some sunken object in such manner as to break in one of her planks near the bottom of said lighter, and she immediately filled and sank before anything could be done to prevent it.

That said disaster was not caused through any fault or neglect on the part of the respondent, its servants or employes, but happened through some cause unknown to respondent, other than as above set forth.

Further answering said libel, and as a separate defense, respondent alleges:"

Eighth and Ninth: These are as pleaded in eighth and ninth paragraphs of the separate defense of the Star, supra, and need not be repeated.

"Respondent further answering the libel herein, and for a further and separate defense, alleges:

Tenth: That respondent is the owner of said lighter 'Eagle'; that said lighter was tight, staunch and strong and seaworthy, properly manned, tackled, appurtenant and equipped at the time she started upon said voyage; that said damage, sinking and loss occurred without the privity or knowledge of respondent, and if respondent shall be held responsible for said damage, sinking and loss, or any part thereof, by reason of the acts or things done or omitted by those in charge of its said property, respondent prays leave to limit its liability herein to the value of said lighter 'Eagle,' her tackle, etc., at the time of said sinking, as she then lay, with her pending freight, which value with such pending freight amounted to the sum of Three Hundred (\$300) Dollars and no more.

Respondent therefore claims the benefit of sections 4283 and 4284 of the Revised Statutes of the United States, and the acts amendatory thereof and supplemental thereto and of all other acts limiting the liability of ship-owners."

The actions were tried together, as some portions of the testimony apply to both.

The disaster to the Star occurred while she was making a voyage to Pier 21, North River. She was found to be leaking badly and taking in more water than her pumps could control and she capsized and dumped her cargo shortly before reaching her destination.

The seaworthiness of the vessel is first in controversy. The Star was about 120 feet long by 21.6 beam and drew between 6 and 7 feet. She was one of a number of boats bought by the Lighterage Company in Baltimore about 1899 or 1900, when it was testified \$12,000 or \$14,000 were paid for five boats of the same general character though differing in size. They were all of about the same age, though what that was did not definitely appear. Respondent's witness Rennie, an inspector for underwriters, said he found her upon examination in 1904 for insurance "in a fair condition for a boat of her age" and insurable; that he inspected her again in 1905 and found her in a condition "safe enough to pass." On the cross, he said he had no idea how old the boats were. "They were not very old boats. They were what I considered up in years but not dead old, not a very old boat. \* \* \* A boat gets an old boat after she is 25 years of age; and up to 40 or 50 that is a very old boat."



When the boats were purchased about \$402 were spent upon the Star in rebuilding her, but what it consisted of does not appear. After that it is not shown specifically what was done to her. The Lighterage Company had a yard at Staten Island, where they overhauled these boats as far as the water line and did repairing. It was said that if boats were found to be leaking, they were sent to the dry dock but if not leaking, no money was spent on them. The dry dock proprietor could not give any particulars but remembered that the boat had been at his yard at some time. After the Star was capsized she was left by her tug and not found again until the next morning. In the meantime, she had been collided with and so damaged that she was beyond repair.

The only witness called to explain the disaster to the Star was the master of the tug who had her in charge during the trip. At the time of the trial he was a deck hand on municipal ferry boats. He explained the trouble as follows:

"Q. Did anything happen on the way down to the vessel? A. I started down the river with the two alongside; it was about slack water when I left up there, and the tide started running ebb; the wind was blowing southwest and blowed up a little sea, going down river it blowed up pretty well and got so rough every once in a while I had to slow down, to slack up. Going down I noticed a lot of debris floating in the river—it looked like logs to me, broken stuff—generally there is after slack water, you see some of that floating through the middle of the river, and I had to slow down a couple of times for that. I got down to Pier 50, North River, the Wilson Line, and the captain came up and told me the boat was taking in water; I asked him if he could hold her until we got down to Pier 21, I told him I couldn't put my siphon in or do anything out there in the river being the sea was so rough; he said, 'I think we can hold her,' and I kept going on down as fast as I could. I got off Pier 21 rounding to to get in there and she started to turn over on top of me, to run over towards the tug; I see she was dumping her load and I told them to cut her adrift and she turned bottom side up."

No cause for the disaster beyond the foregoing was shown and it is not probable that the boat encountered any marine peril to which the loss could be attributed. Taking her age and general condition into consideration, I think the loss was due to inherent weakness of the boat. She should have been strong enough to withstand the ordinary perils of the river.

The disaster to the Eagle, a smaller boat than the Star, occurred while she was lying on the south side of the pier at 49th street, North River, on December 31, 1905. She also had been towed from Edgewater, which she left at 1 A. M., and there was no water in her when she landed at 49th Street. The master had made her fast at high water slack and first observed that she was leaking about a half of an hour later, 2:30 o'clock, when he heard a sound of water coming in and went below. She filled without sinking but turned on her side and dumped her load, which was on deck. After the accident, it was discovered that she had a broken plank in her stern on the starboard side, well aft, which was sufficiently large to let in water enough to sink her. There is no explanation of how this hole was made and nothing can properly be attributed to it as a cause of sinking. As far as appears, it may have occurred just as well after the boat filled as before. Some corroboration of the libellant's contention to the former effect

is found in the testimony that the breaks were outward rather than inward, indicating an internal cause of the sinking.

The Eagle was bought at the same time as the Star and \$923.79 spent in repairing her. Much of what has been said with respect to the earlier history of the Star applies to her case.

Captain Salter, an experienced marine insurance inspector, said with respect to the Eagle:

"Q. Did you look over the boat with him? A. Mackenzie took the lead and I followed him; we surveyed the boat outside first, externally, and hunted for the so-called cause of her sinking, to see if we could find any place in her bottom or sides where she had had any collision or where anything had struck her. There was a plank found under the starboard counter pretty well up, I believe about 18 or 20 inches long according to my recollection, that was very badly decayed; it had broken at the butt and started up which would indicate it had been forced out by the water; and I found the plank defective, in other words rotten.

Q. Started out or started in? A. Started out; that would be natural from the water forcing itself out after she got on the dock.

Q. What else did you find? A. On examining the planks of the boat outside I specially noticed there were quite a number of butts on one frame; it is something that I would be attracted to very quickly because as a rule it is not considered the proper method of planking a boat, to have more than one butt with two planks between them and then a butt, on a frame, but frequently in patching these old boats they don't put a long plank in all between the butts. My recollection is there were four butts in this one frame on the starboard side, four planks coming each way on the one frame, and the same on the other side.

Q. And no break in the butts? A. There was no planks between them, no. \* \* \*

By the Court: Q. Did anything indicate to you that she had come into collision with anything? A. Nothing, your honor. That is what we looked for because that would not be an uncommon occurrence but we could not find it, that is exactly what I looked for.

Q. You say this wound would not indicate a collision? A. I didn't think so, no sir."

He also said that Mr. Mackenzie, the other surveyor, threw up his hands at the time of the survey and said: "Here is another case of a worn-out boat, Salter." Mr. Mackenzie, a witness for the respondent, did not deny this. Mr. Salter said that he considered the boat unseaworthy.

The loss here also appears to have been due to an inherent weakness of the vessel.

It was agreed in some letters which passed between the Lighterage Company and the Glucose Company in February, 1903, when provisions for the lighterage of the latter's goods were made, that in case of loss or damage by marine disaster, that the Glucose Company would look to the underwriters for compensation, to the exclusion of the Lighterage Company, and that agreement is urged in the relief of the respondent. If the accident had happened through some perils of the seas, perhaps the contract would apply, but it was agreed between the parties, by correspondence dated February 5, 1903, that the respondent was to furnish "good, sound, insurable barges or boats." The losses occurred because this undertaking was not complied with and I do not consider that the Lighterage Company is in a situation to resort to the undertaking.

It is urged that the respondent is liable by reason of the condition of the vessels, is entitled to limit its liability to their value, which would relieve it altogether as far as the *Star* was concerned, because she was a total loss, and to the extent of \$300 in the case of the *Eagle*, that having been her value, according to stipulation, if the court should find that the respondent was entitled to limit its liability. The determination of the question depends upon which of the respondent's officers or agents knew or should have known of the condition of the vessels and what he did to inform himself thereof. The president of the respondent was not able to testify to their condition because he did not keep himself familiar with it. He said that Mr. Mulvaney was general superintendent of such affairs and was expected to see that the boats were kept in good condition. There can be little doubt that Mulvaney was the one to whom the condition of the vessels should have been known. *The Republic*, 61 Fed. 109, 113, 9 C. C. A. 386. His testimony discloses that he performed the duty of inspection in a very perfunctory manner. He said in testifying about the *Eagle*, that they did "whatsoever had to be done; if the boat leaked in the bottom we put her on the dock and tended to it; if she wasn't leaking we didn't spend any money." That is, it was left to the progress of decay to develop signs of weakness. Substantially the same was said with respect to the *Star*. I can not regard such a method as a proper one in the performance of the duties of inspection, the burden of showing which was upon the vessel's owner. *The Colima* (D. C.) 82 Fed. 665, 679.

The respondent claims that no title to the property was shown in the General Trading Company and it has therefore no right to recover under any circumstances. It appears that the goods claimed by it were shipped by that company to which they were given by the Glucose Company to sell. The proceeds were collected by the Trading Company, which accounted to the Glucose Company. The former was the proper party to sue by virtue of its interest in the property and even if it had been merely a factor still it was entitled to possession and to maintain the action.

There will be decrees for the libellant, with orders of reference.

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#### THE HOFFMANS.

(District Court, S. D. New York. May 24, 1909.)

#### SHIPPING (§§ 203, 207, 209\*)—LIMITING LIABILITY—ADMIRALTY—JURISDICTION.

A loss to the owner of certain twine was suffered through fire on one of the railroad company's barges, and upon an action being brought against the railroad to recover the damages, the latter instituted proceedings to limit its liability to the value of the barge. The owner of the twine excepted to the petition. The questions involved were: (1) Was a single claim sufficient to give the court jurisdiction? (2) Did the petitioner's bill of lading, providing that water carriage should be subject to certain conditions, operate to prevent the application of the limitation of liability acts? (3) Was the libellant precluded by a stipulation, providing that the agreement might be used in a New York state court from re-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sorting to this court? and (4) Did the Hepburn act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), repeal the provisions of sections 4284-4289, Rev. St. U. S. (U. S. Comp. St. 1901, pp. 2943, 2945), relating to limitation of liability. The first question answered in the affirmative and the others in the negative.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. §§ 203, 207, 209.\*

Limitations of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

(Syllabus by the Judge.)

Wallace, Butler & Brown, for petitioner.

Cravath, Henderson & De Gersdorf, for exceptant, appearing specially to object to the jurisdiction of the court.

ADAMS, District Judge. This is a petition on the part of the New York Central & Hudson River Railroad Company, as owner of the barge Hoffmans, to limit its liability to the value of the barge and freight, ascertained to have been, directly after the disaster, \$4,988.22, with respect to a loss by fire in September, 1907, on 3,500 bales of twine, belonging to the International Harvester Company, and shipped by it on the railroad at Auburn, New York, on the 12th of September, 1907, to New York, for export. The value of the shipment was \$14,505.37, but it was not all burned and the salvage having been deducted, there remained a sum of \$12,286.57, which represented the loss on the twine by reason of the fire and the Harvester Company now seeks to recover that sum from the petitioner. The loss was therefore considerably in excess of the value of the carrying barge, hence this proceeding.

The Harvester Company having originally excepted to the jurisdiction of the court, the exceptions were overruled on the 12th day of November, 1908, but without prejudice to a renewal of the same and they are again presented as follows:

"First: That the shipment in question is governed by the Interstate Commerce Act to the exclusion of the statutes for limitation of liability named in said petition of New York Central & Hudson River Railroad Company, and this court has therefore no jurisdiction of said petition for limitation of liability.

Second: That in addition to the exclusion of the statutes for limitation of liability by the Interstate Commerce Acts any rights which New York Central & Hudson River Railroad Company might have had under said statutes for limitation of liability were waived and excluded by the contract of shipment, and this court has therefore no jurisdiction of said petition for limitation of liability.

Third: That this cause was already in process of adjudication in a proper State Court; that there was and is no other claimant against New York Central & Hudson River Railroad Company on account of said loss or damage to said lighter; that the State Court was and is competent to give all proper relief, and that this court has therefore no jurisdiction of the matters contained in said petition of New York Central & Hudson River Railroad Company."

In the arguments, however, the parties have proceeded upon somewhat different lines, the Harvester Company covering the grounds of the exceptions, as follows:

"First. That inasmuch as it sufficiently appears before this Court that there is only one claimant in regard to the damage to this barge or its cargo, to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

wit, the Harvester Company, and the controversy between that claimant and the petitioner, the Railroad Company, had been actually commenced in a court of competent jurisdiction to determine the same, before the filing of this petition, therefore, under the doctrine enunciated in *The Rosa* (D. C.) 53 Fed. 132, this Court should dismiss the petition for limitation of liability.

Second. That the Railroad Company, by its contract of carriage, to wit, the bills of lading, has waived its right to take advantage of any claim for limitation of liability.

Third. That the Railroad Company, by its stipulation, has likewise waived its right to take advantage of the jurisdiction of this Court; and

Fourth. That the statutes of limitation of liability are not operative to destroy the rights existing between shippers and carriers created by the so-called Hepburn Act and the statutes governing the conduct of interstate carriers."

1. For a considerable length of time this court entertained the view that where there was but a single claim, the court was without jurisdiction to decree a limitation of liability under Rev. St. U. S. §§ 4284 and 4285 (U. S. Comp. St. 1901, pp. 2943, 2944). *The Rosa* (D. C.) 53 Fed. 132; *The Eureka* No. 32 (D. C.) 108 Fed. 672.

Views opposing Judge Brown, however, have been indicated. Judge Thomas in *The M. Moran* (D. C.) 107 Fed. 526, in quoting from *The Rosa*, said the expression there used by Judge Brown was not suited to the case then under consideration but:

"If the facts were similar to those presented in *The Rosa*, the views of the court in that case would not be easily disregarded, notwithstanding contrary holding by the United States Circuit Court of Appeals for the First Circuit in *Quinlan v. Pew*, 5 C. C. A. 438-446, 56 Fed. 111-120."

Later, in the Eastern district, *In re Starin* (D. C.) 124 Fed. 101, Judge Thomas held that a shipowner, by defending and appealing an action in a state court to recover damages for injury to a passenger does not waive his right to petition a court of admiralty for limitation of liability, nor is he debarred from the right to invoke the remedy because there is but a single claimant.

In 1907, Judge Brawley in *The Lotta* (D. C.) 150 Fed. 219, discussed the question quite thoroughly and followed Judge Brown in *The Rosa* and *The Eureka*.

Contrary views have been expressed in *Quinlan v. Pew* (Circuit Court of Appeals, First Circuit) 56 Fed. 111, 5 C. C. A. 438, and by Judge McPherson of Pennsylvania in *The S. A. McCaulley* (D. C.) 99 Fed. 302.

The law of the question was very fully discussed in *Quinlan v. Pew*, 56 Fed. 120, 121, 5 C. C. A. 446, and I consider the reasoning there and the result reached much more consonant with sound maritime principles than the contrary ones expressed. It was there said by Judge Putnam:

"The appellant also objects that it appears from the proceedings that the claim of *Quinlan* is the only outstanding one against the vessel, or owners as owners, and that this fact brings the case within *The Rosa*, 53 Fed. 132, where it was held that the statute limiting liability does not apply under such circumstances. As already said, the state of the record is as claimed by the appellant; yet this court cannot accept the rules laid down in *The Rosa*. The statute right to surrender the vessel to a trustee appointed by any court of competent jurisdiction, which in maritime matters necessarily includes the admiralty courts, and to be thus relieved from liability, is protected both by

the letter of the statute and by its reason, whether there are numerous claims outstanding or but one; and the right to have the vessel appraised under admiralty rule 54 is necessarily coextensive with the right to surrender. Indeed, under admiralty rule 56, the owners may bring the entire contest into the admiralty court, even though they finally establish a contention that there are no valid claims whatever. The rule in *The Rosa* is quite impracticable, as it is frequently impossible for the owners of vessels navigating foreign seas, remote from their personal control, to be assured as to the extent to which they may be subject to liens and claims of various kinds. The original act of 1851 § 4, uses both the plural and singular; and there is no such change found in the Revised Statutes as would justify the court in holding that Congress intended any substantial innovation. Indeed the Revised Statutes (section 4285) use both the plural 'claimants,' and the singular, 'person,' thus bringing forward the plural and singular of the original act. The statute was intended for the encouragement of commerce, and would not receive its full effect to the extent given by the Supreme Court in *Providence & New York Steamship Co. v. Hill Manuf'g Co.*, 109 U. S. 578, 588, 589, 3 Sup. Ct. 379, 617, if the owners of a vessel or wreck, under the circumstance of there being but a single claim outstanding, large enough to absorb the entire vessel or her salvage, could be compelled, on the verdict of a jury, to pay perhaps vastly more than her real value, or be forced to the trouble and expense of litigating any issue of that character. The appellant treats the jurisdiction to be exercised under the statute as though governed exclusively by the principles applicable to courts of equity. But with these neither the statute nor the proceedings under it, so far as concerns the admiralty courts, have any relation, except merely incidentally, whenever it happens that the claims are in excess of the value of the vessel or her salvage. In that event the rules of equity procedure come in, not for the purpose of determining the jurisdiction of the court, but only as they relate to proceedings in bankruptcy, or any other proceedings, when marshaling of assets becomes incidentally necessary."

The ruling in the last mentioned case has recently been quite generally followed in this district notwithstanding *The Rosa* and *The Eureka*, and numerous instances might be cited where it has been applied but I do not consider it necessary to mention them all. The following will serve as illustrations: *The Tommy* (D. C.) 142 Fed. 1034, *The John K. Gilkinson* (D. C.) 150 Fed. 454, and *The Southside* (D. C.) 155 Fed. 364. *The Tommy* was appealed and while there was no mention made of the point now under discussion, yet it was clear that there was only one claimant and the case as decided here was reversed because the boat owner was not given the benefit of the statute limiting liability. *The Tommy*, 151 Fed. 570, 573, 81 C. C. A. 50.

While there can be no doubt that an answer in a state court proceeding often suffices to give an opportunity to present the defence of the limitation of liability provided by the United States Statutes, yet it is manifestly useless where anything in the nature of affirmative relief is necessary. If a person, when confronted with a claim, desires to bring all matters connected with his vessel to a definite determination, he must proceed affirmatively and the only manner in which he can do so is by resorting to a District Court of the United States. *Elwell v. Geibel* (C. C.) 33 Fed. 71; *The Eureka* (D. C.) 108 Fed. 672, 673; *Elwell v. Bender*, 79 Hun, 243, 29 N. Y. Supp. 357. In *Oregon R'd & Navi'n Co. v. Balfour*, 179 U. S. 55, 56, 21 Sup. Ct. 28, 45 L. Ed. 82, quoting from *Providence Steamship Co. v. Manufacturing Company*, it was said:

"The subject is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial; and if this were not so, the subject matter itself is one that belongs to the department of maritime law. The adoption of forms and modes of proceeding requisite and proper for giving due effect to the maritime rule thus adopted by Congress, and for securing to shipowners its benefits, was therefore strictly within the powers conferred upon this court; and where the general regulations adopted by this court do not cover the entire ground, it is undoubtedly within the power of the district and circuit courts, as courts of admiralty, to supplement them by additional rules of their own. \* \* \* In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of ship owners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the shipowners from being harrassed by litigation in other tribunals. \* \* \*

We see no reason to modify these views, and, in our judgment, the proper District Court, designated by the rules, or otherwise indicated by circumstances, has full jurisdiction and plenary power, as a court of admiralty, to entertain and carry on all proper proceedings for the due execution of the law, in all its parts."

The subject was discussed by Judge Morrow in *Re Whitelaw* (D. C.) 71 Fed. 733, and he held that a court of admiralty was the proper one to enjoin the prosecution of suits in state courts against a shipowner. In his opinion, he said (71 Fed. 736-738):

"But in *Re Long Island, etc., Transportation Co.* (D. C.) 5 Fed. 599, the section, as amended, came up for consideration, and the question involved in this case arose there, and was directly passed upon. Judge Choate, of the District Court for the Southern District of New York, gave the matter careful investigation, and came to the conclusion that section 720 was limited in its application by what may aptly be termed 'the injunction clause' of the limited liability act, viz.: 'All claims and proceedings against the owner shall cease.' The reasons upon which the learned judge arrived at that conclusion are so clearly stated that I shall quote from his opinion at some length. He says: 'But it is still insisted, as to the restraining order, that, whatever may be the jurisdiction of this court, it is prohibited by Rev. St. § 720. This section is a re-enactment, with some change of language, of the fifth section of the act of March 2, 1793 (1 Stat. 335, c. 22). The question thus raised, so far as it depended on the original statute of 1793, is disposed of so far as this court is concerned, in favor of the power to restrain the suits conformably to the rules of the Supreme Court by the decision in the case of *The Oceanus* (In re Providence, etc., Steamship Co.) 6 Ben. 131, Fed. Cas. No. 11,451. \* \* \* The question is whether the introduction of this exception into section 720, as to laws relating to bankruptcy, is to be deemed to take away the power to restrain given in the original act by what has been held to be the necessary implication of the words 'after such transfer all claims and proceedings against the owner shall cease,' which were re-enacted without change in section 4285. Whatever the effect of section 720, section 4285 effectually deprives the state court before which such claim or proceeding is pending of all jurisdiction. The only question is, on which court is imposed the duty or conferred the power to issue a restraining order, if a restraining order shall be necessary to prevent the plaintiff in such suit from proceeding with his suit? It cannot be supposed that this was to remain on the statute book a mere brutum fulmen, with no power to carry it into effect and see that it was executed. Clearly, as to any suit pending in a federal court, the duty would remain where it was before, and the court in which the limited liability proceeding was pending would issue the restraining order. It would be so unusual and questionable an exercise of legislative power by Congress to make a direction requiring state courts to issue such a restraining order that I think nothing short of the most

explicit declaration of an intent to do so would justify the conclusion that such an intent existed. It is most improbable, too, that the necessary power to carry into effect the grant of exclusive jurisdiction to a court of the United States, clearly intended to be exercised by some authority, should not be conferred upon the court whose jurisdiction and whose suitors are to be defended against interference. It is very likely that the person who framed section 720 overlooked the fact that there was another law in force besides the laws relating to bankruptcy under which the courts of the United States could restrain proceedings already commenced in a state court; but in view of the fact that this other law was embodied in the same revision, that its meaning and force were determined by decisions of the courts, and that it must be presumed to have been re-enacted with the same meaning, I think the change made in section 720 is not sufficient to show an intention to take away anything from the meaning of section 4285. Section 720 has obviously its principal application to the restraint of suits which, but for the injunction, the state court would have jurisdiction to go on with and determine. This is true with regard to suits against the bankrupt, stayed under the bankrupt law, and generally where a party is by the rules of equity entitled to enjoin a defendant from going on with a prior suit. The peculiarity of this case is that the suit stayed is one in which, by the express terms of an act of Congress, the state court is absolutely without jurisdiction to proceed. There are not, therefore, the same reasons of public policy in this case as in the cases more particularly provided in section 720, for prohibiting the issue of the injunction or restraining order. It does not interfere with any exercise of jurisdiction which could otherwise be claimed by the state court, and it is not likely to lead to unseemly conflicts between the federal and the state tribunals, to prevent which is understood to have been the original purpose of this prohibitory legislation. So positive is the language of section 4285 that it may be doubted whether, after the transfer therein provided for, the state court could make any order whatever in the cause, even one restraining the plaintiff from its further prosecution. On the whole, therefore, construing the two sections together, I think this court may still restrain, by its order pending this suit, parties who have commenced actions in the state court from proceeding further therein. \* \* \* The suggestion that the court which first obtains jurisdiction of a matter has the right to go on and determine the cause has no force in a case where, by a valid statute, a court subsequently obtaining jurisdiction is vested with exclusive jurisdiction."

Assuming that the owner of a vessel can invoke the remedy of the statute in a state court, it is evident that he can only do so effectively by way of defence to the claim or claims involved in a single suit. If he desires to receive the general protection given by the statute, he cannot obtain it otherwise than by resorting to its terms and the rules provided thereunder and, in any event, he is not obliged to adopt that method of a defence. In *The Scotland*, 105 U. S. 24, 33, 26 L. Ed. 1001, Mr. Justice Bradley said:

"The rules referred to were adopted for the purpose of formulating a proceeding that would give full protection to the shipowners in such a case. They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt. They were not intended to prevent a defence by way of answer to a libel, or plea to an action, if the shipowners should deem such a mode of pleading adequate to their protection. It is obvious that in a case like the present, where all the parties injured are represented as libellants or intervenors in the cause, an answer setting up the defence of limited responsibility is fully adequate to give the shipowners all the protection which they need."

The subject was again considered in *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 594, 595, 3 Sup. Ct. 379, 389, 617, 27 L. Ed. 1038, and the same justice said:



"In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the shipowners from being harassed by litigation in other tribunals. Unless some proceeding of this kind were adopted which should bring all the parties interested into one litigation, and all the claimants into concourse for a pro rata distribution of the common fund, it is manifest that in most cases the benefits of the acts could never be realized. Cases might occur, it is true, in which the shipowners could avail themselves of those benefits, by way of defence alone, as where both ship and freight are totally lost, so that the owners are relieved from all liability whatever. But even in that case, in the absence of a remedy by which they could obtain a decree of exemption as to all claimants, they would be liable to a diversity of suits, brought perhaps in different States, after long periods of time, when the witnesses have been dispersed, and issuing in contrary results before different tribunals; whilst in the ordinary cases, where a limited liability to some extent exists, but to an amount less than the aggregate claims for damages, so as to require a concourse of claimants and a pro rata distribution, the prosecution of separate suits, if allowed to proceed, would result in a subversion of the whole object and scheme of the statute. The questions to be settled by the statutory proceedings being, first, whether the ship or its owners are liable at all (if that point is contested and has not been decided), and secondly, if liable, whether the owners are entitled to a limitation of liability, must necessarily be decided by the District Court having jurisdiction of the case; and, to render its decision conclusive, it must have entire control of the subject to the exclusion of other courts and jurisdictions. If another court may investigate the same questions at the same time, it may come to a conclusion contrary to that of the District Court; and if it does (as happened in this case), the proceedings in the District Court will be thwarted and rendered ineffective to secure to the shipowners the benefit of the statute."

If there is more than one forum in which shipowners can obtain relief under the statute, it would seem that the right of selecting the court rests with them. If they wish to proceed in an affirmative manner, they cannot do so except in the District Courts and they must use their machinery to secure full protection.

• Section 4284 provides that whenever any loss is suffered and the whole value of the vessel is not sufficient to make compensation to those injured, appropriate proceedings may be taken for the purpose of apportioning the value. It has been held here that the question of the amount of value is unimportant because the vessel or owner may not be liable at all. It was said in *The Garden City* (D. C.) 26 Fed. 766, 771:

"It occasionally happens that no claims whatever are proved, and sometimes a surplus has arisen, where the claims were less than the proceeds of the vessel sold; but it has never been contended that the decrees in such cases were void. *Briggs v. Day*, 21 Fed. 727. It is often impracticable, moreover, for the petitioners to know or to ascertain just what the amount of the losses is. It would clearly defeat the purpose of this law if all proceedings must be delayed, and no petition could be filed, until claims were actually presented to the owners in excess of the value of the vessel; or if the owners of the vessel must first make sure that the amount of the actual demands against them was in excess of the value of the vessel.

As stated above, one of the clear purposes of the law is to fix and declare a certain limit of liability; and, as incident to this, to determine whether the vessel is liable at all, and to determine this in a single proceeding, and not leave it to be litigated and possibly determined in contrary ways in as many different suits as there may be different demands. *Providence, etc., Co. v. Hill Manuf'g Co.*, 109 U. S. 593-595, 3 Sup. Ct. 379, 617; *In re Long Island Transp.*

Co. (D. C.) 5 Fed. 599, 612. Owners should be held entitled to commence these proceedings with reasonable promptness, in order to determine whether they are liable at all, and, if liable, then the extent of that liability, so that they may know speedily their situation as respects the future. The Supreme Court, in providing by rule for the determination of both these questions in this proceeding clearly recognize, as it seems to me, the scope of this law as extending altogether beyond the mere adjustment of pro rata dividends in case of deficiency."

In a case of a single claim, if there is the merest possibility of there being further claims, it would obviously be gross neglect on the part of a shipowner to fail to resort to limited liability proceedings, unless he was satisfied to take the chance of further litigation respecting his vessel. The only way he could fully protect himself would be by availing himself of the provisions of the statutes and the rules made in furtherance of them.

It is well settled that a shipowner can resort to the District Courts at any time before satisfaction of judgment, even after the claim or claims, has been fully litigated in the state courts. The Benefactor, 103 U. S. 239, 26 L. Ed. 351. Notable instances of a final resort to the District Court for limitation, after proceedings in a state court, are: *In re Starin*, and *The S. A. McCaulley*, *supra*. If vessel owners can finally resort to the District Courts to obtain the benefits of the act, it is difficult to see why they are not entitled to at the outset and it seems unjust to require them to determine in the beginning whether or not there is more than one claim. The machinery of the court affords the only adequate method of legally determining that fact and though it may turn out that there was but one outstanding claim and there may be some incidental hardship to a claimant, that seems to me no sufficient reason for depriving a vessel owner of his statutory right.

I conclude that a vessel owner under the circumstances involved in the present case is entitled to resort to limitation proceedings.

2. The second point in the argument made by the Harvester Company is that the Railroad Company has by the bills of lading waived its right to take advantage of any claim for limitation of liability. This claim is based upon the language of the bills of lading, issued by the Railroad Company at Auburn, covering the property, as follows:

"11. If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier or party shall be liable for any loss or damage resulting from the perils of the lakes, sea or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; or from collision, stranding, or other accidents of navigation; or from the prolongation of the voyage. And any vessel carrying any or all of the property herein described, shall have liberty to call at intermediate ports; to tow and be towed, and to assist vessels in distress, and to deviate for the purpose of saving life and property. And any carrier by water, liable on account of loss of or damage to any of said property, shall have the full benefit of any insurance that may have been effected upon or on account of said property."

The exceptant's contention is that the bills of lading constituted a complete contract between the parties as to the liability of the carrier for damages in the course of shipment; that they constituted a waiver

of the privilege of limitation of liability and there is no basis for the jurisdiction of the court.

Paragraph 1 of the bill of lading provided, however, as follows:

"1. No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damage thereto, by causes beyond its control, or by floods; or by fire; or by quarantine; or by riots, strikes or stoppage of labor; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet; or decay; or from any cause if it be necessary or is usual to carry such property upon open cars."

Fire was a matter beyond the control of the railroad and the right of the carrier to limit its liability in such a case seems unquestionable.

There does not appear to be any evidence of an intention on the part of the carrier to waive anything secured to it by agreement or by law. The case of *The Satanita*, 1897 App. Cas. 59, is however, relied upon by the exceptant. That case was one of express agreement made between yacht owners respecting a club race in which they were about to participate, each owner undertaking to be bound by the club rules which provided that the owner of any yacht disobeying any of the rules was to be liable for "all damages arising therefrom." One of the yachts disobeyed a rule and it was held by the courts, including the House of Lords, that the contract excluded the operation of the English limitation of liability act. In deciding the case it was said by Lord Halsbury, L. C. (page 62):

"On the other hand, I think it cannot be denied that the case of yachts is different from that of merchant vessels. I do not say that such a consideration would be conclusive; but remember that these are competing vessels, and where you are speaking of these first-class yachts competing in a yacht-race you might as well value a race horse by its weight, so many pounds of flesh, as speak of the value of a yacht according to its tonnage. Of course, it may be said in respect to merchant ships also, that that is a very rough test of the value of the ship, and that the object of it is to limit the risk. That is true also; but the conditions under which merchant ships sail and yachts sail are different. Merchant ships must be on the seas at all times and in all weathers, both by day and by night, and it may well be that the considerations that would induce people, so to say, to diminish the stakes upon which they were running their vessels would not be applicable to the case of yachts, which presumably are intended to race in conditions of light and of weather in which they are not exposed to the same risks."

Clearly that case is not an authority for the proposition that the railroad has by its bill of lading waived the right to resort to the act for protection in a case where one of the barges, with cargo, was subjected to danger from fire.

3. The parties prepared a stipulation covering the facts in the case and agreed that it might be used in an action by the Harvester Company in the Supreme Court of the state of New York. The exceptant contends that by doing so the parties submitted the controversy to that court to the exclusion of this one and that the process of this court should not be used to stay the action in the other.

The stipulation provided in its first paragraph as follows:

"First: That, whenever the suit referred to in the caption hereof shall have been commenced in a court of competent jurisdiction (state) in New York county, or (federal) in the Southern district of the state of New York, and not elsewhere, the facts, matters and things herein set forth shall be allowed

to be introduced as evidence in the trial of said cause and this stipulation shall be received for said purpose and shall be received as prima facie evidence of, and in the absence of conflicting evidence as hereinafter provided for, shall be deemed sufficient evidence of the truth of the matters herein set forth; and, further, that neither party shall present evidence either additional to or in conflict with the matters herein stipulated, unless such party shall have first given to the opposite party thirty days' notice in writing setting forth fully the substance of such additional or conflicting evidence."

There is nothing in the stipulation which prevents either of the parties from availing itself of any legal defense, or requiring it to refrain from seeking a limitation of liability under the United States statutes. If the parties had intended anything of the kind, the stipulation should have contained a provision to such effect in unmistakable language.

4. It is urged under this point that the statutes for limitation of liability are not operative to destroy the rights between shippers and carriers created by the so-called Hepburn Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), which provides (section 1) as follows:

"Be it enacted, etc., That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid. The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

It also provided (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1907, p. 909]) as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such re-

ceipt or bill of lading of any remedy or right of action which he has under existing law.

Section 10 of the act provides as follows:

"Sec. 10. That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

It is claimed that the statute for limitation of liability is repealed by these sections of the act.

In the Middle Ages, the doctrine of limitation of liability of the owners of a vessel to their interests in its value and the value of its freight, arose. In *The Rebecca*, Fed. Cas. No. 11,619, 20 Fed. Cas. 373, decided in the district of Maine in 1831, Judge Ware treats the matter in an exhaustive manner. The first statutes of the United States upon the subject were passed in 1851, and became known as the "Limited Liability Acts." They are found in sections 4282-4289 of the Revised Statutes (U. S. Comp. St. 1901, pp. 2943, 2945). The policy of these acts is explained by Mr. Justice Bradley in *Norwich Co. v. Wright*, 13 Wall. 104, 121, 20 L. Ed. 585. On the latter page it was said:

"The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent? The public interests require the investment of capital in shipbuilding, quite as much as in any of these enterprises. And if there exist good reasons for exempting innocent ship-owners from liability, beyond the amount of their interest, for loss or damage to goods carried in their vessels, precisely the same reasons exist for exempting them to the same extent from personal liability in cases of collision. In the one case as in the other, their property is in the hands of agents whom they are obliged to employ."

Under section 4289 of the Revised Statutes, the benefits of the Act of 1851 did not extend to "the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation," but by Act June 19, 1886, c. 421, 24 Stat. 80 (U. S. Comp. St. 1901, p. 2945), it was extended to the owners of all vessels. Therefore the case under consideration is clearly covered by the act.

This act constitutes the statutory foundation governing the rights and liabilities of persons engaged in carriage by water.

The Interstate Commerce Act aimed to correct certain abuses in the carriage of goods, principally by land, incidentally by water, but it was certainly not designed to overthrow the long established system of limitation of vessel-owners' liability in connection with water car-

riage. To suppose so, without any mention of the Act of 1851, would be a perversion of its obvious intent to correct the said abuses. I do not find any merit in the claim.

The exceptions are overruled.

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DAUGHERTY v. SHARP et al.

(Circuit Court, E. D. Michigan, S. D. October 9, 1908.)

No. 3,974.

1. REMOVAL OF CAUSES (§ 74\*)—AMOUNT IN CONTROVERSY.

A suit relating to a mortgage given to secure a note for \$1,700 does not involve a sum exceeding \$2,000, exclusive of interest and costs, and is not removable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 130; Dec. Dig. § 74.\*]

2. REMOVAL OF CAUSES (§ 3\*)—NATURE OF CONTROVERSY—ANCILLARY PROCEEDING.

Where a decision of the Supreme Court of a state affirmed a decree foreclosing mortgages as modified, directed that the property be sold and the proceeds paid into court, and gave a defendant, as administrator of the mortgagor, the right to institute a suit or file a petition in such pending suit to have such proceeds applied to the payment of general creditors of the estate as against one mortgagee, remanding the cause "for the execution of said decree as herein modified," a petition so filed by the administrator is in execution of the decree of the Supreme Court, and ancillary to the foreclosure suit, and is not removable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 21; Dec. Dig. § 5.\*]

3. REMOVAL OF CAUSES (§ 5\*) — ORIGINAL JURISDICTION OF FEDERAL COURT — CONTROVERSY OVER FUND IN STATE COURT.

A suit or proceeding in a state court to determine the disposition to be made of a fund which has been deposited in the registry of such court to await its further order is not removable into a federal court.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 5.\*]

4. REMOVAL OF CAUSES (§ 17\*)—WAIVER OF RIGHT.

A litigant, who instituted an action in a state court and there prosecuted it to a final decision by the Supreme Court of the state, cannot, after it has been remanded by such court, remove it into a federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 10; Dec. Dig. § 17.\*]

Waiver of right, see note to *Atlanta K. & N. Ry. Co. v. Southern Ry. Co.*, 66 C. C. A. 612.]

In Equity. On motion to remand to state court.

John C. Sharp, Wilson & Cobb, and Eugene Pringle, for the motion.  
Robert Campbell, opposed.

Before HARLAN, Circuit Justice, and SWAN, District Judge.

SWAN, District Judge. The facts involved in this motion are set forth in the opinion of Chief Justice Carpenter of the Supreme Court of the state of Michigan in the cases of *Hatch v. Daugherty et al.*,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

*Hatch v. Sharp*, Adm'r, et al., and *Daugherty v. Hatch*, Sharp, Adm'r, et al., 145 Mich. 569, 108 N. W. 986, as follows:

December 3, 1884, James C. Deyo, since deceased, executed a mortgage to one John G. Carter, upon certain land owned by the former, called the "Biddle street property," in the city of Jackson. June 25, 1896, Carter assigned this mortgage to Luella J. Shaw, Deyo's daughter, who subsequently assigned it to James D. Shaw, her son. James D. Shaw subsequently assigned the mortgage to James L. Daugherty. January 29, 1892, Deyo gave a mortgage to George N. Hatch upon the same and other property; this latter mortgage containing a recital that it was subject to the prior mortgage to Carter. August 10, 1896, Deyo assigned to Luella J. Shaw, who then held the Carter mortgage, the right to collect and receive certain rents as security for the interest due and to become due upon that mortgage. Deyo died the 24th day of October, 1896. The first of the three suits above named was one brought by the second mortgagee, Hatch, to obtain an injunction against the statutory foreclosure of the first mortgage. The second suit is a suit brought by Hatch to foreclose the second mortgage, and, as incidental thereto, to obtain a decree declaring that the second mortgage is a prior security to the first. The third suit is one brought by Daugherty for the foreclosure of his mortgage. These several suits were consolidated and heard as one in the court below.

In the lower court a decree was rendered, in accordance with the contention of Hatch, ordering the property sold and giving the Hatch mortgage priority to the Carter mortgage. It was also decreed that the defendant Sharp, administrator of the estate of Deyo, should pay to Daugherty from the rents collected by him, which had been assigned as heretofore mentioned, the amounts paid for insurance and taxes, aggregating \$729. From that decree Daugherty, the holder of the first mortgage, appealed to the Supreme Court of the state. It is unnecessary to state the grounds upon which the circuit court proceeded, or to detail the reasons for the reversal of its decree by the Supreme Court. It is sufficient to say that the latter tribunal modified the decree of the court below, and made the following order in the consolidated cause:

"These suits having been brought to this court by appeal from the circuit court for the county of Jackson, in chancery, where they were duly considered together, and having been argued by counsel on the original and rehearing, and due deliberation had thereon, it is now ordered, adjudged, and decreed by the court that the decree of the circuit court for the county of Jackson, in chancery, be and the same is hereby affirmed, except as modified by this decree, that is to say: That the injunction bill of George N. Hatch, complainant in the first above entitled cause, be and the same is hereby dismissed, and the defendant, James L. Daugherty, recover of and from the said George N. Hatch his costs of the circuit court for the county of Jackson, in chancery, to be taxed. That the mortgage described in the last above entitled suit, executed by James C. Deyo and wife to John G. Carter, bearing date the 31st day of December, 1884, and recorded in the office of the register of deeds for the county of Jackson, in Liber 76 of Mortgages, at pages 411 and 412, is a valid security as against the heirs of said James C. Deyo, and the mortgage made by said James C. Deyo and wife to said George N. Hatch, and described in the second above entitled cause, for the payment of \$3,454.65, that being the sum found due thereon for principal and interest, and \$806.97, for insurance and taxes paid on the property described in said mortgage, and interest, mak-

ing a total of \$4,261.62, due April 11, 1907, on so much of the premises therein described as have not been heretofore released from the lien of said mortgage. That the premises described in said mortgage, and not so released, are lots 1 and 2 in block 16 of Knapp's addition to the city of Jackson, in said county of Jackson, and a parcel of land  $8\frac{1}{2}$  feet wide and 8 rods long, adjoining said lots on the west, or so much thereof as may be sufficient to raise the amount of money herein found to be due, with interest from the 11th day of April, 1907, and costs of sale, as may be sold separately without material injury to the parties interested, be sold at public auction by one of the circuit court commissioners for said county of Jackson, at any time after the 15th day of May, A. D. 1907, in accordance with the statutes regulating foreclosures of mortgages in circuit courts in chancery and the rules and practice of such courts, and said commissioner shall in all things conform to said statutes, rules, and practice, and the deed or deeds executed on such sale shall have the same force and effect, and be subject to the statutory provisions for redemption, as is made pursuant to the decree of the circuit court for the county of Jackson, in chancery, and the provisions of said decree of said court for sale under said mortgage to George N. Hatch, so far as applicable, shall apply to the sale herein ordered, except as herein modified or otherwise ordered, and that complainant, or any party interested in either of the above entitled suits, may become the purchaser. That the commissioner, from the proceeds of said sale, pay the costs thereof, and pay the balance of such proceeds to the register of the circuit court for the county of Jackson, in chancery, to be held and disposed of as herein ordered. That in case the complainant, James L. Daugherty, shall neglect for 30 days to proceed with said sale, the same may be had at the instance of John C. Sharp, administrator, with the same force and effect as if made at the instance of said James L. Daugherty. That said mortgage, made by James C. Deyo and wife to John G. Carter, is, in the hands of said James L. Daugherty, complainant in the last above entitled cause, fraudulent as to the general creditors of the estate of said James C. Deyo. That in order to give the general creditors of the estate of said James C. Deyo, who shall have procured the allowance of their claims against said estate, the benefit of the proceeds of said sale, said John C. Sharp, administrator, or his successor in office, may, within 60 days from date of the payment of said proceeds to said register, or within such further time as may be allowed by the circuit court for the county of Jackson, in chancery, commence suit therein, or file a petition in the last above entitled cause, for a decree or order that said proceeds in the hands of said register, or so much thereof as may be proper, be paid to him to be distributed among the creditors of said James C. Deyo. In case said suit shall not be commenced, or petition filed, as hereinbefore provided, said fund shall be paid by said register to said James L. Daugherty, so far as necessary to satisfy the moneys secured to be paid by said mortgage. That no part of the principal or interest secured to be paid by said mortgage, or the money paid for taxes or insurance on the premises described therein, shall be paid from the funds in the hands of said John C. Sharp, Administrator. That said James L. Daugherty do recover of said George N. Hatch his costs of this appeal. It is further ordered that said suits be remitted to the circuit court for the county of Jackson, in chancery, for the execution of said decree as herein modified."

Under this order of the Supreme Court, as the petition alleges, Sharp, as administrator of the estate of Deyo, commenced suit in the circuit court for the county of Jackson, in chancery, against petitioner, to recover all moneys paid into the hands of the clerk or register of the circuit court for the county of Jackson, state of Michigan, in chancery; "that such suit was instituted by a petition entitled in the foreclosure action, in which final judgment had been entered, and the sale of the mortgaged premises had; that the suit so instituted by such petition is of a civil nature. \* \* \* The plaintiff claims the proceeds of said foreclosure action, amounting to \$3,873, lawful money of the United States, upon the ground that the mortgage so



foreclosed by the complainant was fraudulent as to the said John C. Sharp, as administrator of the estate of James C. Deyo, and that the matter in dispute in said suit between the said John C. Sharp, as petitioner, and the said James L. Daugherty, as the respondent or defendant in said suit, exceeds, exclusive of interest and costs, the sum of \$2,000." The fifth paragraph of the petition for removal claims "that said suit so instituted by the filing of said petition by said John C. Sharp," administrator as aforesaid, "is a separate and severable controversy, existing solely between the said administrator and James L. Daugherty, your petitioner."

It was stated upon the hearing that the mortgage of December 3, 1884, executed by James C. Deyo to Carter, "was given as security to the mortgagee for payment of a bond of that date given by Deyo, a citizen of Michigan, conditioned for the payment of the sum of \$1,700 and interest at the rate of 7 per cent. per annum, in one year from date thereof." This also appears on page 184 of the record of the case in the Supreme Court, a copy of which is filed in this cause with Daugherty's petition for removal filed in the circuit court for the county of Jackson, in chancery. Notwithstanding the averments of Daugherty's petition for removal, that the amount in controversy exceeds \$2,000, exclusive of interest and costs, it is clear that the value of the matter in dispute, exclusive of interest and costs, is only the sum of \$1,700 in this case.

Second. It is also manifest from the record that the petition filed by John C. Sharp, administrator as aforesaid, under the order of the Supreme Court of the state of Michigan, quoted above, is not a separate suit within the meaning of the removal act of 1888. *Bank v. Turnbull*, 16 Wall. 190, 21 L. Ed. 296; *Jifkins v. Sweetzer*, 102 U. S. 177, 26 L. Ed. 129; *Rosenthal v. Coates*, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. Ed. 399; *Fidelity Ins. Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898. It is a proceeding in the execution of the decree of the Supreme Court, incidental and auxiliary to the foreclosure case, directing that the proceeds of the sale of the mortgaged property be deposited in the registry of the Circuit Court for the county of Jackson, as the order recites:

"In order to give the general creditors of the estate of said James C. Deyo, who shall have procured the allowance of their claims against said estate, the benefit of the proceeds of said sale."

It accordingly allows John C. Sharp, administrator, or his successor in office—

"60 days from the date of the payment of said proceeds to said register of the circuit court for the county of Jackson, in chancery, or within such further time as shall be allowed by said circuit court for the county of Jackson, to commence suit therein, or file a petition in the above-entitled cause for a decree or order that said proceeds in the hands of such register, or so much thereof as may be proper, be paid to him to be distributed among the creditors of said James C. Deyo. \* \* \* That no part of the principal or interest secured to be paid by said mortgage to John G. Carter, or the money paid for taxes or insurance on the property described therein, shall be paid from the funds in the hands of said John C. Sharp, administrator. \* \* \* It is further ordered that said suits be remitted to the circuit court for the county of Jackson, in chancery, for the execution of said decree as herein modified."

Third. It also appears, from the certificate to the record for removal of the cause filed by Daugherty, that with the consent of the counsel of all the parties to this cause, including Daugherty, the circuit judge for the county of Jackson, upon their petition, ordered:

"That Walter A. Cunningham, register of this court, retain the moneys paid by the commissioner to him, as such register, on the sale of property, as alleged in said petition, until the further order of this court."

The fund in controversy has never been paid into the registry of this court, and is still held by the circuit court for the county of Jackson, in chancery. There is nothing, therefore, upon which a judgment or decree of this court could act to grant relief.

Fourth. Daugherty brought his suit in the state court, and prosecuted it there and in the Supreme Court, until its final disposition by that tribunal. He now brings the case here after experimenting in the state courts. Not satisfied with the decision of the Supreme Court, he fruitlessly sought a rehearing in that court, and was again defeated. He has thereby lost the right under the removal act to transfer his litigation to this court. *Rosenthal v. Coates*, 148 U. S. 144, 13 Sup. Ct. 576, 37 L. Ed. 399.

Fifth. The fact that no suit upon Deyo's bond to Carter for \$1,700, of which Daugherty is assignee, could be maintained in this court by any of the parties to whom it was assigned, both because the value of the matter in dispute is insufficient, and under section 1 of the act of March 3, 1887 (24 Stat. 552, c. 373), as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), is also fatal to the jurisdiction of this court. *Parker v. Ormsby*, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654.

For these several reasons, this court is without jurisdiction of this controversy, and the petition to remand is granted.

## THE CIUDAD DE REUS.

### THE MARAVAL.

(District Court, S. D. New York. June 21, 1909.)

#### 1. COLLISION (§ 69\*)—ANCHORED VESSELS.

The Maraval held solely in fault for casting anchor in too close proximity to the Ciudad de Reus and for refusing to utilize her steam power to move away after the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 87; Dec. Dig. § 69.\*]

(Syllabus by the Judge.)

#### 2. WORDS AND PHRASES—"WINDRODE."

A vessel is "windrode" when it is held in equilibrium between the wind and tide.

Convers & Kirlin, for the Maraval.

Curtis, Mallet-Prevost & Colt (Alfred H. Strickland, of counsel), for the Ciudad de Reus.

ADAMS, District Judge. These are cross libels filed by the Trinidad Shipping & Trading Company, Limited, as owner of the steamship Maraval, and La Mutua Sociedad Anonima, as owner of the steamship Ciudad de Reus, to recover the damages sustained, alleged, respectively, to amount to \$5,000 and \$30,000, through a collision which occurred between those vessels in the early morning of January 5, 1908, while they were at anchor a short distance above Quarantine, Staten Island.

The Ciudad in her libel alleges:

"Third: On the morning of January 3rd, 1908, the 'Ciudad de Reus' was anchored at a proper place opposite Stapleton, Staten Island, City of New York, where she had a perfect right to be, the said steamer being then and also at the time of the collision as hereinafter mentioned, tight, staunch, strong and in every respect well manned, tackled, appareled and appointed, and having the usual and necessary complement of officers and men, and there being at all times hereinafter mentioned a proper lookout for the protection and safety of the said vessel. At about 2 o'clock in the morning of Sunday, January 5th, 1908, while the 'Ciudad de Reus' was anchored as aforesaid, the steamship 'Maraval' came to anchor near the steamship 'Ciudad de Reus.' At said time the 'Ciudad de Reus' was carrying her regulation lights, which were properly set and burning brightly, and were plainly visible to the 'Maraval,' and at said time said 'Ciudad de Reus' had a good and competent lookout on duty. There was a strong current from the northeast. The weather was clear, with a strong but variable wind from the northwest. The 'Maraval,' without heeding the location of the 'Ciudad de Reus,' carelessly and negligently anchored very close to her; the result of this carelessness and negligence on the part of the 'Maraval' in choosing her anchorage was that subsequently the 'Maraval' came in collision with the 'Ciudad de Reus,' striking her on her starboard side amidships, doing serious injury to her pilot house, hull, boats, deck cabin, bridge and electrical apparatus, and doing other serious damage to be shown at the trial of the action.

After the collision the 'Maraval' refused to move away, although able to do so, and as the 'Ciudad de Reus' had not steam up, the two vessels were beaten together, although the officers and crew of the 'Ciudad de Reus' did everything in their power to prevent further damage.

That the two vessels remained together for several hours, and the 'Ciudad de Reus' was then obliged to and did call tugs to her aid, and was towed to a dock in Erie Basin, Brooklyn. That in her efforts to get away from the 'Maraval' the 'Ciudad de Reus' was obliged to and did cut her anchor chain, and a number of fathoms thereof and her anchor were lost. \* \* \*

Fifth: The collision and the aforesaid resulting damages to said steamship 'Ciudad de Reus' were not due to any fault whatsoever on the part of those in charge of and navigating the steamship 'Ciudad de Reus,' but were due to the fault and negligence on the part of the steamship 'Maraval' and those in charge of her, in the following particulars:

1. In anchoring in too close proximity to the 'Ciudad de Reus.'
2. In not discharging the duties of a burdened vessel in providing such a margin of clearance between the two vessels as to make it impossible for said 'Maraval' to collide with the 'Ciudad de Reus.'
3. In failing to keep a good and competent lookout.
4. In not avoiding the 'Ciudad de Reus.'
5. In not starting her engines when the vessel began to swing, and thereby avoiding the 'Ciudad de Reus.'
6. In not pulling in her anchor chain when the vessel began to move towards the 'Ciudad de Reus.'
7. In not drawing away from the 'Ciudad de Reus' immediately after the collision.
8. In allowing her anchor chain to become entangled with the anchor chain of the 'Ciudad de Reus.'"

The Maraval in her libel alleges:

"Second: The steamship Maraval is of 2569 tons gross and 1622 tons net register. She is approximately 324 feet long and of 38 feet beam. On January 4th, 1908, the Maraval was on her voyage from Trinidad to New York. About 11:30 that night, she received a licensed Sandy Hook pilot on board in the vicinity of the Scotland Light Ship. The pilot immediately went on the vessel's bridge and thereafter took charge of and directed the navigation of the vessel. Under the directions of the pilot, the vessel proceeded to an anchorage off the quarantine station, and at 1:50 a. m. on January 5th anchored in 8 fathoms of water with 45 fathoms of cable. The regulation lights were properly set, and thereafter were burning brightly. A proper anchor watch was on duty. The night was dark but the weather was clear with occasional squalls of wind from the north-west. As the vessel lay at anchor her heading was in a general northerly direction, subject to occasional slight variations from the effect of the wind and the ebb tide.

Third: About 2:50 a. m. on January 5th, as the Maraval lay at anchor in the position above described, the steamer Ciudad de Reus bore down upon the Maraval from a north-westerly direction. The starboard side of the Ciudad de Reus struck the port side of the Maraval and did considerable damage, injuring a number of the latter's plates, her stanchions, bulwarks and superstructure. The Ciudad de Reus apparently had one anchor out which was insufficient to and did not hold the vessel. After striking the Maraval the Ciudad de Reus dragged along the port side of the Maraval until she came to a stop by reason of the fouling of her anchor with the anchor of the Maraval which was sufficient to and did hold both vessels. There did not appear to be any one upon the deck of the Ciudad de Reus when she came into collision with the Maraval, nor was any attempt made by those on the Ciudad de Reus to adopt any measures to avoid or lessen the collision and its effects. For a considerable length of time after the collision, the Ciudad de Reus remained fast to the Maraval and then was taken in tow by two tugs and towed to a dock on the Brooklyn shore. The extent of the damage to the Maraval resulting from the collision, including the damages for the loss of use of the Maraval during the period that reasonably and necessarily will be required to repair the damage caused by the collision, so nearly as it can be estimated now will be about \$5,000.

Fifth: The collision above mentioned and the resulting damage to the Maraval were due wholly to and caused solely by the negligence of the Ciudad de Reus and those in charge of her, in the following among other respects that will be shown at the trial:

1. She was not properly manned, equipped and supplied.
2. She was not under the command nor in charge of competent persons.
3. She was not supplied with or she did not use adequate cable and anchors to hold her in the conditions then existing.
4. She did not have a proper anchor watch.
5. She did not take proper or timely measures to avoid a collision with the Maraval.
6. She carelessly and negligently collided with the Maraval which was lying at anchor."

The answers of the vessels were in conformity with the allegations of their libels.

The testimony shows that the Ciudad was about 255 feet long. She was light at the time, using water ballast, drawing 12 feet at the bow and 18 feet at the stern. She came to New York on the 3rd day of January. After finishing her business at Quarantine, she proceeded a short distance above and anchored at a place where she remained, according to her contention, until the collision took place. She had no steam available for moving.

The Maraval was 324 feet long. She came into the harbor as stated in her libel, about half loaded. She also proceeded to the north-

ward of Quarantine, and, it is claimed by her, anchored to await boarding by the Quarantine officer, outside of the general anchorage limits but inside a line from Robins Reef Light to Craven Shoal Buoy. She remained under steam and had steam available for use at the time of the collision.

Each vessel had about 45 fathoms of chain from the surface of the water to the anchors. The Maraval had an old-fashioned fluke anchor. The Ciudad had a patent revolving anchor.

About 2:45 o'clock a. m. of January 5th, the vessels collided, the Maraval on the starboard side of the Ciudad, and remaining together until about 10 o'clock a. m. when the Ciudad was towed away. During this period there was a change of tide to flood but owing to a strong north-west wind, the vessels did not swing completely to the tide but remained heading to the westward, being what one of the officers termed "windrode," that is held in equilibrium between the wind and tide.

Each claims a change of position by the other which brought about the collision. The Maraval contends that the Ciudad dragged her anchor from a position to the northward and westward of the Maraval, while the Ciudad claims that the Maraval came to anchor to the northward of the Ciudad and being given a foul berth, in a short time, about 10 minutes, after she dropped her anchor, she collided with the Ciudad, which had been anchored at the place of collision for 2 days.

The testimony is very conflicting and creates a situation of almost inextricable confusion. Some relief is afforded, however, by the statements of two officers of the steamer Royal Prince, which was anchored in the vicinity. She came to Quarantine about 7:10 p. m. of the 4th and left about noon of the 5th. She was lying so that Fort Tompkins bore about S. 3° E. and Robins Reef N. 2° E. This was probably somewhat outside of the eastward anchorage line. The chief officer said she was heading about north, with the wind about northwest, causing the vessel to lie athwart the tide. He did not notice any vessels anchored ahead of him but on the morning of the 5th, when it was beginning to get daylight, he saw the Ciudad somewhat to the north of his vessel. At that time he did not see the Maraval but later saw them together the Maraval being about north of the Ciudad. The second officer of the Royal Prince, was on watch from 12 to 4 of the 5th. He said the wind was squally from about northwest, the tide ebb; that there was a vessel about a mile ahead, a little on his port bow; that the wind was such as to cause him some anxiety with respect to his vessel dragging her anchor but she remained steady and did not drag; that about 12:30 or 12:45 o'clock he saw a steamer (the Maraval) coming into harbor very close to him and that she must have anchored above the first mentioned vessel (the Ciudad); that supposing she anchored above, she must have dragged her anchor to bring the vessels together; that if any other vessel than the one last mentioned had passed he would have noticed her; that he was sure she did not anchor between his vessel and the one already anchored ahead; that he saw the vessels afoul about 7 o'clock in the morning.

The testimony of the witnesses just mentioned was taken on behalf of the Maraval but not offered by her but put in evidence by the Ciudad. It was said by the Maraval that the depositions did not amount to anything in favor of either side but in view of the uncertainty caused by the conflicting accounts, they are very helpful and go far toward sustaining the Ciudad's account of the matter.

The only eyewitness from the Ciudad was her quartermaster who was acting as anchor watch. He said:

"A. While I was acting as lookout, walking on deck, the Maraval entered along the starboard side and proceeded about to the place where we had our anchor; and by the sound of the chain when it was let out I was able to determine that it was let down approximately over our anchor; the Maraval thereupon fell back until she was parallel with our vessel, and thereupon the Maraval proceeded with her bow in the direction of our bridge, and as soon as I noticed she was coming directly towards us, I went to notify the officer; before I got to the bridge I was afraid of being caught between the pilothouse and one of the boats, and I went around to the port side, and upon arriving at the bridge on the port side, she had collided with us already."

He further said that the bow of the Maraval struck the Ciudad amidships on the starboard side, almost at right angles, and in this the officers of the Maraval agree, though claiming that the position was the result of the Ciudad's drifting movement:

There has been a great deal of discussion, both in the testimony and briefs, with respect to the greater liability of the Ciudad to drag because of her patent anchor. It is probable that an old-fashioned anchor, one with fixed flukes, is more reliable for holding than the patent anchor, one with movable flukes. With respect to the use of these anchors, after speaking of the great advantages of the patent anchor, it is said in Knight's Seamanship, pp. 146, 147:

"In spite of the advantages above enumerated, the patent anchor cannot be regarded as fulfilling satisfactorily the ultimate purpose of an anchor if it is deficient in the power of holding a ship. This is, and must be, the final test in the matter. With regard to this point, there is a wide diversity of testimony but it may probably be asserted safely enough that in a critical situation most seamen would prefer to trust the old-fashioned anchor rather than the new one. In good stiff holding ground there is not much to choose between the two. If there is any difference here it is probably in favor of the double-fluked type. In soft mud this type is likely to drag, whereas the old style will usually work its way down until it holds. On a hard bottom, the old style has a much better chance of biting than the new one, the latter showing a disposition to slide along the ground, in spite of the tilting shoulder.

It may be laid down as a rule that the patent anchor always needs a longer scope of chain to bite and hold than does the old-fashioned one. This is because a slight upward pull on the ring drives the old-fashioned fluke into the ground but breaks out the flukes of the other type."

The foregoing extract fairly expresses the effect of the testimony in this case. Here the holding ground was good. Assuming, however, there was a greater liability on the part of the Ciudad to drag, it does not establish that she did so in the face of the testimony, which indicates that she did not, at least until the vessels were together, when it is probable that their anchors failed to work properly and that they dragged slightly on the change of the tide when the chains became more entangled and more was let out. The strain upon the anchors was then from a different direction and the situation of the an-

chors when raised about 8 o'clock in the morning does not seem to throw any light upon the dispute.

One of the witnesses most depended upon by the Maraval was the master of the tug boat Mutual, who was in the vicinity of the collision, but he did not appear to me to be very reliable. He "changed his mind" after he had been requested to look the situation over for the Maraval, subsequent to his stating the position to the counsel for the Ciudad. Another witness, also relied upon by the Maraval, was the master of the tug Charles F. Allen, one of the Quarantine boats, who at first stated the position of the Ciudad favorably to the Maraval. The effect of his testimony, however, was considerably diminished by his cross examination, where he declined to say he knew positively where the Ciudad was anchored and it appeared that a mark on the chart purporting to represent his view of the position was not made by him.

The place where the vessels were anchored was well protected from the effects of a north-west wind, by the hills of Staten Island, and the reports of the Weather Bureau that there was a velocity of from 24 to 34 miles is not of much importance as affecting the decision here. Such a wind upon well anchored vessels in an unprotected place would ordinarily have little effect. The ebb tide which was prevailing at the time of the collision took a south-west course. The vessels, which were subject to the influences of the wind and tide, were more affected by the latter, so that if freed from their moorings would have drifted south-west, not south-east, which would have been the case if the wind were stronger. Therefore, the Maraval's contention that the Ciudad drifted south-easterly must be rejected.

The whole testimony shows that both of the vessels were anchored somewhat within the anchorage limits and that the Maraval anchored too close to the Ciudad with the result of bringing about the collision. I think the former should be especially censured for refusing to use her steam power to move away from the Ciudad because such a course might be prejudicial to the Maraval. In other words, additional damage was done for the purpose of preserving or making evidence.

There will be a decree for La Mutua Sociedad Anónima, with an order of reference. The libel of the Trinidad Company is dismissed.

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ANDERSON LAND & STOCK CO. v. McCONNELL et al.

(Circuit Court, D. Nevada. May 3, 1909.)

No. 783.

1. EQUITY (§ 392\*)—GROUNDS FOR REHEARING—SURPRISE.

Surprise as a ground for the granting of a rehearing in equity must be something unexpectedly arising under circumstances which the party was not reasonably called upon to anticipate, and which ordinary prudence and foresight could not guard against.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 844; Dec. Dig. § 392.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. EQUITY (§ 392\*)—GROUNDS FOR REHEARING—SURPRISE.**

A suit in equity was tried on oral testimony taken in open court, the trial lasting nine days. On the first day complainants introduced testimony as to certain physical facts which were pertinent to the issues. Defendants made no claim of surprise, but cross-examined and introduced evidence as to such facts, and submitted the case without objection. *Held*, that they were not entitled to have the case reopened and to be permitted to introduce further testimony on the ground that they were surprised by such testimony, it having been their duty, if surprised, to at once call the attention of the court to such fact and ask for time to meet such testimony.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 392.\*]

In Equity. On motion by defendants to reopen case and admit further testimony.

See, also, 133 Fed. 581.

Mack & Green and J. W. Dorsey, for plaintiff.

Cheney, Massey & Price and H. Warren, for defendants.

VAN FLEET, District Judge. This is a motion by the defendants to reopen the case and for leave to offer further testimony.

While the action is upon the equity side (being one to determine conflicting claims of the parties to the waters of certain natural streams appropriated for the purposes of irrigation), the evidence, instead of being taken under equity rule 67, was heard and submitted in open court, agreeably to the practice more usually obtaining in this district of pursuing the same general mode of procedure in the trial of suits in equity as in actions at law.

The grounds for the motion are: (1) That "defendants were taken by surprise on the trial of said action, which they could not have guarded against by reasonable diligence"; (2) that "defendants were misled to their injury by reason of the action of counsel and the court respecting an inspection of the premises in controversy, and the unavoidable inability of the court to examine said premises"; and (3) "that the ends of justice require that further proof be taken in said cause"; the motion being based upon the records, proceedings, and testimony in the case and a supporting affidavit by one of the defendants' counsel. While not specified in the motion, it is disclosed by the affidavit of counsel, when read in the light of the evidence taken at the trial, that the particular features of the controversy giving rise to the alleged surprise and upon which it is sought to make further proof are limited to two physical facts, mooted in the evidence, and claimed by defendants to be material to the issues; the first involving the question whether there exists upon the lands of defendants, which lie superior to those of plaintiff upon Quinn river and Eight-Mile creek, two of the streams involved, a natural ridge or elevation of the surface so situated as to intercept waters from those streams when diverted upon certain alfalfa fields of defendants, and prevent the surplus from reaching and flowing upon the meadow lands of plaintiff, as, it is claimed by the latter, it is entitled to have it flow; and the second, whether there is upon the surface a visible, well-defined channel or channels connecting

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



said Eight-Mile creek, from a point where it debouches upon the meadow lands of defendants, with a natural water course running through the lands of the defendants and those of plaintiff, known as "Eight-Mile Slough." For the purposes of the motion it may, without determining it, be assumed, in accord with defendants' theory, that both of these facts when ascertained are material to a determination of the rights of the parties.

The first two grounds of the motion may be appropriately and more conveniently considered together, since, while nominally involving separate predicates, they are so intimately associated and interblended in their facts and in the manner of their presentation as to virtually constitute but one substantive proposition. In other words, the surprise specified in the first is claimed to have arisen in the evidence produced by plaintiff as to the existence of the two facts above adverted to; while the injury resulting to defendants' case specified in the second is claimed to have resulted from defendants being prevented in properly meeting such evidence through the misleading action of opposite counsel and the court with reference to a proposed inspection of the locus in quo by the latter.

The portions of the affidavit pertinent and material to this feature of the motion are these:

"\* \* \* That shortly before the close of the taking of testimony and evidence in said action, in open court and in presence of the court and of counsel for the respective parties, it was agreed and understood that the court, if not prevented by other business, should view the premises involved in the action; that it was at the same time agreed how the accommodation should be provided and how the expenses of such view should be apportioned and provided for; that the court then and there expressed a desire and willingness to view the said premises; that the defendants and their counsel relied upon the arrangements made providing for a view of the premises aforesaid by the court, and especially relied upon the offers of plaintiff's counsel and the expressions of the court aforesaid in this behalf, and fully expected that the court would be able to view said premises in accordance with its said expressed desire, and the arrangements and agreements of counsel for both sides providing for such view; that there is a direct conflict in the evidence introduced at the trial of said action; that such conflict arises with respect to certain natural, physical, and unalterable facts; that had a view of the premises been had by the court such facts, about which the conflict prevails, would have unavoidably passed under the notice and observation of the court, and the court could have determined the facts with reference to such conflict which the defendants and their counsel fully expected and relied upon the court to do, and had a right to expect and rely upon by reason of the facts and the arrangements of counsel and expressions of the court with reference to such view.

"That the said conflict in the evidence arose substantially as follows, to wit: Upon the trial of said action one Colman, an expert witness for the plaintiff, testified in effect that there was a certain ridge between the alfalfa fields of the defendants and the lands of the plaintiff, which said ridge barred and interfered with and prevented the waters used by defendants on their said fields from flowing to the lands of the plaintiff. Said Colman testified further that there were certain well-defined channels connecting what is known as 'Eight-Mile Slough' with what is known as 'Eight-Mile Creek,' and during his testimony plaintiff introduced a map of the premises made by said Colman which said Colman testified was true and correct; the said map was admitted by the court as 'Plaintiff's Exhibit —,' and illustrates and shows graphically, directly, and positively, that the channels testified to by said Colman truly exist upon the ground connecting said slough with said creek and continuing said slough and said Eight-Mile creek as one stream through

the lands of the defendants onto the lands of plaintiff; that in said action the plaintiff claims to be the owner by appropriation of the waters of said Eight-Mile creek, and that its right to the use of such waters is first and superior to the rights of the defendants of said waters; that with reference to such channels the defendants offered some testimony to the effect that there were no such connecting channels as shown on said exhibit, nor as testified to by said Colman; that if there was any such ridge the defendants and their witnesses had not noticed it; but as to the existence or nonexistence of said ridge and said channels, the defendants and counsel for defendants relied and had the right to rely upon the view of the court to determine such conflict; the trial of said action was hurried by reason of the other engagements of the court; the court intimated during the trial that it would not appeal to the court if delays were interposed during the trial; that it is more than 300 miles from Carson City to the said Eight-Mile slough and creek, 90 miles of which must be made by wagon; that it would have delayed the trial of said case at least six days to get further evidence upon the disputed points; that neither the defendants nor the attorneys for the defendants had ever before heard of any such channels, or any such ridge, and they were surprised and entirely unprepared to rebut or offer any further proof at that time upon said disputed facts, but knowing that such facts, if true, were natural, physical, and unalterable, easy to determine, and believing that the court would view the premises, and knowing that in such case the said disputed facts and each thereof would of necessity pass under the court's observation during such view, the defendants' counsel did not before the close of said case ask for a continuance of the same nor for time in which to present further evidence upon said disputed facts, but relied upon the said proposed view of the court of said facts, and closed said case without asking for time in which to meet the evidence of said Colman and his said map; that had the defendants' counsel not believed that the court would view the said premises, and that each of the said disputed facts would have passed under the view of the court personally, the defendants would have asked for time in which to offer further testimony upon the said disputed facts, but, relying on a personal view by the court, the defendants consented that the case be closed on the evidence then adduced with reference to said disputed facts."

Whatever merit this feature of the motion might present, if these statements of the affidavit correctly represented the facts, need not be considered, since an examination of the record and proceedings at the trial discloses that they are wholly at variance with the actual circumstances of the case.

In the first place, the record fails to sustain the claim made in the affidavit that defendants suffered surprise by the evidence referred to in the affidavit. The trial consumed a part of two weeks, commencing June 19, and ending June 27, 1908; and the first evidence as to the existence of the facts in question was given at the threshold of the trial by plaintiff's engineer, the first witness called by it on June 19th. That the evidence was pertinent and relevant to the issues made by the pleadings, no question was made. The evidence went in without objection as to its admissibility, and the witness was fully and at length cross-examined on both subjects, without the slightest suggestion that as to either fact it was in any wise unexpected by defendants or that they were surprised thereby. This was followed during the subsequent days of the trial by the evidence of other witnesses for the plaintiff bearing on the same facts, which, in like manner, was allowed to go in without any intimation by defendants that they were unprepared to meet it. In fact, the record shows that defendants did meet it by the testimony of their own engineer and other witnesses tending to negative that of plaintiff's witnesses, and the existence of

the facts in question was the subject of a sharp and well-sustained conflict. At no time during the trial did the defendants express in any way a desire to produce anything further on the subject, and the court was left at the close of the evidence with no reason to suppose that they were in any way dissatisfied with the showing they had made.

In the next place, the statements in the affidavit that this course of silence on the part of the defendants was induced by an agreement between counsel and the court that a view of the premises should be had, and that but for such agreement they would have asked a postponement of the trial to enable them to procure other witnesses, are likewise without foundation in the record. No such proposition was ever suggested during the progress of the trial, nor until after the evidence on both sides was entirely closed and the matter of arguing the case was under consideration. The reporter's notes show that then for the first time the subject of an inspection of the premises by the court was brought up; and this was by one of plaintiff's counsel, who suggested that it would be a desirable thing if the court could have a view of the premises in dispute, and asked if that would be possible, to which the court answered that it did not think it would be; and after some desultory talk on the subject, in which the court and counsel on both sides acquiesced in the idea that an inspection, if it could be had, would be of value to the court as an aid in applying the evidence, the subject was dropped, and the court proceeded to make an order as to the time for filing briefs.

Thereafter, in September, as appears by the affidavit, counsel for defendants wrote the trial judge renewing the suggestion that the court make an inspection of the premises in dispute, or, as an alternative, that the case be reopened for further testimony. No pretense was then made as to the existence of any previous understanding that such an inspection was to have been had. Correspondence followed between counsel for both parties and the judge, as a result of which, while counsel could not agree upon reopening the case, both sides were willing to have an inspection by the court, and a tentative effort was had to that end, but failed through the inability of the court to make it. Thereafter the defendants presented this motion.

It is quite probable that in framing his affidavit, which was made some months after the trial, counsel did not have ready access to the record, and inadvertently got the matters discussed after the close of the evidence or in the subsequent correspondence confused in his mind as having occurred at the trial. But however this may be, it is apparent that the facts as shown by the record entirely fail to sustain this claim. Surprise as a ground of relief must be something unexpectedly arising under circumstances which the party was not reasonably called upon to anticipate; a thing which ordinary prudence and foresight could not guard against; and where, as here, it is claimed to arise out of evidence of an unexpected character which the party is unprepared to meet, it is obviously the duty of counsel to at once call the fact to the attention of the court and ask a continuance—unless there is something to prevent or excuse that course. In this instance, as we have seen, if the defendants were taken by sur-

prise, which the record does not disclose, nothing was done to advise the court of the fact; while the reason assigned for remaining silent is likewise shown to be based upon so entire a misapprehension of the facts as to leave it without support.

What has been said is perhaps sufficient to dispose of the remaining ground of the motion as well, since it arises upon the same circumstances, and no additional considerations are advanced in its support. While it is always desirable, in the interest of justice, that a party be afforded the fullest opportunity to present his case, yet, in the practical administration of justice, this means no more than that he is to have a fair and reasonable opportunity. It certainly does not contemplate that one may ignore the most ordinary precautions in protecting his rights and still be relieved from the effect of his omission. It is stated in the affidavit that "the court intimated during the trial that it would not appeal to the court if delays were interposed." But it is not pretended that this was said in response to any suggestion of a delay by reason of the matter involved in this motion, and in fact it was not; and it cannot therefore be regarded as in any wise strengthening defendants' case.

The motion to reopen the case must therefore be denied; but the order may recite that it is without prejudice to the right of the court, should it deem it desirable, to make an inspection of the premises involved, in the company of counsel, prior to the entry of a final decree.

Let an order be entered to that effect.

ST. LOUIS & S. F. R. CO. v. CROSS, Secretary of State of Oklahoma, et al.

(Circuit Court, W. D. Oklahoma. June 4, 1909.)

No. 278.

1. COURTS (§ 314\*)—JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF CORPORATION.

The fact that foreign corporations licensed to do business in a state are declared by statute to be domiciled in such state for all purposes does not make such a corporation a citizen of that state so far as to affect the jurisdiction of the federal courts upon the question of diverse citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. § 314.\*]

Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

Jurisdiction over corporations, see note to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174.]

2. RAILROADS (§ 142\*)—EFFECT OF SALE OF ROAD TO FOREIGN CORPORATION—CONSOLIDATION—OKLAHOMA STATUTE.

Under the statute of Oklahoma Territory (Wilson's Rev. & Ann. St. 1903, § 1067), which authorized any railroad company owning any railroad in the territory to sell or lease the same to any other railroad company, domestic or foreign, and provided that the purchasing or leasing company "shall possess and enjoy all the rights, powers, privileges and franchises conferred by the laws of this territory upon a railroad corporation formed thereunder," such a purchase did not effect a merger or consolidation

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the two companies, so as to constitute a new domestic corporation, which is separately provided for by section 1023 of the same statutes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 444; Dec. Dig. § 142.\*]

**3. COURTS (§ 303\*)—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE.**

Where officers of a state assuming to act under an unconstitutional statute, or under a valid law, but going beyond the powers thereby conferred, threaten to commit an act of wrong and injury to the rights and property of another, a suit to enjoin them is not one against the state, and for that reason without the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 844½; Dec. Dig. § 303.\*]

Federal jurisdiction of suits against state, see note to *Tindall v. Wesley*, 13 C. C. A. 165.]

**4. COURTS (§ 259\*)—JURISDICTION OF FEDERAL COURTS—NATURE AND SOURCE.**

The right to resort to the jurisdiction of the federal courts, including the right of removal thereto, is one conferred by the federal Constitution and the laws of Congress enacted in pursuance thereof that cannot be impaired or abridged by any statute of a state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 795; Dec. Dig. § 259.\*]

**5. CONSTITUTIONAL LAW (§§ 130, 303\*)—OBLIGATION OF CONTRACTS—IMPAIRMENT BY STATE—REVOCATION OF LICENSE OF FOREIGN CORPORATION—DUE PROCESS OF LAW.**

A railroad company which at the time of the admission of Oklahoma as a state, was the owner of railroad lines therein, acquired at a large expenditure for construction and purchase, under the sanction of the laws of the territory of Oklahoma, and of Congress relating to the Indian Territory, was vested thereby with contract rights within the protection of the state Constitution, Schedule 1, which provides that existing rights and contracts shall continue unaffected by the change in form of government, and also within the protection of the contract clause of the federal Constitution, and as applied to such company Act Okl. May 26, 1908 (Laws 1908, p. 214, c. 16), providing in effect that on the filing by any foreign corporation of a petition for the removal of any suit into a federal court on the ground that it is a citizen of another state or country, it shall forfeit its right and license to do business in the state, which shall at once be revoked, is unconstitutional and void both as impairing the company's contract rights and as depriving it of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 301, 863; Dec. Dig. §§ 130, 303.\*]

**6. CONSTITUTIONAL LAW (§ 23\*)—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS—RETROACTIVE EFFECT.**

Const. Okl. art. 9, § 31, which provides that no foreign railroad company shall be entitled to the benefit of eminent domain in the state until it shall incorporate under the laws of the state, is not retroactive and does not affect the right of a foreign railroad company to the use and enjoyment of its right of way previously lawfully acquired.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 20; Dec. Dig. § 23.\*]

**7. CONSTITUTIONAL LAW (§ 23\*)—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS—RETROACTIVE EFFECT.**

Const. Okl. art. 9, §§ 8, 9, regulating the right of foreign corporations to lease or purchase parallel or competing railroad lines and to consolidate with domestic corporations, do not apply to past transactions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 20; Dec. Dig. § 23.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

## S. INJUNCTION (§ 22\*)—ACTIONS FOR INJUNCTIONS—JURISDICTION.

In a suit in a federal court to enjoin a state officer from proceeding under an alleged unconstitutional statute to revoke the license of complainant, a foreign corporation, to do business in the state, it is not a defense that the order of revocation was signed before the restraining order became effective or was served on the defendant, where it was after the suit was begun and the court had acquired jurisdiction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 19; Dec. Dig. § 22.\*]

## In Equity. On demurrer to amended bill.

The amended bill contains allegations, as follows:

That the complainant is a corporation organized and existing under the laws of the state of Missouri and a citizen of that state, and that the defendants are citizens of the Western district of the state of Oklahoma. That the matters in dispute exceed \$5,000, exclusive of interest and costs, and that the cause arises under the Constitution and laws of the United States. That the complainant has for several years owned and operated, and now owns and operates, a system of railroad as a common carrier of freight, passengers, and mail between, in, and through, the states of Missouri, Kansas, Oklahoma, Arkansas, Tennessee, Mississippi, and Alabama. That the portion of said railway system in Oklahoma is composed of 16 lines of railway, of the aggregate length of 1500 miles, which were constructed between certain named termini by other railroad companies, under and by the authority of and in compliance with certain designated acts of Congress and the statutes of Oklahoma Territory (some of the lines being located in both Oklahoma and Indian Territories and others in each of them), and thereafter with all of their property, franchises, etc., acquired by the complainant by deeds of conveyances (2 of them being made by purchasers at foreclosure sales, 12 by the original companies, and 2 by intermediate grantees, in one instance a lease being made), all prior to the admission of the state, and at all times since so acquired forming a part of a continuous and connecting line of interstate railway, on which since completion and acquirement by complainant it has been carrying interstate and intrastate commerce and the mail. That by the laws of Congress and the territory of Oklahoma and said conveyances, valid contracts were made whereby the complainant acquired the right to operate and maintain said railroads. That the laws of Congress and the territory of Oklahoma invited the investment of capital in railroad enterprises, and that pursuant to the invitations, offers, and conditions contained in such laws, the complainant has invested many millions of dollars in these railroads; its property being assessed for the current year at \$47,266,311. That by virtue of such laws and the investments thereunder, the complainant has acquired the right by contract to continue to own, maintain, operate, and enjoy such railroads and possess and enjoy the rights of a common carrier of interstate and intrastate commerce as well as all the rights, privileges, and franchises of corporations organized under the laws of the territory of Oklahoma. That, not being so required, complainant has not procured a license from the territory or state of Oklahoma to transact business in the state, but has carried on its business as such common carrier in the state under the authority of the laws in force at the time of the organization of the state (on November 16, 1907) and the Constitution of the state, so far as applicable.

That in a civil action instituted against it in the district court of Comanche county, in this state, for the recovery of damages sustained prior to the admission of the state, the complainant filed a petition with bond, for the removal of the action to the Circuit Court for this district, and that the presiding judge of the state court certified the fact to the Secretary of State, whereupon the defendant Leo Meyer, Acting Secretary of State, after this suit was begun in this court, signed an instrument as follows:

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"State of Oklahoma.

"Revocation of Charter of St. Louis & San Francisco Railroad Company in Oklahoma.

"Guthrie, Oklahoma, August 29, 1908.

"Petition for removal and to the Circuit Court of the United States.

"Gertrude Goode, Administratrix of the estate of Frank R. Goode, Deceased, Plaintiff, v. St. Louis & San Francisco Railroad Company, a Corporation, Defendant.

"State of Oklahoma, Comanche County, in the District Court.

"Having received due and legal notice from J. T. Johnson, judge of the district court of Comanche county, that the above-named corporation defendant, St. Louis & San Francisco Railroad Company, has filed a petition for removal to the United States court, a certified copy of which is on record in the office of the Secretary of State at the Capitol in the city of Guthrie in the state of Oklahoma: Therefore I, Leo Meyer, Assistant Secretary of State and now Acting Secretary of State of the state of Oklahoma, by authority invested in me under section four of House Bill No. 131 approved by the Governor of the state of Oklahoma, C. N. Haskell, May 26, 1908, do hereby declare the license of the said St. Louis & San Francisco Railroad Company to transact business in the state of Oklahoma forfeited and revoked.

"In testimony whereof, I have set my hand and cause to be affixed the great seal of the state.

"Done at the city of Guthrie this twenty-ninth day of August, A. D. 1908.

"Leo Meyer, Acting Secretary of State. [Seal.]"

That the defendants have by said instrument attempted to declare the charter and authority of complainant to do business within the state of Oklahoma to be revoked and forfeited, and since the date of the instrument have been and are threatening and attempting to deprive it of the right to do business in the state under and by virtue of the legislative act of the state, approved May 26, 1908, and that the effect of that instrument, unless declared void, and the proposed action of the defendants in attempting to enforce the provisions of the act will be to subject complainant to numerous prosecutions and annoying litigation, and make possible the assessment by various courts of the state of fines, ranging from \$1,000 to \$5,000, for each day or part thereof during which complainant transacts business in the state. That the complainant is without remedy at law, and that the injury and damage to result from the enforcement of the act are irreparable.

The complainant then asserts that the legislative act of the state is void for conflict with the Constitution of the United States on several specified grounds and with the Constitution of the state, and prays a decree enjoining the defendants from forfeiting or revoking, or declaring forfeited or revoked, or attempting to forfeit or revoke, its authority or charter to carry on its business as a common carrier in the state, declaring the legislative act void and ineffective as to complainant and the instrument signed and issued by the defendant Leo Meyer, Acting Secretary of State, null and void and inoperative as to the right of complainant to carry on such business in the state.

The legislative act of the state (Laws 1908, p. 214, c. 16) complained of is as follows:

"An act fixing the domicile of persons, firms and corporations transacting business within the state of Oklahoma; providing for forfeiture and revocation of license to transact business in the state upon the filing in any court of record, claim or declaration of domicile in another state or foreign country; the duty of judges relative thereto; and providing penalty for transacting business after revocation of license.

"Be it enacted by the people of the state of Oklahoma:

"Section 1. That the domicile of every person, firm or corporation conducting a business in person, by agent, through an office, or otherwise transacting business within the state of Oklahoma, and which has complied with

or may comply with the Constitution and laws of the state of Oklahoma, shall be for all purposes deemed and held to be the state of Oklahoma.

"Sec. 2. That the license or charter to do business within the state of Oklahoma of every person, firm or corporation conducting a business in person, by agent, through an office or otherwise transacting business within said state of Oklahoma, who shall claim or declare in writing before any court of law or equity within said state of Oklahoma, domicile within another state or foreign country, shall, upon such declaration be immediately revoked.

"Sec. 3. That it shall be the duty of the judge of any court in which any declaration or claim of domicile within another state or foreign country, is filed, to report to the Secretary of State and to furnish said Secretary of State with an authenticated copy of any claim or declaration in writing made or filed, declaring domicile within another state or foreign country.

"Sec. 4. That the Secretary of State immediately upon the receipt of the copy of the claim or declaration of any person, firm or corporation as aforesaid, shall declare the license or charter of any person, firm or corporation so filing said claim or declaration, forfeited and revoked.

"Sec. 5. That any person, firm or corporation conducting a business in person, by agent, through an office, or otherwise transacting business within the state of Oklahoma, whose license to do business within said state of Oklahoma shall have been revoked as aforesaid, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one thousand dollars (\$1,000.00) nor more than five thousand dollars (\$5,000.00) for each day or part thereof they shall so conduct a business after the revocation of their license to do business within this state as aforesaid.

"Sec. 6. Nothing in this act shall be construed to allow any corporation organized under the law of any other state, territory or foreign country to exercise the right of eminent domain in the state of Oklahoma.

"Sec. 7. An emergency is hereby declared to exist, whereby the immediate passage of this act is declared necessary for the preservation of the public peace and safety, and this act shall be in full force and effect upon its passage and approval.

"Approved May 26, 1908."

W. F. Evans, Flynn, Ames & Chambers, and R. A. Kleinschmidt, for complainant.

Charles West, Atty. Gen. of the State of Oklahoma, M. Fulton, and Charles Mitschrich, for defendants.

COTTERAL, District Judge (after stating the facts as above). The question of the jurisdiction of this court calls for first consideration. It must be held that diversity of citizenship is sufficiently alleged. The complainant is incorporated under the laws of the state of Missouri, and the defendants are citizens of the state of Oklahoma. The first section of the legislative act by its terms fixes the domicile in the state of every corporation transacting business in the state which complies with its Constitution and laws. It is not clear whether the complainant has complied therewith. If it be assumed that it has done so, as contemplated in this act, still it remains a foreign corporation so far as the jurisdiction of the federal courts is concerned. A similar statute was construed in the case of Southern Railway Co. v. Allison, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078, where it was held that by compliance with the same a corporation "may be made what is termed a domestic corporation, or in form a domestic corporation," but that it does not thereby become a citizen of the state "so far as to affect the jurisdiction of the federal courts upon a question of diverse citizenship."



But it is insisted that the domestication of the complainant was effected by virtue of its consolidation with one or more of the lines of railroad now a part of its system and the formation of a new corporation, under the statutes of the territory of Oklahoma. Wilson's Rev. & Ann. St. 1903. If the complainant became a corporation of the territory, it is a corporation of the state. *Kans. Pac. v. Atchison R. R.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794. The fact alleged is that the complainant acquired this property by means of deeds of conveyance, after the adoption of section 1067 of those statutes in 1899. Section 1028 was adopted in 1890.

The argument is that both sections should be construed together, and that they authorize consolidation and the formation of a new corporation only, and that this was the necessary result of the transfers. Section 1028 provides that a railroad corporation may consolidate its stock, franchises, and property with any other railroad corporation, whether within or without the territory, when they can be lawfully connected and operated together, etc., upon agreed terms by any name selected, which within the territory shall possess all the powers, franchises, and immunities, and be subject to all the liabilities, etc., of domestic corporations, etc.; the articles to be approved by the vote or assent of stockholders as specified, and a copy of the articles and the record of the proceedings to be filed with the Secretary. It further provides that any railroad corporation whose line is wholly or in part within the territory, whether chartered by or organized under the laws of the territory, or of any state or territory, or of the United States, may lease or purchase and operate the whole or any part of any other railroad, together with the franchises, powers, etc., when the roads may be lawfully connected or operated together, constituting a continuous line, etc., provided that the capital stock of the company formed by such consolidation shall not exceed the sum of the capital stock of the consolidating companies at par value, etc. Section 1067 provides that any railroad company owning any railroad in the territory (the words "and any railroad company organized under the laws of this territory owning a line of railroad either within or without the territory" being added by the amendment of 1901 [*Laws 1901*, p. 86, c. 11, art. 4, § 1]), may sell or lease its railroads, etc., or any interest therein, with all the property, rights, privileges, and franchises thereto pertaining to any other railroad company of the territory, or of any state or territory, or of the United States, the lines being continuous, etc., "which such purchasing or leasing company shall have the right by contract or otherwise when completed to use or operate," and that any railroad company of the territory or of any state or territory, or of the United States, purchasing or leasing a railroad in the territory, shall possess and enjoy all the rights, powers, privileges, franchises conferred by the laws of this territory upon a railroad corporation formed thereunder."

It is not apparent why the two sections, even if they should be treated as parts of one act, do not provide for different transactions, one a consolidation of railroad property and the formation of a new local corporation, and the other a conveyance of the railroad property, fran-

chises, etc. That each may be separately accomplished cannot be gainsaid, and, if so, it seems clear that this is what the Legislature intended. No reason appears for the additional legislation contained in section 1067, if only consolidation and a new corporation were to be authorized, because section 1028 is complete in its terms; but section 1067 is silent as to any consolidation or merger, and as to any dissolution, or abandonment of corporate existence of the former corporations, providing practically for the transfer and right of operation, etc., and is likewise complete. With respect to the claim of a different meaning, it may be said to be equivalent to the statute construed in the case of *St. Louis & San Francisco Ry. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802, where it was held that a purchase under its provisions "by the Missouri corporation did not convert it into an Arkansas corporation." See *Louisville & Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. The theory that a consolidation was made and a new corporation was formed by these transfers of the railroad property, franchises, etc., cannot be accepted.

However, complainant sets out another independent ground of jurisdiction—a controversy arising under the Constitution and laws of the United States. *City Railway Co. v. Citizens' R. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114. Upon either ground—that is, diverse citizenship, or a controversy arising under the federal Constitution or laws—an amount in dispute, exceeding \$2,000, exclusive of interest and costs being also alleged, the case falls within the provisions of Judiciary Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508). *U. S. v. Sayward*, 160 U. S. 493, 16 Sup. Ct. 371, 40 L. Ed. 508.

The state being entitled to immunity from suit, objection is made to the jurisdiction of the court on the ground that the suit is one against the state. The question whether, when state officers are defendants, the suit is against the state, has been the subject of frequent decisions by the courts. The only difficulty in a given case lies in the application of the principles which have been judicially settled. The test is not always whether the state is named as a party. It may virtually be the real party, if its officers are sued as representing the state's action or liability. In such case, or where the officers proceeded against are charged with no duty relative to the statute which is assailed, the suit may not be maintained; but where the officers, under color of an unconstitutional statute, or assuming to proceed under a valid law, but going beyond the powers thereby conferred, threaten to commit an act of wrong and injury to the rights and property of another, a suit to enjoin them is not a suit against the state. *Pennoyer v. McConnaughy*, 140 U. S. 10, 11 Sup. Ct. 699, 35 L. Ed. 363; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Fitts v. McGee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535; *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932. The same objection was overruled in the recent cases of *C. I. & P. Ry. Co. v. Ludwig* (C. C.) 156 Fed. 152, and *C. R. I. & P. Ry. Co. v. Swanger* (C. C.) 157 Fed. 783. The authorities justify the conclu-

sion that the suit is not one against the state, and the holding of this court will be to that effect.

It will be observed that the forfeiture and revocation provided by the legislative act are rested upon but one cause—the fact of a written declaration in a court of the state of a domicile in another state. Evidently the act is aimed against the removal of causes from the state courts to the federal court on the ground of diversity of citizenship, because it is based on the assertion in court of a fact necessary to secure such removal. This is conceded; but does such removal of a case to a federal court furnish any justification for the consequences of the act? It is claimed, in substance, as understood by the court, that the act is a rightful exercise of police power, based not on any specific authority to that effect, but upon precedents declaring analogous principles, and that inasmuch as residents and nonresidents had in the former territories the right of litigation only in the courts thereof—in the Indian territory in the United States courts and in Oklahoma Territory in the territorial courts—no right of removal being there enjoyed, the state could, on a basis of nondiscrimination, by this means, put all litigants on a parity and confine their litigation to its courts. The police power of the state, it is true, is a broad and extensive power. It is the power “to prescribe regulations to promote the health, peace, morals, education, and good order of the state, develop its resources, and add to its wealth and prosperity.” *Barbier v. Connelly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. But plainly the notion that the subject of federal jurisdiction is within the limits of that power is a mistake. The right to resort to the jurisdiction of the federal courts, including the right of removal thereto, is a constitutional right conferred by the federal Constitution and the laws of Congress enacted in pursuance thereof. It is an absolute right that cannot be impaired or abridged by any statute of a state. *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Butler Bros. v. U. S. Rubber Co.*, 156 Fed. 15, 84 C. C. A. 167. The right to litigate in the federal courts of this state has no qualification annexed; but it is the same as in the other states. *Enabling Act June 16, 1906*, c. 3335, § 13, 34 Stat. 275 (U. S. Comp. St. Supp. 1907, p. 149). And, furthermore, it is competent for Congress in exerting its constitutional power to vest the federal courts of a state with the jurisdiction of proper cases theretofore pending in the territorial courts. *Koenigsberger v. Richmond*, 158 U. S. 48, 15 Sup. Ct. 751, 39 L. Ed. 889. The supposed cause assigned in the act is therefore quite the opposite of any support for its operation.

Nor is the legislative act to be vindicated upon any reserved power of repeal of former legislation. It is quite unnecessary to consider whether, or to what extent, any such power may be vested in the Legislature, inasmuch as it has not attempted to act in the only manner given to it, namely as “that no injustice shall be done to the incorporators.” *State Const. art. 9, § 47*; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102; *Noble State Bank v. Haskell (Okl.)* 97 Pac. 602.

It is therefore to be determined whether the act may be upheld against the complainant upon the ground which is insisted upon that

it is a proper exercise of discretionary legislative power. Undoubtedly it is a general rule that foreign corporations enter a state to carry on business therein by comity only, and that a state may at will exclude them, admit them on conditions, or terminate its permission once given to continue such business. In the cases of *Doyle v. Insurance Co.*, 94 U. S. 535, 24 L. Ed. 148, and *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, it was held that, while a state may not exact in advance an agreement from a foreign insurance corporation that it will not remove a case to the federal court, yet it may make such removal the contingency upon which the expulsion is to take place. In the latter case it was said:

"A state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withhold that permission once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

But that there is an important qualification on the legislative power of a state in dealing with foreign corporations is pointed out in the former case, where it was said:

"No right of the complainant under the laws or the Constitution of the United States, by its exclusion from the state, is infringed; and this is what the state now accomplishes. There is nothing therefore that will justify the interference of this court."

By the Constitution of the United States it is provided that no state shall impair the obligation of contracts or deprive any person of property without due process of law. Upon these grounds, among those relied upon, the complainant maintains that the legislative act enforced against it infringes its constitutional rights.

The rights asserted by the complainant had their origin prior to the admission of the state. The standing to be accorded those rights is well settled. The Indian Territory was not an organized territory, but Oklahoma Territory was provided with territorial government by its organic act of May 2, 1890. Without question, the United States had entire dominion and sovereignty, national and and municipal, and federal and state, over both territories. *American Insurance Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 242; *Shively v. Bowlby*, 152 U. S. 48, 14 Sup. Ct. 548, 38 L. Ed. 331; *Mormon Church v. U. S.*, 136 U. S. 42, 10 Sup. Ct. 792, 34 L. Ed. 478. And the included legislative power over these territories possessed by the states Congress was authorized to intrust to the territorial Legislature, subject to such limitations on its exercise as Congress might impose and to abrogation by it in its discretion. The legislative power of Oklahoma Territory was by section 6 of its organic act extended "to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," etc. That power was coequal with that of a state within its limits. *Simms v. Sims*, 175 U. S. 168, 20 Sup. Ct. 58, 44 L. Ed. 115. In keeping with its authority, Congress could lawfully exercise the power of eminent domain in the territories and confer upon a corporation of any state or territory the right to construct and operate a railroad within the territories. *Cherokee Nation v. Kansas Railway Co.*,

135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201; *California v. Southern Pac. Ry. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; *St. Paul v. Phelps*, 137 U. S. 528, 11 Sup. Ct. 168, 34 L. Ed. 767. A state Constitution is itself a law within the meaning of the contract clause of the federal Constitution. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 672, 6 Sup. Ct. 252, 29 L. Ed. 516; *Fisk v. Jefferson*, 116 U. S. 133, 6 Sup. Ct. 329, 29 L. Ed. 587. The state of Oklahoma, organized upon the domain of the two territories, has provided by its Constitution that existing rights and contracts shall continue unaffected by the change in the forms of government. Schedule, § 1. The rights and contracts so far as shown by the complainant and originating before the admission of the state must be considered as preserved thereafter in their original integrity. *Trustees of Vincennes v. State*, 14 How. 268, 14 L. Ed. 416; *Rogers v. Burlington*, 3 Wall. 663, 18 L. Ed. 79; *Smith v. Atchison (C. C.)* 64 Fed. 272.

By certain acts of Congress a portion of the original constructing companies were granted the right to acquire and appropriate rights of way and to build, maintain, and operate their railroads, or were granted rights of way for the purpose of exercising those rights. Terms and obligations were imposed by these acts which are variant and not common to all; but among them may be mentioned special regulations respecting the acquirement of rights of way and payment therefor, obligations in the way of payments to Indians, liability to taxation for their benefit by Congress and the state, regulations with respect to transportation privileges and charges, local and foreign, crossings, carriage of the mails, etc. The rights of the remaining companies accrued under the laws of Oklahoma Territory, which extended generally the authority to construct and operate connecting railroads. Upon the faith of these laws, which were duly accepted, great outlays of capital were made in building and equipping these lines; the railroad property being largely permanent and immovable, and the use of the property being its chief value—a component part of it and inseparable from it. By the laws of Oklahoma Territory also the purchase of railroads and franchises and the operation of such railroads by both domestic and foreign companies with connecting lines were expressly authorized. In the most of the cases, the original acts of Congress, by direct and indirect provisions, authorized the transfer of the corporate property and franchises of the constructing companies in the Indian Territory. It is alleged that these various lines with the accompanying franchises were transferred to the complainant, and that the purchases were made in consideration of great investments of capital, pursuant to the invitations, offers, and conditions of the federal and territorial laws. There is controversy relative to the legislative authority for the sale and purchase of a part of the property and franchises of the constructing companies in the Indian Territory, but none in Oklahoma Territory. Such controversy, however, need not be entered upon or decided. The proposal of the defendants under the legislative act here assailed is to put an end to the entire right of the complainant to carry on business in the state.

If the complainant has any right to continue business in the state, a case has been stated for relief. So far therefore as the complainant relies upon an impairment of contract obligations, such controversy may be eliminated.

In view of the legislation and transactions referred to, did complainant secure a "license or charter" for the conduct of railway operations within the state, of such character that it was subject to forfeiture and revocation by the Legislature at will without any cause, resulting in a great depreciation of the railroad property and visiting an enormous loss upon all holdings and interests therein, and at the same time working an incalculable inconvenience and injury to the public, desirous or in need of the facilities of railway transportation and travel over this railroad in the state? Or did complainant enter into such contracts now binding upon the state that the proposed termination of its right to continue its railway business and the use of its property within the state infringes its constitutional rights by impairing the obligations of those contracts and depriving it of its property without due process of law?

Whether the complainant be considered as having succeeded by transfer to direct grants made to the original companies of the right to construct, own, and operate their railroads and standing precisely in their relation to the state, or as having accepted and made its investments upon the faith of the proposals extended generally or specially by statutes conferring the same right upon it as a purchasing company, is not of consequence. In the light of the authorities, the same result was accomplished, and contracts were made. As was said in the case of *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 392, 14 Sup. Ct. 1047, 1052, 38 L. Ed. 1014:

"In the famous *Dartmouth College Case*, 4 Wheat. 518, 4 L. Ed. 629, it was held that the charter of a corporation is a contract protected by that clause of the national Constitution, which prohibits a state from passing any law impairing the obligation of contracts. The *International & Great Northwestern Railroad Company* is a corporation created by the state of Texas. The charter which created it is a contract whose obligations neither party can repudiate without the consent of the other. All that is within the scope of this contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and, on the other hand, one obligation assumed by the state was that it would not prevent the company from so constructing and operating the road."

And in the case of *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352:

"Unless forbidden by some exceptional constitutional provision, the same authority which can make a law can repeal it. The Constitution of the United States has imposed such a limitation upon the legislative power of all the states by declaring that no state shall pass any law impairing the obligation of a contract. \* \* \* It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause referred to of the federal Constitution."

In the case of *Home of the Friendless v. Rouse*, 75 U. S. 430, 19 L. Ed. 495, where it appeared that, in order to encourage the establishment of a charitable institution, it was provided by the statute

creating it that its property should be exempt from taxation, and under a subsequent provision of the Constitution of the state, a levy for taxes was about to be made, it was held:

"There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the Legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. \* \* \* We are of the opinion that the state of Missouri did make a contract on sufficient consideration with the Home of the Friendless, to exempt the property of the corporation from taxation, and that the attempt made on behalf of the state through its authorized agent, notwithstanding this agreement to compel it to pay taxes, is an indirect mode of impairing the obligation of the contract, and cannot be allowed."

In the case of *Powers v. Detroit & Grand Haven Ry.*, 201 U. S. 559, 26 Sup. Ct. 556, 558, 50 L. Ed. 860, a statute of Michigan was upheld which limited the taxes upon a railroad. The court said:

"Surely no clearer case of contract can be presented than one in which a Legislature passes an act in respect to a particular corporation making special provision concerning taxation, and does so with a view of inducing large expenditures by the corporation and the completion of an unfinished road, whose completion is deemed of great importance, and where the special provision is, as required, formally accepted, the expenditure made, and the road completed."

In the case of *Erie Railroad v. Pennsylvania*, 153 U. S. 642, 14 Sup. Ct. 952, 957, 38 L. Ed. 846, the railroad company, incorporated in New York, was by the Acts of 1841 (P. L. 28) and 1846 (P. L. 179) of Pennsylvania, granted the authority to build partly in Pennsylvania its line projected from New York to Lake Erie, and certain terms, conditions, payments, and taxes were imposed. By Laws 1885 (P. L. 194) § 4, an additional tax on its indebtedness to residents of the state was required, and the Supreme Court of the United States, reversing a judgment of the state court upholding this tax, held:

"We are of the opinion that the fourth section of the Laws of 1885, in its application to this railroad company, impairs the obligation of the contract between it and Pennsylvania, as disclosed by the acts of 1841 and 1846, and by what was done by that company upon the faith of those acts. \* \* \* Consistently with those terms and conditions, Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the state, in the exercise of its police power for purposes of taxation, and for other public objects, may legally impose in respect to business carried on said property situated within her limits."

In *American Smelting Co. v. Colorado*, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393, the company, a corporation of New Jersey, had paid the fees required by the laws of the state of foreign corporations, as a condition precedent to transacting business in the state, and by those laws they were subject to the same liabilities as domestic corporations. It then made an investment of \$5,000,000. Later an additional tax was imposed upon foreign corporations, which this company resisted, and a judgment of forfeiture therefor, affirmed by the Supreme Court of the state, was reversed by the Supreme Court of the United States, where it was held that the company obtained the

right to enter and do business in the state, and that it was not a mere license to do so "liable to be revoked or the sum increased at the pleasure of the state, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both," and that the later act impaired the obligation of that contract.

In *Chicago, R. I. & P. Ry. Co. v. Swanger* (C. C.) 157 Fed. 783, it appeared that by the laws of the state railroad corporations of adjoining states were authorized to build or acquire continuous lines in the state and were to be subject to the same regulations as corporations of the state. A later act was passed which provided that, if a railway corporation doing business between points in Missouri should without the consent of the other party remove a case from a state court to an United States court, its license to do business in the state should be forfeited and penalties added. The court said:

"It is stoutly denied that there is any contract, and, of course, there must be a contract before the obligation of one can be impaired. What was the contract? The state gave it the power of eminent domain. In many instances it gave it pecuniary aid. It gave it the rights of a common carrier. It gave it the right to charge reasonable prices for its services. It promised it the equal protection of the laws as to taxation, and equal protection with others against all who might seek to injure its property or earning power. The state in effect said: 'Make your investments, and we will give you these rights.' The company accepted the offer and made the investments, and now cannot remove if it so desired, because it has a contract in perpetuity to serve the people as a common carrier and to give efficient service for reasonable remuneration. That there is a contract is easily discerned."

According to the principles of the adjudged cases, while they differ in their facts, it is established that by the purchase of these railroads, pursuant to the laws applicable and upon the terms, obligations, and considerations shown, contracts were made, obligations of which are that the state, succeeding to the domain of the territories, should respect and not destroy the vested right of the complainant to the use and benefit of its property in carrying on its railroad operations within the state and should not vary the terms of the exercise of that right beyond the legitimate scope of its police powers.

The act, so far as it has application to the complainant, proposes the revocation and forfeiture of valuable rights and privileges amounting to franchises. There being, as already shown, an absence of legislative power reserved or properly exercised to that end, this could not be accomplished by legislative declaration, and in no event except upon adequate grounds, by judicial proceedings regularly instituted for that purpose, and it is not the subject of collateral inquiry. 2 *Clark & Marshall, Pri. Corp.* § 313; 1 *Elliott on Railroads*, §§ 47, 48, 55. It is clear therefore that the enforcement of the act against the complainant would not only impair the obligations of contracts, but also deprive it of its property without due process of law.

The complainant challenges the act for other reasons. It is asserted that it is an interference with interstate commerce—a subject committed by the federal Constitution to congressional regulation. The language of the act confines its operation to "transacting business within said state of Oklahoma." If it extends to the interstate transactions



of the complainant, it must necessarily be void in that respect. *Butler Bros. v. U. S. Rubber Co.*, supra. The rule is that every reasonable construction should be given to an act to save it from being unconstitutional. *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297. And although interstate commerce may be in part carried on within a state, a reasonable construction of the act would limit its meaning to intrastate commerce alone. *Chesapeake v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244. But by holding that the act relates solely to such commerce, it is not aided, as all that has been said has been upon the assumption that it had only such relation.

Further grounds are also urged against the validity of the act; but a decision thereon is not essential, and for that reason, and not for want of merit, they may be withheld from present consideration.

It remains to be determined whether the foregoing propositions are controlling, in view of certain grounds advanced by the defendants in support of a contrary ruling.

The argument is made that, because of the public nature of the business of a railway company, it is a joint enterprise, and that the state may deprive it of its public property. The inquiry is submitted: "Why may not the public, a partner in the industry, prohibit the further prosecution of the joint enterprise?" The question has already been answered. The contract relations involved are such that the state is bound to adhere to the obligations imposed by them. A different answer is said to be found in the case of *Myers v. Manhattan Bank*, 20 Ohio, 302, which is supposed to hold that a state may prohibit foreign corporations in the further use of a banking franchise granted before statehood; but that case decided that an act of a voluntary state Legislature of Michigan, before the admission of the state, and during the existence of the territorial government, incorporating and authorizing the bank to do a banking business at Manhattan, in Lucas county, was void, and that even if duly incorporated by the law of Michigan, yet, the privilege or contract being in conflict with the laws of Ohio, it was not valid therein after the transfer to Ohio of Lucas county.

Another contention of the defense is that, as the state has succeeded to the power of eminent domain within its limits, the complainant, not having complied with section 31 of article 9 of the state Constitution, is excluded from the use and benefit of its right of way. That section provides that no railroad corporation organized under the laws of any other state or of the United States shall be entitled to the benefit of the right of eminent domain in the state until it shall become a body corporate pursuant to or in accordance with the laws of the state. It is to be assumed that the state has succeeded to this power upon an equality with the other states of the Union. Still, the proposition is subject to fatal objections. If there were prior contracts whereby the use and enjoyment of the right of way were vested in complainant, that section, if given the application contended for, would be, as has been shown, obnoxious to the federal Constitution; but regarding the language of the section, and in the absence of the expression of a contrary intention, it would seem plainly intended to refer only to future applications for the benefit of the right. Such is the rule of construing Constitutions. *Cooley, Const. Lim.* (7th Ed.) 97. Furthermore,

the same Constitution declares against the impairment of the obligation of contracts and the taking of property without due process of law, and the foregoing construction must be correct, because, as said by the Supreme Court of Oklahoma (*Arie v. State*, 100 Pac. 23):

"The entire instrument is to be examined in arriving at the meaning of any part thereof, and to be construed as a whole. Effect is to be given, if possible, to each section, clause, and word; and, if any part be doubtful, it must be interpreted with every fair intendment to harmonize with the main purpose and not to defeat it."

It is also contended that the complainant itself surrendered its right to carry on interstate or intrastate business by acquiring its railway property from several companies which under a joint ownership by its stockholders ceased to be in active competition for trade and commerce, in violation of the Anti-Trust Act of Congress of July 2, 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), as applied in the case of *Northern Securities Co. v. U. S.*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, and the anti-trust laws of the state, and that this defense may here be availed of upon the doctrine of the case of *Continental Wall Paper Co. v. Voigt*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. —. In the former case it was said:

"What the government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which, in violation of the act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them."

The contention is not based upon any facts alleged in the amended bill. It does not appear that competitive lines were acquired, or that there was any combination of stockholders. There is no occasion to pass upon these purely abstract questions of law upon the subject of either national or state anti-trust legislation.

With reference to the supposed application of section 8 of article 9 of the state Constitution, proscribing and limiting the right of foreign and federal corporations to consolidate with, lease, or purchase parallel or competing lines, and of section 9 of that article, prohibiting domestic corporations from consolidating with or selling their property to such corporations, it is sufficient to say, without intimating any further opinion, that by the language of those sections and the settled principles of construction they do not apply to past transactions.

Another contention is that the congressional acts which granted the corporate rights to the original companies contained terms relative to maximum transportation charges amounting to conditions, and that the complainant being bound to plead a performance of those conditions, but having departed from such rates, and thus violated and forfeited its contracts, has no standing to insist upon them. Assuming, but not deciding, that these rates have not been superseded by subsequent legislation, it is clear that no burden of pleading an adherence to them can rest upon the complainant, because such an issue could not be inquired into collaterally, and hence is no proper subject to be set out in any pleading in this suit.

It is also insisted in support of the demurrer that the defendant Meyer actually made the declaration against the complainant, revoking its authority in the state. In the amended bill it is alleged that the signing of the instrument was "subsequent to the institution of the suit." It bears date one day later than that of the filing of the original bill and of the preliminary order restraining its issuance, but on the day of service of the order. Presumably it was executed before the order became effective or was served. It does not appear that "a foreign domicile" was alleged in the petition for removal or was the ground of the declaration; but assuming that such domicile was alleged, and the fact certified to the Secretary as contemplated in the legislative act, still must the relief prayed for be denied because the declaration shortly preceded the time when the order became effective or was served? The point is highly technical and goes to an avoidance of a decision on the merits. It is not available. This court had acquired jurisdiction over the subject-matter of the suit before the defendant acted, and he could not therefore prejudice or defeat the rights of the complainant. In such a case a court of equity has ample "power to compel by mandatory injunction the restoration of the former condition of things," and prevent the gaining of advantage by reason of the wrongful act. 22 Cyc. 743; *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; *High on Injunctions* (4th Ed.) § 5a; *Bispham's Prin. Eq.* 400; *Gibson's Suits in Chancery*, § 824.

The demurrer will be overruled.

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ATTLEBORO MFG. CO. v. FRANKFORT MARINE ACCIDENT & PLATE GLASS INS. CO.

(Circuit Court, D. Massachusetts. July 1, 1909.)

No. 367.

1. NEGLIGENCE (§ 2\*)—DUTY TO USE CARE.

Where an employers' liability company, on being notified of an action against plaintiff by an employé for injuries, assumed the defense of the cause, it thereupon became obligated to exercise reasonable care in such defense, whether it was required by its contract to defend the cause or not.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 2.\*]

2. ACTION (§ 27\*)—NATURE AND FORM—CONTRACT OR TORT.

Where an insurer under an employers' liability policy on being notified of an action for injuries to insured's servant assumed the defense thereof, and was negligent in conducting the suit, to the loss of the employer, the latter was entitled to sue the insurance company for breach of its implied contract to exercise reasonable care in conducting the suit or in tort for negligence.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 27.\*]

On Demurrer to Declaration. Overruled.

Fred S. Hall, Albert P. Worthen, Sherman L. Whipple, and Whipple, Sears & Ogden, for plaintiff.

Matthews, Thompson & Spring, for defendant.

LOWELL, Circuit Judge. This is an action at law removed into this court from the superior court of Massachusetts. The amended declaration is in tort, and alleges a policy of liability insurance for \$5,000 issued by the defendant, hereinafter called the "Insurance Company," to the plaintiff, hereinafter called the "Manufacturing Company." The material parts of the policy are as follows: The Insurance Company agrees to indemnify the Manufacturing Company "against loss arising from legal liability for damages on account of bodily injury or death suffered by any employé or employés of the assured resulting from any and every accident of whatsoever nature or cause happening in, upon, or about the premises of the assured as described herein and in the application herefor; but the liability of the company in respect to any one employé suffering injury or death shall in no case exceed the sum of five thousand dollars (\$5,000), nor shall the total liability of the company in respect to any one accident resulting in injury to, or the death of, several employés in any event exceed the sum of ten thousand dollars (\$10,000)." "That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall give immediate notice in writing of such accident to the company, addressed to the Manager for the United States at the office of the company in New York, N. Y., or to the duly authorized representative of the company for the locality in which this policy is issued. If, thereafter, the assured shall receive notice of any claim growing out of an accident, duly reported to the company, as before provided, or of any legal proceedings to enforce such a claim, he shall give immediate notice thereof to the company in like manner. That if any legal proceedings are taken to enforce a claim, against the assured, covered by this policy, the company shall, at its own cost, undertake the defense of such legal proceedings in the name and on behalf of the assured and shall have the entire control of such defense. But, if the company shall offer to pay to the assured the full amount for which the company is liable in respect to the claim sought to be enforced, it shall not be bound to defend any legal proceedings nor be liable for any costs or expenses which the assured may incur in defending the same. The assured at all times shall under the direction of the company render all reasonable and necessary assistance to enable the company to effect settlements or to properly conduct a defense or to prosecute an appeal. That the company may undertake at its own cost the settlement of any claim, duly reported to it as before provided, and the assured shall not, except at his own cost, settle any claim nor incur any expense without the consent of the company thereto previously given in writing; provided, however, that such immediate medical and surgical relief to the injured may be furnished as may be imperative at the time of the accident and reasonable expenses thus incurred shall be deemed a part of the liability of the company." The declaration goes on to allege that one Hodde "while in the employ of the plaintiff did suffer bodily injury resulting from an accident in, upon, or about the said premises of plaintiff; that thereafter claim was made against plaintiff on behalf of said Hodde for damages growing out of said accident"; that Hodde brought suit against the plaintiff to enforce the claim, "and that plaintiff gave

written notice to defendant of said accident, claim, and suit, respectively, immediately upon the happening, making, and commencement of the same respectively. Upon the commencement of said suit, defendant undertook the defense thereof and assumed and took unto itself the entire and exclusive control of the defense thereof throughout the pendency thereof." And plaintiff states that it was the duty of defendant in defending said suit to conduct itself with a reasonable degree of care, skill, and diligence commensurate with the duties and responsibility assumed by it, as aforesaid, but that defendant unmindful of its duty in the premises so carelessly, negligently, and unskillfully conducted and demeaned itself in the premises that the plaintiff in said suit recovered final judgment against this plaintiff in the sum of \$17,343.81, which judgment this plaintiff has been compelled, on writ of execution issued against plaintiff by said superior court at the instance of said Hodde, to satisfy and pay in full, principal, interest, and costs; that the aforesaid negligence and misconduct of defendant consisted, in this: that defendant, although given by plaintiff timely and ample notice of said accident, claim, and suit, negligently failed to make any timely, proper, or intelligent investigation touching the facts and circumstances under which said bodily injuries were sustained by said William Hodde, Jr., whereby material evidence favorable to this plaintiff which could and should have been produced at the trial of said suit was not produced or offered thereat on this plaintiff's behalf; that no intelligent, adequate, or timely preparation was made by defendant in this suit for the trial of said suit of said William Hodde, Jr.; that competent and legal evidence material to the issue in said suit, and tending to exculpate this plaintiff of liability therein, and which was known, available, and accessible to defendant herein, and which could and should have been produced on this plaintiff's behalf on the trial of said suit, was not produced or offered by defendant; that it was charged by said Hodde in said suit that his said injuries had been caused by the negligence of this plaintiff, as it was alleged in furnishing said Hodde with a defective and unsuitable pitcher for carrying certain acid, which claim that said pitcher was defective and unsuitable by the plaintiff so that the actual condition of said pitcher became and was one of the vital issues on the trial of said suit; that said pitcher, if it had been offered in evidence on the trial of said action, would have tended strongly to rebut and negative said charge of negligence of said Hodde, and would on said trial have seriously impaired the weight and credibility of the evidence offered on his behalf; that this plaintiff before the trial of said suit, at defendant's request, delivered into defendant's custody and care the said pitcher, but the defendant, instead of taking care of the same, carelessly and negligently permitted said pitcher to become lost or destroyed, so that it was not and could not be used or offered in evidence in this plaintiff's behalf on the trial of said suit. And plaintiff states that it was by reason of the aforesaid negligence, carelessness, and unskillfulness of defendant in and about the premises that said judgment was rendered against this plaintiff and became final as aforesaid.

"Wherefore plaintiff states that it has been damaged in the sum

of \$12,343.81, being the difference between the sum of \$17,343.81 paid by plaintiff in satisfaction of said judgment and the sum of \$5,000, the sum in which plaintiff was insured by said policy, for which sum of \$12,343.81 plaintiff prays for judgment, together with its costs in this behalf expended."

In substance, the declaration alleged that the Insurance Company, having undertaken the defense of Hodde's action under the circumstances stated, managed that defense so negligently that the verdict went against the Manufacturing Company in \$17,000, of which it had to pay \$12,000 or thereabouts beyond the indemnity furnished by the policy. The Insurance Company demurred on several grounds which are summarized in the opinion.

To set forth a good cause of action the declaration must show: (1) That the Insurance Company was under duty to conduct with care the defense in the case of Hodde against the Manufacturing Company. If this duty be shown, it is not denied that a breach of duty is alleged. (2) That the Insurance Company's liability for this breach of duty may be enforced in an action of tort.

First. The Insurance Company contends that no duty to defend the action was cast upon it by the terms of the policy. It propounds an ingenious dilemma by inquiring of the Manufacturing Company whether Hodde's claim was well-founded or unfounded. If the former, the verdict against the Manufacturing Company was proper and inevitable, and any negligence of the Insurance Company in defending the suit was *injuria absque damno*. If the latter, the suit was not within the terms of the policy, and the Insurance Company, being under no duty to undertake the defense, was not liable for what it did or did not do in the litigation. Therefore the Manufacturing Company's loss, though arising from the Insurance Company's negligence, was *damnum absque injuria*. But this action is not based upon an alleged breach of the written contract. The Manufacturing Company does not sue for a failure of the Insurance Company to keep its contract to defend the Hodde suit. The insurance policy is, indeed, set forth in the declaration, but no breach of it is alleged. It is inserted only as matter of inducement in order to make clear the history of the case. The duty of the Insurance Company to defend the Hodde suit with care is not alleged to arise from a promise contained in the written contract, but rather to arise out of a certain act of the Insurance Company which was done after the contract was made, after the accident had occurred, and after Hodde's suit was brought, viz., the assumption by the Insurance Company of the defense of the Hodde suit. So far as the plaintiff's claim rests upon a contract, that contract is not the written policy of insurance, but an implied contract arising out of the conduct of the Insurance Company long after the policy was signed. In this respect the case at bar is like *Getchell & Martin Co. v. Employment Liability Assurance Corp.*, 117 Iowa, 180, 90 N. W. 616, 62 L. R. A. 617, although in the Iowa case the subsequent contract was expressed rather than implied.

It follows, therefore, that this court is not required to decide, nor was the plaintiff required to allege, that Hodde's suit was within or without the purview of the insurance policy. In common sense, at

the time when the Insurance Company undertook the defense of the suit, it was neither the one nor the other, but, as its issue was in doubt, so its relation to the policy was doubtful also. To suggest, as does the defendant in effect, that Hodde's right to recover existed as an entity, wholly apart from the litigation and predetermined from the happening of the accident, is to assert a practical absurdity. Inasmuch as the plaintiff is not suing upon the insurance policy, this court is not required to determine whether, as was suggested by the Circuit Court of Appeals for this Circuit in *Munson v. Standard Marine Ins. Co.*, 156 Fed. 44, 45, 84 C. C. A. 210, the clause in question provides that, "whenever a claim of liability was made, the suit was to be defended at the cost of the underwriters," or, as was held in *Cornell v. Travelers' Ins. Co.*, 175 N. Y. 239, 67 N. E. 578, the insurer may, at its option, leave the defense altogether to the insured, thereby leaving at the risk of the suit only the amount of the insurance. See *St. Louis Beef Co. v. Casualty Co.*, 201 U. S. 173, 26 Sup. Ct. 400, 50 L. Ed. 712. The case at bar is unlike the *Cornell Case*. There the insured sued for breach of the contract of insurance. Here the contract relied upon arose by implication after Hodde's suit was brought. The defendant's argument assumes that the duty of the Insurance Company to defend the suit with care was all the same when that suit was brought and when the alleged negligence occurred. On the contrary, the duty here sued upon arose, not upon the bringing of the suit, but out of the act of the Insurance Company in undertaking the defense, whether obliged to do so by the policy or not. I hold, therefore, that the Insurance Company by undertaking the defense of the Hodde suit agreed with the Manufacturing Company to conduct that defense with reasonable care. It is not necessary at this time to determine the precise extent of the duty; if, for example, the defendant may justify itself by showing that it employed an attorney of good reputation. Having procured to itself the management of the defense in apparent compliance with the terms of the policy, the Insurance Company would be liable if it corruptly bargained with Hodde to the injury of the Manufacturing Company. This the Insurance Company admits. But mere absence of fraud in the defense carried on by the Insurance Company would afford but little comfort to the Manufacturing Company. Plainly, the duty of the Insurance Company did not end with the entry of the Manufacturing Company's appearance in court. To enter an appearance without more is not the defense of a suit. So a submission to a jury without evidence or argument would ordinarily involve a breach of the duty undertaken by the Insurance Company. In a word, to enter upon the defense of a suit on behalf of another ordinarily involves an undertaking to carry on that defense with reasonable care and diligence.

There is nothing in the policy to create an exception to the general rule by authorizing the Insurance Company to sacrifice the interests of the Manufacturing Company either maliciously or negligently. Even if we admit, for the sake of the argument, that, under the terms of the policy, the former might have left the defense altogether to the latter, and might have satisfied its utmost liability under the policy by the payment of the damages recovered in the suit up to \$5,-

000, yet, having undertaken the defense, it came under a liability, not only to pay the costs of that suit, but to carry it on with due care. In *Davison v. Maryland Casualty Co.*, 197 Mass. 167, 83 N. E. 407, the Insurance Company, having undertaken the defense, prosecuted a writ of error from the judgment of the lower court against the objection of the insured. The judgment was affirmed, and the delay caused by the action of the Insurance Company increased the judgment finally recovered by the addition of interest. Yet the court held that the prosecution of the writ did not increase the liability of the Insurance Company beyond the amount insured. In other words, the court there held that the Insurance Company might reasonably carry the case to the highest court, though loss to the insured resulted therefrom. That is not the case at bar. Both insurer and insured are interested in suits of this kind. Proper preference for its own legitimate interests by the insurer, even over the interests of the insured, is not the same thing as a negligent disregard of the interests of the insured because the insurer is willing to risk its own share of the loss. I hold, therefore, that the Insurance Company came under a liability to the Manufacturing Company to carry on the defense of the Hodde suit with due care.

Second. The defendant further contends that, even if it is liable to the Manufacturing Company, yet it is not liable in an action of tort. Much of the argument on this head has been already dealt with. As the suit is not based upon a breach of the policy, the argument that a suit for a breach of the policy must be brought in contract is irrelevant. A contract or undertaking to carry on the defense did, however, exist.

That the Manufacturing Company might here have sued the Insurance Company in an action of contract for a breach of this implied contract I do not doubt. Is a suit in tort excluded? Some negligent failures to discharge the duties of an agent lay the foundation for actions both of tort and contract. This is true of the negligence of an attorney. Even in the absence of an express contract the attorney is said to undertake to act with due professional care, and for a failure to perform his undertaking is liable in tort as well as in contract. For a negligent failure to perform the ordinary duties of a common carrier or of a physician an action of tort may be maintained. This liability is not confined to attorneys, professional men, and common carriers. *Shipherd v. Field*, 70 Ill. 438; *Heinemann v. Heard*, 62 N. Y. 448; *Savage v. Birkhead*, 20 Pick. (Mass.) 167; *Corbett v. Packington*, 6 B. & C. 268; *Nat. Bank v. City Bank*, 103 U. S. 668, 26 L. Ed. 417. The basis of the liability is the agent's duty to exercise care and to refrain from negligence about his principal's business, apart from the provision of any express contract. It must be borne in mind that in the history of common-law pleading the action of assumpsit to recover damages for breach of contract is a species of the action of trespass upon the case, to which genus belong, also, the action of trover and the special actions upon the case. Although the practice act of Massachusetts makes its principal distinction between actions of contract and actions of tort, yet some results of the common-law classification still persist. In the case at bar it was suggested that the



Insurance Company here undertook the duty of a professional attorney and assumed, either by itself or by its agent, to furnish the Manufacturing Company with an attorney's skill. Even if this be going too far, yet, an undertaking by one not an attorney to carry on the lawsuit of another being ordinarily an undertaking to carry it on with due care, it is the basis of an action of tort where negligence has been substituted for the due care undertaken and agreed upon. The declaration as drawn, even if it contains some unnecessary allegations (which is not asserted), contains sufficient to support an action of tort. Demurrer overruled.

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UNITED STATES, to Use of CREEK NATION, v. REA-READ MILL  
& ELEVATOR CO. et al.

(Circuit Court, E. D. Oklahoma. May 8, 1909.)

No. 510.

1. INDIANS (§ 27\*)—LANDS—SUIT BY UNITED STATES FOR USE OF TRIBE.

A suit by the United States for the use of the Creek Nation of Indians to cancel patents or deeds to town lots belonging to said nation in its tribal capacity and sold by the United States for its benefit under Act March 1, 1901, c. 676, § 10, 31 Stat. 864, on the ground that such deeds were obtained by fraud for less than the price at which the lots were authorized by such act to be sold, and to recover such lots for the tribe, is within the authority given by Act April 26, 1906, c. 1876, § 18, 34 Stat. 144, which authorizes the Secretary of the Interior to bring suit in the name of the United States for the use of any one of the Five Civilized Tribes "for the collection of any moneys or recovery of any lands claimed by any of said tribes."

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 19; Dec. Dig. § 27.\*]

2. COURTS (§ 302\*)—JURISDICTION OF FEDERAL COURTS—SUIT BY UNITED STATES FOR USE OF INDIANS—"SUIT IN WHICH UNITED STATES ARE PLAINTIFFS OR PETITIONERS."

Such a suit is one in which "the United States are plaintiffs or petitioners" of which a Circuit Court is given jurisdiction by the federal judiciary (Act March 3, 1875, c. 137, § 1, 18 Stat. 470, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 434 [U. S. Comp. St. 1901, p. 508]), and in view of the relations between the United States and the Indian tribes, it was competent for Congress to so provide and to give the tribes the status of the United States in the federal courts. The fact that the act expressly conferred jurisdiction of such suits on the United States courts in the Indian Territory did not make such jurisdiction exclusive so as to prevent the bringing of suits thereunder in the Circuit Court after statehood and after the territorial courts had ceased to exist.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 843; Dec. Dig. § 302.\*]

3. INDIANS (§ 27\*)—LANDS—SUIT BY UNITED STATES FOR BENEFIT OF INDIAN TRIBE—PROSECUTION BY PRIVATE COUNSEL.

In act April 26, 1906, c. 1876, § 18, 34 Stat. 144, to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, the provision of section 18 authorizing the Secretary of the Interior to bring suit in the name of the United States for the use of any of such tribes for the collection of any moneys or the recovery of any lands claimed by it, and "to pay from the funds of the tribe interested

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

the costs and necessary expenses incurred in maintaining and prosecuting such suits," is within the power of Congress, and under such authority the Secretary may employ private counsel to conduct such suits; the United States having no interest therein as a suitor. And in any event a defendant in such a suit cannot be heard to object that it was not brought by a law officer of the government.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 19; Dec. Dig. § 27.\*]

4. EQUITY (§ 150\*)—PLEADING—MULTIFARIOUSNESS.

A bill for the cancellation of a deed to a tract of land for fraud and to recover the land, brought against the parties charged with the fraud, is not multifarious because subsequent grantees of parts of the tract in severalty are joined as defendants on allegations that they bought with knowledge of the fraud; the validity of the original deed in issue being a common point in the litigation, in which all the defendants are interested, and the decision of which may determine the rights of all.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 371-379; Dec. Dig. § 150.\*]

In Equity. With this case were heard cases of the same complainant against the Midland Valley Railway Company, A. H. Sharum, and others (No. 7), against H. B. Spaulding and others (No. 9), against C. N. Haskell and others (No. 11), against Frederick B. Severs and others (No. 12), against C. W. Turner and others (No. 14), against B. F. Colley and others (No. 258), against B. F. Colley and others (No. 260), against The Frisco Oil & Gas Company and others (No. 261), against Wm. G. Williamson and others (No. 505), against Fred E. Turner and others (No. 506), against C. W. Turner and others (No. 507), against Chauncey A. Owen and others (No. 508), against The Tulsa Oil & Mining Company, Lynch and others (No. 509), against Mary A. Hogan and others (No. 511), against Fred S. Clinton and others (No. 512), against C. W. Turner and others (No. 513), against J. H. McBirney and others (No. 514), and against Sophia M. Pittman and others (No. 515).

W. L. Sturdevant, Special U. S. Counsel, M. L. Mott, Merritt Eslick, and H. B. Talley, for complainant.

Zevely, Givens & Smith, Hutchings & German, Charles Baggs, Bid-dison, Campbell & Eagleton, J. J. Henderson, R. W. Kellough, Norman Haskell, C. L. Jackson, C. W. Grimes, Carroll S. Bucher, Sam V. O'Hare, S. B. Dawes, Kuykendall & Martin, Franklin & Tscharn-er, Roach & Bradley, Jay Farnsworth, Anderson & Anderson, John G. Lieber, Martin & Rice, Charles P. Runyon, Bert E. Nussbaum, Anselam Buchanan, A. F. Schuermeyer, West, Mellette & Jones, Gib-son & Ramsey, Edgar A. DeMeules, Carroll & Walker, James B. Diggs, Sleeper & Davidson, Stone, Owen & Fleming, Thomas & Fore-man, Magee, Magee & Conner, Bailey & Kistler, E. C. Griesel, B. B. Wheeler, Charles W. Wheeler, Davis & White, Cook & De Graffen-ried, Benj. Martin, Jr., J. E. Wyand, Butte, Boone & Johnson, E. V. Vernor, J. R. League, Crump, Rogers & Curd, Baker & Purcell, and Randolph & Havre, for defendants.

CAMPBELL, District Judge. In the above causes the United States, as complainant for the use of the Creek Nation, has filed bills

\*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

against the various defendants to cancel certain patents or deeds to certain town lots in several towns in the Creek Nation, alleging fraud and deception on the part of the defendants in procuring the same. The defendants have demurred. The demurrers have been argued and submitted upon briefs. The bills are substantially the same in each case, and the demurrers set up substantially the same grounds. A brief résumé of the history of the Creek title to the land, out of which these lots were carved, is probably not amiss.

In the early part of the last century the Creek, Cherokee, Chickasaw, Choctaw, and Seminole Tribes of Indians, known as the "Five Civilized Tribes," occupied in their tribal capacity various portions of the states east of the Mississippi river. The growth and development in these then new states had caused the conflict between the advancing civilization of the white man and the habits and customs of these tribes to become more marked. The Indians, as a rule, were not then sufficiently advanced toward the civilization of their white neighbors to adapt themselves to the new order of things, and to merge these tribes into the body politic of the state was found to be impracticable. It was therefore apparent to Congress that some disposition of these Indians must be made. The plan of giving them, in exchange for their lands east of the Mississippi, portions of the public domain west of the Mississippi, where, as it then appeared, they would be undisturbed by the encroachment of white men for years to come, was finally devised, and on May 28, 1830 an act of Congress was passed (Act May 30, 1830, c. 148, 4 Stat. 411) providing that the President might cause the country west of the Mississippi, not within any state or organized territory, and to which the Indian title had been extinguished, to be divided up into districts for the reception of such tribes or nations of Indians who might choose to exchange lands then occupied by them for such districts and remove thereto. This act contained the following provisions:

"Sec. 3. And be it further enacted, that in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same; provided, always, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same."

By treaty with the Creek Tribe, entered into at Washington on January 24, 1826 (7 Stat. 286), that tribe, for a monetary consideration, ceded to the United States certain of their lands in Georgia. In this treaty it was further provided that, inasmuch as a portion of these Indians expressed a desire to emigrate west of the Mississippi river, a deputation of five of their number should be sent by them, at the expense of the United States, to examine the available lands west of that river, and select a tract for their new home which the government was to purchase for that purpose. This selection was made. Accordingly, on February 14, 1833 (7 Stat. 417), a treaty was entered into with the said nation, in which it was provided, among other things:

"Art. 3. The United States will grant and patent in fee simple to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States, and the right thus guaranteed by the United States shall be continued to said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned them."

On August 11, 1852, patent was issued to said tribe in accordance with the terms of the treaty, the granting clause of which reads:

"Now know ye, that the United States of America, in consideration of the premises and in conformity with the above-recited provisions of the treaty aforesaid, have given and granted, and by these presents do give and grant unto the said Muskogee or Creek Tribe of Indians, the tract of country above described, to have and to hold the same unto the said tribe of Indians, so long as they shall exist as a nation and continue to occupy the country hereby conveyed to them."

By this patent title to the land was conveyed to the Creeks as a nation, and no title was vested in severalty in the individual Creek citizens. *Cherokee Nation v. Journeycake*, 155 U. S. 196, 15 Sup. Ct. 55, 39 L. Ed. 120; *Shulthis v. McDougal* (C. C.) 162 Fed. 342. But by the usages and customs of the tribe, each individual was entitled to the use and occupancy of a limited portion of the surface of the land for agricultural or grazing purposes, and the inclosures and improvements made for such purpose were permitted to pass by quitclaim deed or bill of sale from one citizen of the tribe to another. As time passed, and railroads were permitted to be built into the Indian Territory from adjoining states, white men came in, and, as a consequence, towns of more or less importance sprang up all over these Indian lands. By common consent of the people, both citizens and noncitizens, these towns resolved themselves into residence and business portions, with distinct lots and blocks, streets, and alleys, of more or less regularity. The possessory right to such lots passed from hand to hand, by quitclaim or bill of sale, and substantial dwellings and business houses were built.

By the act of Congress approved June 28, 1898 (Act June 28, 1898, c. 517, 30 Stat. 495), known as the "Curtis act," provision was made whereby these towns in the Indian Territory could be incorporated and have organized city government. This was the condition confronting Congress, when, on March 1, 1901, it came to deal with the question of allotting the lands of the Creek Nation to the individual members thereof, and providing for the winding up of the tribal affairs. To accomplish this an act was passed by Congress upon that date (Act March 1, 1901, c. 676, 31 Stat. 861), entitled "An act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and for other purposes," known as the "original Creek agreement," which was shortly thereafter ratified by the Creek Nation.

This agreement authorized the Secretary of the Interior to survey, lay out, and plat the towns in the Creek Nation having a population of 200 or more. It provided for the filing of plats thereof. The Secretary was empowered to appoint a town-site commission of three members, which commission, under his supervision, was to sell the town lots for the benefit of the tribe; such sales to be in conformity

with the plan detailed in the agreement. For the purpose of this sale, the commission was empowered to appraise each lot, and improvements, which appraisement was then to be approved by the Secretary. Certain provisions were made in the agreement whereby persons having procured the right of occupancy of a limited quantity of such town property were given a preference right to purchase the same at less than the appraised value. Among these provisions were the following:

"Any person having the right of occupancy of a residence or business lot, or both, in any town, whether improved or not, and owning no other lot or land therein, shall have the right to purchase such lot by paying one-half of the appraised value thereof.

"Any persons holding lands within a town occupied by him as a home, also any person who had at the time of signing this agreement purchased any lot, tract, or parcel of land from any person in legal possession at the time, shall have the right to purchase the lot embraced in same by paying one-half of the appraised value thereof, not, however, exceeding four acres.

"All town lots not having thereon improvements, other than temporary buildings, fencing, and tillage, the sale or disposition of which is not herein otherwise specifically provided for, shall be sold within twelve months after their appraisement, at public auction to the highest bidder at not less than their appraised value.

"When the appraisement of any town lot is made, upon which any person has improvements as aforesaid, said appraisement commission shall notify him of the amount of said appraisement, and he shall, within sixty days thereafter, make payment of ten per centum of the amount due for the lot, as herein provided, and four months thereafter he shall pay fifteen per centum additional and the remainder of the purchase money in three equal annual installments, without interest."

#### Section 31 provides:

"All moneys to be paid to the tribe under any of the provisions of this agreement shall be paid, under the direction of the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe, and an itemized report thereof shall be made monthly to the Secretary of the Interior and to the principal chief."

#### Section 34 provides:

"The United States shall pay all expenses incident to the survey, platting, and disposition of town lots, and of allotments of lands made under the provisions of this agreement, except where the town authorities have been or may be duly authorized to survey and plat their respective towns at the expense of such town."

Pursuant to the foregoing agreement, a commission was appointed by the Secretary of the Interior to appraise and sell the lots in various towns in the Creek Nation, among them Tulsa and Muskogee.

The bills in the cases at bar are substantially alike, and allege:

"That the Creek Nation is one of the Five Civilized Tribes of Indians residing in the then Indian Territory, now state of Oklahoma, and now is, and at all the times stated herein was, a ward of the complainant, and that complainant is, and was at the times herein stated, the guardian of said Creek Nation both as to person and as to property, and charged with the duty of enforcing any and all the proper claims relating to the property of said nation; that by virtue of authority vested in him by law, the Secretary of the Interior has caused this suit to be instituted and prosecuted in the name of the United States of America for the use of the Creek Nation on the grounds and for the causes herein alleged, and has duly authorized and empowered the undersigned counsel to act as such in instituting and prosecuting the same."

Reference is then made to the act of May 28, 1830, and the patent to the Creek Nation above referred to, to the communal ownership of the tribe, and to the rights of occupancy and use of distinct portions of the land existing in individual members of the tribe, and the vendibility of such rights to other members by bill of sale or otherwise, the act of Congress providing for the appraisal and sale of town lots and the appointment of a commission for that purpose, and that the appraisal was very low, being in many instances but a small fraction of the value of the lots. They then alleged: That certain of the defendants, either having or claiming to have the right of possession of certain unimproved tracts in said towns in excess of the amount they would be permitted to acquire under the terms of the act at less than the appraised value, and which tracts had been platted into lots and blocks, proceeded to make pretended transfers of the same to other persons for the purpose of reducing individual holdings to the amount within the maximum amount which the act permitted such holder to acquire, with the intention and agreement that the pretended purchasers should retransfer to them after issuance of patent, or to such persons as they should direct. That said defendants procured the necessary payments to be made, and patent issued by the Creek Nation to such pretended purchasers, who thereafter retransferred the same to said defendants, or to such persons as they nominated, thereby enabling said defendants to secure the benefit of more land within said town sites than they were by law entitled to, being land which under the terms of the act should have been sold at public auction to the highest bidder and for not less than its appraised value, thereby defrauding the Creek Nation out of the money it would otherwise have received from the sale of said lots, by securing them at less than the appraised value. It is then alleged that by various transfers these lots in question have finally come into the hands of the present claimants of the property, who are also made defendants herein.

It is also alleged that the defendants now claiming to be the respective owners of said lots acquired the right, title, and interest now claimed by them with full knowledge, actual and constructive, of the fraudulent manner in which the lots were scheduled and the deeds thereto procured, and that the consideration, if any, paid by them for said lots, was paid with full knowledge of the facts. It is further alleged that neither complainant nor the Creek Nation had any knowledge of the fraudulent manner in which the said lots were scheduled, and the deeds thereto procured, at the time of the execution and approval thereof, nor subsequent thereto, until immediately before the filing of these suits.

The complainant prays that patents issued for these lots, and all subsequent conveyances be canceled, and the title decreed to be in the nation; or, in event that cannot be done, that the complainant have judgment for the value of said lots against the defendants alleged to have fraudulently procured the deeds therefor, and all other defendants named in the bill who may be adjudged on the hearing to have participated in the alleged fraudulent transactions.

To these bills the various defendants have severally demurred. The principal grounds of demurrer alleged are the following: First, that the complainant has no legal capacity to sue; second, that the court has no jurisdiction over the parties or subject-matter; third, that the bills are multifarious; fourth, that there is a misjoinder of parties and causes of action; fifth, that the bills are without equity. Other minor grounds are urged in some of the demurrers; but in my opinion, unless the demurrer can be sustained on some one or more of the foregoing grounds, they must fail. It is also urged that, if these actions can be maintained at all, they can only be prosecuted under the direction of the Attorney General, acting through the District Attorney, or some other officer of the Department of Justice authorized to conduct the litigation.

By settled rules of pleading these demurrers, for the purpose of the present consideration, admit the truth of the allegations in the bills. Conceding that, are they subject to the objections raised? Section 2 of article 3 of the Constitution of the United States provides that the judicial power shall extend to controversies to which the United States shall be a party. By the act of Congress of 1887-88 (Act Aug. 13, 1888, c. 866, 25 Stat. 434), it is provided that Circuit Courts of the United States shall have original cognizance of all suits of a civil nature at common law or in equity in which controversy the United States appear as plaintiffs, or petitioners. In this case the United States appear as plaintiffs. Therefore, if it shall be made to appear that the United States have capacity to sue herein, and are real and not merely nominal parties plaintiff, it follows that this court has jurisdiction. The first two grounds of the demurrer above referred to may therefore be considered together.

The land involved in these suits was tribal land, and the interest urged in behalf of the Indians is their tribal interest, and not their individual interest as allottees. The question of the relation of the United States to the allottee, with regard to lands allotted and patented to him in severalty, is not involved in this case, and in my opinion presents a very different proposition. It is argued that the members of the Creek Nation are now citizens of the United States, and hence the government cannot maintain these actions. In suits involving allotments, this argument is worthy of most serious consideration; but I cannot agree that the present status of the individual Indian with regard to citizenship in any way affects this case. They have no separate individual interest in the property involved, and it is a tribal and not an individual matter. At the time the agreement of 1901 was entered into, the Indians composing the Creek Tribe, like those of all other tribes, were treated as the wards of the United States, in a state of pupilage and dependency (*Stephens v. Cherokee Nation*, 174 U. S. 483, 19 Sup. Ct. 722, 43 L. Ed. 1041), and they were still, as a tribe, under the parental care of the United States guaranteed to them by the treaties. The power existed in the United States to administer upon the property of the tribe. *Cherokee Nation v. Hitchcock*, 187 U. S. 308, 23 Sup. Ct. 115, 47 L. Ed. 183. Congress had determined that the tribal condition and the status of the title to the lands which had prevailed ever

since the original treaty and patent should be changed, and hence the agreement.

It must be borne in mind that the agreement above quoted did more than merely provide for the disposition of the town sites. It also provided for the allotment in severalty of the lands of the tribe, other than town sites, to the individual members of the tribe. This was to be accomplished by the individual members selecting their respective allotments, for which they were to later secure patents signed by the principal chief and approved by the Secretary of the Interior, passing to them in severalty the tribal title and all interest of the United States; but these town sites were to be segregated from the allotted lands, were not subject to allotment, and by agreement with the tribe the United States undertook to dispose of the same for the use and benefit of the tribe. This was a proper subject of agreement with the tribe. In fact, it was in keeping with the uniform policy of the government in its attitude of superintendence and parental care over these and all Indian tribes in matters involving their property rights, where noncitizens were concerned. The Secretary of the Interior was empowered to direct and supervise all the public business relating to the Indians. U. S. Comp. St. 1901, p. 252. Without the agreement of Congress, the tribe could only hold the lands as tribal lands, for by the terms of their patent they could not dispose of the land without congressional assent, and it inured to them only so long as they continued as a tribe to occupy the same. In disposing of these town sites there was not only the interest of the tribe and the interest of the United States to be considered, but there were the further interests of individuals, most of them white men and noncitizens of the tribe, who by invitation of the tribe, or, at any rate, by sufferance of the tribe and the United States, had settled in these towns, procuring from the Indians certain possessory rights of occupancy of lots or parcels of lands within such town, made valuable improvements thereon in good faith, and it became the policy of Congress to protect them.

It was but natural therefore that the United States, in view of their unquestioned right to administer upon this vast Indian estate, and superintend its division among the individual members of the tribe, should undertake to manage the disposition of these town sites, adjusting the extensive and varied interests involved, receiving and holding the moneys realized for the sale of lots, to be accounted for to the tribe later. The terms of the agreement, we have noted, were very explicit as to the appraisement and scheduling of the property to persons in possession, the percentage of the appraised value they were to pay under the varying circumstances, etc. The Secretary of the Interior, as the representative of the United States, was required to follow these provisions in disposing of the lots. As the representative of the United States, the duty and obligation clearly devolved upon him to dispose of the lots in the manner provided by the agreement, and to secure as proceeds therefrom, for the benefit of the tribe, the full amount to be realized in strict accordance with its terms. The commission provided for by the act for the appraising and scheduling of the lots was appointed by the Secretary, represented him and the



United States in the matter, and the Secretary and the commission were merely the agencies through which the United States acted in carrying out the provisions of the agreement. It will be remembered that the agreement contained this provision:

"That any person who had at the time of the signing of said agreement purchased any lot from any person in legal possession at the time, should have the right to purchase the same at one-half the appraised value thereof, not however, exceeding four acres."

Did the transactions recited result in the United States realizing for the tribe any less for the property than would have been realized had it been disposed of in accordance with the terms of the agreement?

The lots in controversy, the bill alleges, comprise an unimproved tract of land. The defendant or defendants in each bill, who claimed the right of occupancy of the same, were only entitled to take not exceeding four acres at one-half the appraised value. The lots in said tract in excess of four acres were, by section 14 of the agreement, to be sold under the direction of the Secretary of the Interior at not less than their appraised value. It is readily seen therefore that, had this been done, the Creek Nation would have realized not less than the full appraised value from all the lots carved out of such tract in excess of four acres. If then, as alleged in the bills, the defendant or defendants, who claimed the right of occupancy in each case, secured these lots in excess of four acres at one-half their appraised value, it is clear that the Creek Nation was deprived of proceeds to which it was entitled to the extent at least of one-half such appraised value, if the United States, in accounting therefor, only pay to it the amount actually received for said lots. When the United States undertook by said agreement to manage the disposition of the town sites, they impliedly, if not expressly, undertook to secure for the Creek Nation in return therefor the full amount which could be realized for the sale of the same, in strict accordance with the terms of the agreement. They are obligated to the Creek Nation to do so. Taking the allegations of the bill as true, which for the purpose of this demurrer must be done, it follows that the terms of the law have been violated, and the defendants who evolved the plans set out in the bills have wrongfully secured the property of the Creek Nation.

The United States government in taking charge of these town sites and selling them and collecting the money therefor, to be held and later paid to the Indians, was but discharging a duty imposed by the peculiar relations existing between the Indians and the government, and which had given rise to the agreement. The agreement provided that blank deeds should be furnished by the Secretary to the principal chief, whose duty it was to execute deeds to all persons to whom lots were scheduled, and for which payments had been made into the Treasury of the United States. The law further provided that all conveyances should be approved by the Secretary of the Interior, which should serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in such deed. Certainly if, as alleged in the bills, the Secretary is

imposed upon and induced to direct the principal chief to execute a deed and to himself approve the same, for a consideration less than the law provided for, and thus the illegal issuance of a deed is secured, the United States government, which the Secretary represents, has such an interest in the matter as entitled it to maintain an action to have the fraudulent transaction set aside. Having undertaken on behalf of these Indians to sell these town lots in a certain manner, and for a certain consideration, the United States is under obligations to the Indians to so dispose of them. There can be no doubt that, when the original agreement was made, the relation of the United States to the Creek Tribe was such that, whether they be termed "guardian," "protector," or whatsoever term may be applied, they could and did assume the duty of disposing of the town sites for the benefit of the tribe as a part of the national plan in finally disposing of the affairs of the tribe, and it would be a strange doctrine which would refuse them access to their own courts to protect them and the tribe against the results of fraud and deceit practiced upon them in regard to such property, regardless of any specific legislation granting such jurisdiction. *United States v. San Jacinto Tin Co.*, 125 U. S. 285, 8 Sup. Ct. 850, 31 L. Ed. 747; *United States v. Bell Telephone Co.*, 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450; *United States v. Lock Shaw (C. C.)* 39 Fed. 433, 3 L. R. A. 232.

But this litigation is instituted under the provisions of a specific act of Congress. By section 18 of the act of Congress of April 26, 1906 (chapter 1876, 34 Stat. 144), entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," it was provided:

"That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribe, respectively, either before or after the dissolution of the tribal government, for the collection of any moneys or recovery of any lands claimed by any of said tribes whether such claim shall arise prior to or after the dissolution of the tribal government, and the United States Courts in the Indian Territory are hereby given jurisdiction to try and determine all such suits and the Secretary of the Interior is authorized to pay from the funds of the tribe interested, the costs and necessary expenses incurred in maintaining and prosecuting such suits."

The bills allege that the Secretary of the Interior has caused these suits to be instituted and prosecuted in the name of the United States for the use of the Creek Nation. The suit is for the cancellation of deeds and patents alleged to be void by reason of matters set up in the bills, and prays that the court decree the title to the land involved to be in the nation. It is therefore, in my opinion, such a suit for the recovery of land as is contemplated in the act. The attorney for the nation is one of the subscribing counsel, from which it may be assumed the nation is asserting its claim. The name of the United States is used as a complainant by authority of the act. The suit therefore is one of those contemplated by the act, and the jurisdiction of this court must be measured by the act. The United States do not appear as a suitor further than the act itself provides for the use of their name, so that no interest they may have in protecting the government in carrying out its agreement with the tribe

can be considered, although counsel in drawing the bill and in argument have apparently sought to base the jurisdiction both upon the special act and upon the interest which the United States themselves have in the matter.

A suit by the United States against the defendants for fraud practiced upon the government is one thing; a suit in the name of the United States for the use of the Creek Nation, authorized by special act of Congress, is another—and these cases are of the latter class. But on the faces of the bill the suits are still within the jurisdictions of this court, because the United States appear as plaintiffs or petitioners, unless the contention of defendants that they are merely a nominal party is sound. It is urged that Congress merely happened to provide that the suit should be brought in the name of the United States, and might as readily have provided that it be in the name of the Secretary, or the principal chief, or any individual; but to my mind the fact that it did not do so is significant. It provided for suits in which the United States should be plaintiffs, and of which, on the face of the papers, this court would have jurisdiction. If it was competent for Congress to provide for the bringing of these suits at all, was it not competent for it to provide that they should be brought in such manner as to give the tribe the status of the United States, with relation to suits in the federal courts, and is it not fair to assume that Congress so intended? *United States v. Churchyard* (C. C.) 132 Fed. 82. The act of the Secretary in instituting the suit is the act of the United States whom he represents, and the United States Congress legislates for the tribe by virtue of the relation they bear to the tribe in the nature of a guardianship. It is upon this theory that Congress assumed to legislate regarding the matter, and it is a very reasonable conclusion that Congress intended that such suits should be tried in federal courts, and purposely provided that they should be brought in the name of the United States.

It is argued that the courts of the Indian Territory had all the jurisdiction of the federal Circuit and District Courts, and that, if it was necessary to specially confer upon the Indian Territory courts jurisdiction of such suits as these by section 18 above quoted, it must follow that such jurisdiction did not and does not now exist in this court as a federal Circuit Court. It is true that it must be presumed that Congress does not pass useless laws, and that it must ordinarily be assumed that no act is passed without reason therefor. The jurisdiction finally exercised by the United States courts in Indian Territory prior to statehood was established by a series of acts, each referring back to a former act or acts, and each succeeding act, as a rule, adding to the jurisdiction.

A careful examination of all these jurisdictional provisions inclines me to the opinion that without this special legislation the courts of Indian Territory would have had jurisdiction of these causes; the United States being a party plaintiff or petitioner. But I am not prepared to say that the matter is entirely free from doubt, and, as their jurisdiction was purely statutory, it is not unreasonable to assume that Congress thought best to remove all doubts by ex-

placitly conferring jurisdiction. But, however that may be, it does not follow that the giving of such jurisdiction to the Indian Territory courts excludes the jurisdiction of this court.

It is significant that at the very time this act of April, 1906, was passed, Congress had under consideration the statehood bill, which was passed soon afterwards, and by the terms of which the Indian Territory courts would pass out and this court come into existence. Nothing in the act indicates that it was intended that all these suits should be instituted before statehood, and Congress must have had in mind that such suits instituted after statehood would be instituted in the United States Circuit Court, under the general provision of law giving jurisdiction in cases where the United States are parties plaintiff or petitioner. There is nothing in the section referred to which in my opinion confers exclusive jurisdiction upon the Indian Territory courts, and which makes the right to institute such suits coexistent only with such courts. It provides that such suits may be filed either before or after the dissolution of the tribes, and, until further legislation to the contrary, such suits may be filed when the claims referred to in the act shall arise. The first purpose effected by the act is to give the Secretary of the Interior authority to bring such suits. Without such specific authority the Secretary had no power, independent of the Department of Justice, to bring suit in the name of the United States.

By section 771 of the Revised Statutes (U. S. Comp. St. 1901, p. 601), it is provided:

"It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury."

In *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747, a suit instituted directly by the Attorney General without intervention of the district attorney, to set aside a patent to certain lands, the authority of the Attorney General to institute such suit was questioned, and the court said:

"Notwithstanding the want of any specific authority to bring an action in the name of the United States to set aside and declare void an instrument issued under its apparent authority, we cannot believe that, where a case exists in which this ought to be done, it is not within the authority of that officer to cause such action to be instituted and prosecuted. He is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and all the litigation which is necessary to establish the rights of the government."

In *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, it is said:

"We are of the opinion that, unless, by virtue of an act of Congress, no one but the Attorney General, or some one authorized to use his name, can bring a suit to set aside a patent issued by the United States, or a judgment rendered in its courts upon which such patent is founded."

But here we have specific legislation authorizing the bringing of the suit by the Secretary of the Interior, and the power of Congress to grant such authority cannot be questioned.

But it is contended that, even though the Secretary may institute the suit, the Attorney General or the district attorney must appear as counsel, and that he cannot be represented by attorneys not connected with the Department of Justice acting as special counsel.

It is clear, as we have seen, that ordinarily, in the absence of special provisions to the contrary, in any particular case, the Attorney General and the district attorneys are the officers upon whom the law imposes the duty of instituting and conducting the litigation which is necessary to establish the rights of the government; that is, to bring suit for such purposes, in the name of the United States. But by the act of April 26, 1906, the Secretary of the Interior is specially authorized to bring suit in the name of the United States, for the purposes mentioned in the act. It is further provided that any costs and necessary expenses incurred therein may be paid from the funds of the tribe interested. The bill alleges that the Secretary of the Interior has caused this suit to be instituted and prosecuted in the name of the United States of America, for the use of the Creek Nation, on the grounds and for the causes therein alleged, and has duly authorized and empowered the subscribing counsel to act as such in instituting and prosecuting the same. In view of the special authority vested in the Secretary to institute such suits, and the provision by which he may defray the necessary costs and expenses of the same, may the Secretary, if he so desire, employ for the purpose special counsel not in any way connected with the Department of Justice?

Kennedy v. Gibson et al., 75 U. S. 498, 19 L. Ed. 476, was a suit by a receiver of a National Bank against its stockholders to enforce a statutory liability. The law provided:

"That all suits and proceedings arising out of the provisions of this act, in which the United States or its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury."

The suit was prosecuted by special counsel and not by the district attorney. One of the grounds of demurrer alleged by the defendants was that the bill was not signed by the United States attorney. In relation to this the court say:

"The receiver is the agent of the United States, and, according to the fifty-sixth section of the act, this suit should have been conducted by their attorney; but this provision is merely directory. The question which arises is between the United States and its officers. The rights of the defendants are in no wise concerned, and they cannot be heard to make the objection that this duty of the local law officer of the government has been devolved upon another. It is to be presumed there were sufficient reasons to warrant this departure from the letter of the law."

United States Fidelity Co. v. Kenyon, 204 U. S. 349, 27 Sup. Ct. 381, 51 L. Ed. 516, was a case involving an act of Congress approved August 13, 1894 (Act Aug. 13, 1894, c. 282, 28 Stat. 279 [U. S. Comp. St. 1901, p. 2315]), providing that contractors on public buildings should enter into bonds with the United States that, among other

things, they would promptly make payments to all persons supplying them labor and materials, and providing that such persons not so paid might be furnished with a certified copy of the contract and bond upon which they should have a right of action, and authorizing them to bring suit in the name of the United States for their use and benefit, against the contractor and his sureties. It was further provided that the court might require proper guaranty for costs in case judgment should be for the defendant. Kenyon, a materialman, not being promptly paid, brought suit on the bond. The suit was by the United States, "suing herein for the benefit and on behalf of James S. Kenyon." It was prosecuted by private counsel of Kenyon, and not by the Attorney General or district attorney. While it was held that the United States was a "real and not a mere nominal plaintiff" in the action, and that therefore the Circuit Court had jurisdiction, the right to maintain the action by special and private counsel is not questioned.

If a suit should be hereafter instituted by the Attorney General or the district attorney against these defendants, seeking the same relief, it would of necessity be in the name of the United States, and, being the same plaintiff against the same defendants, involving the same subject-matter, and seeking the same relief, would be barred by this suit. It appears therefore, as said in *Kennedy v. Gibson*, *supra*, that, at most, the question is between the United States and its officers, that the rights of the defendants are in no wise concerned, and that they cannot be heard to make the objection that the duty of a local law officer of the government has been devolved upon another.

It is charged that the bills are multifarious. In *Brown v. Guarantee Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468, it is said:

"It is well remarked by Lord Cottenham, in *Campbell v. Mackay*, 7 Sim. 564, and in 1 Myl. & Cr. 603, 'to lay down any rule applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible.' Every case must be governed by its own circumstances; and, as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience, in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts. In that case the bill was filed against the two executors of the will of Daniel Clark, the heirs at law of his legatee, and the several purchasers of various pieces of property which had been sold off from the estate. The relief asked was an accounting in respect to the rents and profits of the several parcels and for general relief, as the heir and devisee of Clark under a different testament. Under this state of facts, the court said (page 643): 'The right of the complainant, Myra, must be sustained under the will of 1813, or as heir at law of Daniel Clark. The defendants claim mediately or immediately under the will of 1811, although their purchases were made at different times and for distinct parcels of the property. They have a common source of title, but no common interest in their purchases. And the question arises, on this state of facts, whether there is misjoinder or multifariousness in the bill, which makes the defendants parties. \* \* \* And the main ground of the defense, the validity of the will of 1811, and the proceedings under it, is common to all the defendants. Their interests may be of greater or less extent; but that constitutes a difference in degree only and not in principle. There can be no doubt but that a bill might have been filed against each of the defendants; but the question is whether they may not

all be included in the same bill. The facts of the purchase, including notice, may be peculiar to each defendant; but these may be ascertained without inconvenience or expense to codefendants. In every fact which goes to impair or establish the authority of the executors, all the defendants are alike interested. In its present form the bill avoids multiplicity of suits, without subjecting the defendants to inconvenience or unreasonable expense."

"The case against one defendant may be so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case the objection of multifariousness cannot be allowed to prevail. *Attorney General v. Poole*, 4 Myl. & Cr. 17, 31; *Turner v. Robinson*, 1 Sim. & St. 313; *Attorney General v. Cradock*, 3 Myl. & Cr. 85.

"It is not indispensable that all the parties should have an interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others. *Addison v. Walker*, 4 Yo. & Col. Ch. 442; *Parr v. Attorney General*, 8 Cl. & Fin. 409, 435; *Worthy v. Johnson*, 8 Ga. 236.

"To support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur: First, the grounds of the suit must be different; second, each ground must be sufficient as stated to sustain a bill. *Bedsole v. Monroe*, 5 Iredell, Eq. 313; *Larkins v. Biddle*, 21 Ala. 252; *Nail v. Mobley*, 9 Ga. 278; *Robinson v. Cross*, 22 Conn. 171."

In *Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729, the court, quoting from Mr. Story, say:

"By 'multifariousness' is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them, as for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters, of a distinct and independent nature, against several defendants in the same bill."

On the other hand, as to when a bill is not multifarious, it is said, in *Curran v. Campion*, 85 Fed. 67, 29 C. C. A. 26:

"No bill is multifarious which presents a common point of litigation, the decision of which will affect the whole subject-matter, and will settle the rights of all the parties to the suit, and that it is not indispensable that all the parties should have an interest in all the matters contained in the suit; but it is sufficient if each party has an interest in some material matters involved in the suit, and they are connected with the others."

In *Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co.*, 137 Fed. 26, 71 C. C. A. 1, it is said:

"The vice of multifariousness is the union of causes of action which, or of parties whose claims, it is either impracticable or inconvenient to hear and adjudicate in a single suit. Where this vice does not exist, where it is as practical and convenient for the court and the parties to deal with the claims or causes of action presented, and the parties joined by a petition, in one suit as in many, the pleading is not multifarious, and it should be sustained."

In each case the question of multifariousness is one within the sound discretion of the court, and the exercise of that discretion is seldom, if ever, reviewed on appeal. *Ulman v. Jaeger* (C. C.) 67 Fed. 985. But it is nevertheless incumbent on the court to exercise such discretion with care; that is, applying to the question a sound discretion. In each of these cases the controversy involves what was originally a single tract of land. The bills charge that a portion of the defendants, either individually or combining together, secured the tract by fraud.

It is charged that the other defendants, with knowledge of the frauds, secured the several lots in which they are separately interested, either mediately or immediately, from the defendants who had procured it in the first instance. Each lot is a part of the original tract. The main question in the case is whether in the first instance the patents or deeds were procured in the fraudulent manner charged in the bill. In this question all the defendants are interested, and if, as is alleged in this bill, they all secured their several interests with knowledge of the manner in which the lots were secured in the first instance, then they are interested in the main question in the case, and the bill presents a common point in litigation, the decision of which may affect the whole matter, settling the rights of all parties. If, on final hearing, the complainant should establish the allegations of fraud on the part of the principal defendants, there will be the further question of participation therein by the other defendants, or as to their having purchased with knowledge of the original fraud. This will involve a separate and distinct inquiry on that point, as to each subsequent purchaser named as defendant; but the question as to each may be as readily and finally established in this present case as it could be in a separate action, as to each defendant, and with much less court costs and vastly more convenience to the court. Whenever a defendant is shown to have purchased with knowledge of the facts involved in the original transaction, there is no reason why he should not be joined in this action, and, wherever a defendant is shown to have been an innocent purchaser in good faith for a valuable consideration, that in all probability will be a complete defense as to him, and that may be shown just as well in this action as in a separate action against him individually. In my opinion, in view of the foregoing authorities, the bill is not multifarious.

As to the question of laches interposed by some of the demurrers, it is alleged in the bills, and for the purpose of these demurrers must be taken as true, that neither the United States nor the Creek Nation had any knowledge of the matters and things charged until immediately before the filing of the suits. This allegation meets the objection of laches, so far as the consideration of these demurrers is concerned.

In view of the foregoing considerations, the demurrers will be overruled.

It is so ordered.

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In re LAMON.

(District Court, N. D. New York. July 15, 1909.)

**1. PARTNERSHIP (§ 22\*)—CREATION—PAROL.**

While a partnership to deal in real estate may be created by parol, there must be an agreement, express or implied, from the acts done and the mode and manner of conducting the business, showing the relation with regard to the transaction in question.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 22.\*]



## 2. PARTNERSHIP (§ 52\*)—REAL ESTATE—DIVISION OF INCOME.

That one person, having the title to real estate in his name, passed a part of the income or profits to another, does not establish a partnership relation between them.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 75; Dec. Dig. § 52.\*]

## 3. BANKRUPTCY (§ 340\*)—CLAIMS.

On a claim against a bankrupt on an alleged indorsement of the note of a prior associate in business, which indorsement the bankrupt claimed was forged and unauthorized, evidence *held* to sustain a finding that the money was not borrowed for the purposes of a partnership, of which the bankrupt was claimed to be a member, nor used for the purposes of such alleged firm.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.\*]

## 4. BANKRUPTCY (§ 316\*)—CLAIMS—FORGED INDORSEMENT.

Where a bankrupt had nothing to do with a note discounted by a bank bearing his false indorsement, and the evidence did not show that the bankrupt ever received any benefit from the discount, except that \$500 of the amount was used by the maker to reduce a note at another bank on which the bankrupt was liable as indorser, the note was not a valid claim against the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 316.\*]

In Bankruptcy. Review of orders of referee disallowing and expunging claim of Mason M. Swan, for about \$2,070, and claim of First National Bank of Baldwinsville, N. Y., for \$1,000, and interest from July 18, 1907.

J. H. O'Brien, for trustee.

W. A. Nims, for claimant bank.

Field & Swan, for claimant Swan.

RAY, District Judge. As the questions of law involved are substantially the same as to each claim, they may be appropriately considered together, although there is no connection between the claimants.

## Swan Claim.

November 14, 1906, the claimant, Mason M. Swan, loaned to H. G. Beach the sum of \$2,500, taking his promissory note, purporting to be indorsed by Francis M. Lamon, the bankrupt. Lamon denies that he indorsed the note, or authorized his name to be indorsed or written thereon, and Beach, in prison, declines to say whether the signature of Lamon, indorsed thereon, is genuine or was authorized, on the ground his answer would incriminate him. No proof was given of the genuineness of the indorsement. But the claimant says that Beach and Lamon were in partnership, and that the money was borrowed for and used in the partnership business, to pay a debt for money borrowed to purchase or pay for partnership real estate, and that therefore Lamon is liable for the debt, irrespective of the genuineness of the indorsement. There is no claim that Beach purported to borrow the money for the partner-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ship, if one existed, or that Swan understood he was loaning the money to the partnership. It was a loan to Beach on his note, purporting to be indorsed by Lamon, who was a large owner of real estate, and the loan was made by Swan, relying on the financial responsibility of Lamon, the indorser. Swan says:

"I can't recall that Beach told me what he intended to use the money for that he obtained from me. \* \* \* I had known Mr. Lamon 10 or 15 years, knew that he was a large owner of real estate, and knew he owned property in Sterling street and in Court street. I made the loan entirely upon the financial responsibility of Lamon."

It cannot be successfully claimed under the evidence that Beach and Lamon were general partners, or partners in any commercial business. They were partners in at least one real estate speculation. A property in Brooklyn, N. Y., known as the "Amity Street Property" was held by them as a joint venture or speculation, and sold, and the proceeds, over and above the incumbrances, put into an apartment house in New York; the title being taken by Beach in his own name. The Brooklyn property was purchased in 1903; but the title to this was taken in the name of Lamon, and same was paid for in part by the proceeds of a note discounted at the Jefferson County National Bank, of Watertown, N. Y., where the parties resided, and which note was made by Beach and indorsed by Lamon. This Amity property was sold in 1905, and the New York property purchased. When the Brooklyn property was purchased, a blank account was opened at the Jefferson County National Bank in the name of Lamon & Beach. While this account has never been finally closed, it has been dormant for years, with a very small balance to their credit. It appears that the rents, etc., of the Amity went into this account.

This New York city property was known as the "Awosting." The evidence tends to show that the money borrowed of Swan was used by Beach to pay notes given for the purchase of the Amity property, made by Beach and indorsed by Lamon. The facts that Beach and Lamon were jointly interested in the original purchase, that Beach borrowed money to put into the property, and that Lamon indorsed, does not make that debt a partnership debt, nor does it make Lamon liable as a partner. If he indorsed, he would be liable as indorser as a matter of course. Beach could borrow money on his own credit and put it into the partnership account and fund without making the debt a partnership liability. Two or more persons may enter into partnership. Each may borrow money on his own credit and responsibility to put into the business as his share of capital, and put it into the business, and give a note; but this does not make the debt a partnership debt or obligation, or make the other partners liable therefor. I think the evidence fails to establish that there was any partnership between Beach and Lamon after the sale of the Brooklyn property. Beach did some business in New York under the name of Beach & Co.; but the evidence fails to disclose that Lamon had any part in it, or that he assented to it, or that he knew he was being treated as a partner, or a member of any company. The testimony of Beach is to the effect that

there was in fact no company; that he used the name Beach & Co. as a matter of convenience, and to give himself a better or more extended credit. It is settled that a partnership for dealing in real estate may be created by parol. *Buckley v. Doig*, 188 N. Y. 238, 254, 80 N. E. 913; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Fairchild v. Fairchild*, 64 N. Y. 471; *Williams v. Gillies*, 75 N. Y. 197. But to constitute a partnership there must be an agreement, express or implied, showing the relation with regard to the transaction in question. It may be implied from acts done, the mode and manner of conducting a business (*Manson v. Williams*, 213 U. S. 453, 29 Sup. Ct. 519, 53 L. Ed. —, May 3, 1909); but the fact that the person having the title in his name pays some part of the income or profits to another does not establish the relation.

The claimant places stress upon the case of *Ontario Bank v. Hennessey*, 48 N. Y. 545, as establishing this claim in his favor. That case was decided by the Commission of Appeals in 1872, but was distinguished, and its effect as an authority questioned, by the Court of Appeals in *Williams v. Gillies*, 75 N. Y. 197, 203. It was there held:

"As to whether a parol agreement between two or more persons to purchase a specific parcel of real estate with a view of selling at a profit, to pay for the same from their individual means, and to take the deed in the name of one of them, constitutes a partnership in any commercial sense, and so is not violative of the statute of frauds, quære. Conceding a partnership in some sense, it does not follow that all the incidents and liabilities of a commercial partnership attach. Where, in such case, the party taking title gives back his individual bond for a part of the purchase money, the name of his associates not appearing in the bond and nothing therein indicating that it was executed on their behalf or for their benefit, they cannot be held personally liable thereon."

Beach told Lamon he had deeded the New York property to him. Lamon supposed he had, and acted accordingly. No deed to Lamon was received or delivered. In June, 1907, Lamon and wife gave to Beach a power of attorney to sell the New York property, the Awosting. July 1, 1907, Beach, acting under said power of attorney, contracted in writing to sell such property to one Enistein. This is inconsistent with a partnership as to such property. Beach makes a general statement that he and Lamon were interested in various real estate projects or transactions. This is denied by Lamon. It is undisputed that Lamon indorsed a large number of notes for Beach. Lamon kept an account of these indorsements, which, in the list, run from February, 1900, to July 6, 1907. Of course, all or much of this money could have been borrowed for partnership transactions; they concealing the relation, and one making the note and the other indorsing, so as not to go outside for indorsers. But there is no satisfactory evidence that the business was done in this way. On all the evidence I think a finding that this money was borrowed for partnership purposes, or used for partnership purposes, would be based on mere conjecture, and not on evidence that satisfies the mind. The order of the referee disallowing this claim is therefore affirmed.

## Bank Claim.

About February 18, 1907, the First National Bank of Baldwinsville, the claimant herein, loaned to Beach \$1,000 on his promissory note, purporting to bear the indorsement of Lamon, the bankrupt. Lamon did not indorse the note or authorize it. At that time Beach and Lamon were not partners. May 18, 1907, Beach renewed the note, forging Lamon's name thereon as indorser. July 18, 1907, Beach renewed the note, forging the name of Lamon to the renewal. Lamon had nothing to do with the making of this note. In describing the Swan claim I have stated quite fully the partnership relations of Beach and Lamon.

Prior to the 18th day of February, 1907, Beach had made a note, indorsed by Lamon, which was held by the Commercial National Bank of Syracuse. Lamon had insisted that Beach pay at least \$500 on that note held by the Commercial National Bank at each renewal and of the money received of the claimant bank Beach paid \$500 on the note held by the Commercial National Bank. This reduced the liability of Lamon as indorser; but the money obtained from the Commercial National Bank by Beach on the note referred to was not used for partnership purposes. Conceding that Beach used the money in a real estate transaction in Canada in which Lamon was in some way interested, there is no evidence to establish that Beach and Lamon were copartners in that Canada transaction. The referee has failed to so find, and I think the evidence falls far short of establishing a partnership in that deal. It follows, I think, that there is no evidence that the money obtained from the Baldwinsville Bank was used for partnership purposes. I am unable to ascertain from the evidence what disposition was made of the other \$500 obtained from the Baldwinsville bank. There is no satisfactory evidence that Lamon had it, or the benefit of it, directly or indirectly. It would be a violent assumption to find that Lamon ever received any benefit from the loan made at the Baldwinsville bank, other than that \$500, was used by Beach to reduce a note at the Syracuse Bank upon which Lamon was liable as indorser.

I think the referee was right in rejecting the claim, and his order disallowing same is therefore affirmed.

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MOUND CITY CO. v. CASTLEMAN et al.

(Circuit Court, W. D. Missouri, Central Division. July 15, 1909.)

No. 2,320.

1. EQUITY (§ 182\*)—PLEADING—PLEA IN BAR—RES JUDICATA.

An answer to a bill in equity may plead a former judgment in bar in connection with matters of defense to the merits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 418; Dec. Dig. § 182.\*]

2. JUDGMENT (§ 949\*)—RES JUDICATA—PLEA IN BAR—FORM.

A plea of res judicata should not merely plead former judgment as an ultimate fact, but should set forth the commencement of the suit in which

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the judgment was rendered, its general character, object, and the relief prayed, and aver the facts with reference to the subject-matter, so that it shall appear that there is identity of subject-matter.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1795-1803; Dec. Dig. § 949.\*]

**3. EQUITY (§ 182\*)—PLEADING—ALLEGATIONS OF MATTERS JUDICIALLY NOTICED.**

An answer to a bill is not defective because it alleges matter of record which would be judicially noticed, as a predicate for defendant's contention that by the course of pleading and action taken thereon complainant acquiesced therein.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 418; Dec. Dig. § 182.\*]

**4. EQUITY (§ 191\*)—PLEADING—EXCEPTIONS.**

The allegations of matter in a bill which the court would judicially notice is insufficient to sustain an objection for impertinency.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 434; Dec. Dig. § 191.\*]

**5. EQUITY (§ 191\*)—ANSWER—OBJECTIONS—ESTOPPEL.**

Where a complainant charged defendants, parties to a prior suit in the state court for partition of the property in controversy, and their attorneys, in general terms with fraud in the allotment of parcels of land, to the prejudice of complainant's rights, but did not set out the conduct constituting the fraud, complainant could not object that allegations in the answer, intended to show the good faith and regularity of the proceedings leading to the partition decree, etc., were impertinent.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 434; Dec. Dig. § 191.\*]

**6. EQUITY (§ 191\*)—EXCEPTIONS.**

Exceptions to allegations in an answer as impertinent are unsustainable, where they include facts pleaded which are responsive to the bill and admissible as defensive matter.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 434; Dec. Dig. § 191.\*]

Silver & Brown, for plaintiff.

W. M. Williams, John Cosgrove, W. G. G. T. Pendleton, and Campbell Cummings, for defendants.

PHILIPS, District Judge. The exceptions filed by the complainant to the answers of the defendants fitly enough illustrate the unnecessary delays in reaching a final decree in chancery cases. When at the March term, 1909, of this court, the complainant, after so much delay, filed its supplemental bill against the defendants' protest, and the defendants expressed a desire to raise objections to certain portions of the amended bill, the court suggested, in order to expedite the final hearing of the cause, that the defendants make answer, in which they could avail themselves on the final hearing of all there was in the matter of their objections affecting the merits of the controversy. This was acquiesced in. On April 16, 1909, the defendants made full answer, to which the complainant has filed a most unusual number of exceptions for impertinency, going to almost every feature of the plead-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ings. Whether allowed or disallowed, as to many of them, would not control or affect the questions of law and fact which will ultimately determine the merits of this controversy.

Many of the criticisms made upon the answers pertain to matters of technical procedure, which, at one time was so much adhered to by chancellors, the Supreme Court in formulating the equity rules sought to obviate. Rule 37, for instance, declares:

"No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea."

Rule 39 declares, *inter alia*, that:

"The defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense."

Giving to these rules a construction in furtherance of their spirit and object, many of the exceptions taken to the answers herein are quite inconsequential. For instance, the answer pleads in bar, as is permissible in connection with matters of defense to the merits, a proceeding and judgment in the state court in partition between the original parties to the bill of the same lands mentioned in the bill of complaint, which matters the answers plead have passed in *rem judicatum*. The objection made in argument to the extended reference made in the plea to the proceedings in the state court, leading up to the final judgment therein, if I correctly comprehended it, is that it would have been sufficient merely to have pleaded the judgment as the ultimate fact. If this were an action based upon a judgment, it doubtless would have been sufficient to have alleged that the judgment was duly rendered in the proceeding in a court of competent jurisdiction between the same parties, or the like; but the plea in bar under consideration is to show that, under the pleadings and issues, the proceedings had pertained to and covered the whole question of the rights of the tenants in common and jointure, as well as the dower interest in the same lands, between the same parties, involving the same questions of law and fact sought to be relitigated in the bill of complaint in this jurisdiction, and that the judgment so rendered in the state court constitutes a bar to the suit here in question. I think this was permissible and necessary.

Story on Equity Pleadings, § 736, says:

"The plea should set forth with certainty the commencement of the former suit, its general nature and character, its object, and the relief prayed. The plea should aver, and so the facts should be, that the second suit is for the same subject-matter as the first, and therefore a plea, which did not expressly aver this, although it stated matter tending to show it, was considered as bad in point of form. It should state that the same issues were joined in the former suit, as in the suit now before the court, and that the subject-matter is the same, and that the proceedings in the former suit were taken for the same purpose. The plea should also aver that there have been proceedings

in the suit; such as an appearance, or process requiring an appearance at least."

It is true that said rule was applied more especially with respect to the plea of *lis pendens*; but, as applied to the situation of the litigation here, I think the same rule should apply.

Objection is also urged in the exceptions and argument to the reference made in the plea in bar to the proceedings had in this court, leading up to the action taken by the court at a former term on the answer to the original bill, postponing the proceedings in this court until the final determination of the partition suit pending in the state court; the criticism being that matters of record in the same suit in the same court will be judicially noticed by the court without recitation thereof. If this were conceded, the reference to the antecedent proceedings had in this court could not possibly prejudice the complainant, nor increase the costs; but the reference to said proceedings in the answer is made as a predicate for the contention made by the defendants that by the course of pleading and action taken thereon the complainant acquiesced therein. Be this as it may, the objection thereto does not distinctly come within the purview of an exception for impertinency, as the matter pleaded raises the question of operative law.

Especial complaint is made in the exceptions, and discussion thereof, to various statements made in the answer tending to show the good faith and regularity of the proceedings leading up to the judgment in partition in the state court, and the like. There might be merit in this objection, but for the fact that throughout the amended bill of complaint the complainant with reiteration in a general way charged the parties, and even their attorneys, in the conduct and management of the case in the state court, and in the matter of the allotment in parcels of land by the commissioners in partition, with fraud to the prejudice of the rights of the complainant herein. As there is no specification as to what the particular acts and conduct were constitutive of the imputed fraud, the answer could not well content itself by a simple denial; but this matter is well met by the statement of the generally recognized rule in *Mercantile Trust Company v. M., K. & T. Ry. Co.* (C. C.) 84 Fed. 379-384, by Judge Wheeler, as follows:

"As defenses, strictly, the parts of the answer found by the master to be immaterial and scandalous are so; and, if that were all, they should be suppressed. But the bill itself brings forward the motives of the suit, and charges bad motives to the officers of the defendant. The plaintiff has no right to say in its allegations that these things shall not be met. Some of the statements in the answer go further, perhaps, than was justifiable; but as the master divided them by the line of strict defenses, and that cannot be followed, no attempt to distinguish them on any line is made here. Exceptions to report sustained, and motion to strike out pleas and exceptions to answer overruled."

Several of the exceptions are vulnerable to the objection that while some particular sentences contained in the answer may be impertinent, the exceptions include many other facts pleaded which are responsive to the bill and are admissible as defensive matter. Therefore such exceptions are too broad and should be overruled.

The exceptions to all the answers are overruled, and the court will again observe: As it is quite apparent that the ultimate determination of the rights of the parties in this controversy will unquestionably turn upon few controlling questions of law and fact, the complainant would best subserve his own interest, if he have a meritorious cause of complaint, by passing over these dilatory pleas and coming to a final issue.

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INSURANCE CO. OF NORTH AMERICA v. FREDERICK LEY-  
LAND & CO., Limited.

(District Court, E. D. Pennsylvania. July 8, 1909.)

No. 20.

SHIPPING (§ 132\*)—CARRIAGE OF GOODS—INJURY TO CARGO—NEGLIGENCE IN  
LOADING.

In a suit against a shipowner to recover for damage to a shipment of cotton from New Orleans to Liverpool, which on delivery was found to have been injured by fresh water, the evidence, including the testimony of an inspector of the New Orleans Cotton Exchange, given from his report made at the time, showing that a certain number of bales were loaded during rain, held sufficient to charge respondent with liability for the damage to such bales, but not to the remainder, which, so far as shown, may have been wet before they were delivered to the ship.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.\*]

In Admiralty. On final hearing.

See, also, 139 Fed. 67.

Francis S. Laws and John F. Lewis, for libellant.

Howard H. Yocum, for respondent.

J. B. McPHERSON, District Judge. In June and July, 1903, Vincent & Hayne, cotton brokers and factors doing business in New Orleans, delivered to the steamship Darien, a vessel owned and operated by the Leyland Line, 2,152 bales of cotton to be carried to Liverpool for certain consignees named in the bills of lading. The bills were not offered in evidence, but the respondent admits that the cotton was accepted as "in apparent good order and condition." When it arrived in Liverpool, 1,877 bales were found to be more or less injured, and for this damage the libellant paid \$2,789.66 in the following October. The policy of insurance was not offered in evidence, and it does not appear; therefore, under which provision of that contract the underwriter's liability arose; but, as no objection has been made to the libellant's right to bring the suit, I shall assume that the policy covered such damage as appeared when the cotton was unloaded at Liverpool, and that the underwriter may now recover, if Vincent & Hayne could have recovered in case they themselves had brought the suit.

The gravamen of the action is the respondent's negligence at the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



port of New Orleans at or before the date of loading the cotton. After averring the receipt of the bales upon the wharf on several days between June 30th and July 14th, the libel thus states the negligence complained of:

"IV. That while the said cotton was so in the possession of the said respondent for transportation as aforesaid, and while the same was in process of being loaded on board the said steamship Darien, the said respondent, its agents, servants, and employes, not regarding its said duty in the premises, did not take proper care of the said cotton, nor safely or properly stow the same on board the said steamship Darien, nor safely deliver the same in a like good order and condition at the port of Liverpool as when received. On the contrary, while the said cotton was in the custody and under the control of the said respondent, a large portion of it was allowed to become greatly wet by fresh water and otherwise damaged, and was stowed on board the said vessel in a wet and damaged condition, and other portions of the said cotton were allowed to become greatly wet and otherwise damaged while aboard the said vessel, by reason of the hatches being kept open during heavy and rainy weather, and other portions of the said cotton were allowed to become greatly wet and otherwise damaged, by being stowed in the same compartment and in proximity with the said cotton so wet as aforesaid and without proper dunnage.

"That by reason of the said improper and negligent care and stowage, and by reason of the lack of proper dunnage as aforesaid, the said cotton was greatly damaged, so that when the same was delivered at the port of Liverpool, 1,877 bales thereof were found to be damaged by the causes aforesaid, to the amount of \$2,789.66."

The libelant undertook to prove the respondent's negligence in the foregoing respects, but the evidence offered is for the most part unsatisfactory. One reason for its lack of persuasiveness may perhaps be found in the delay in bringing suit, or, indeed, in making any claim upon the respondent for reimbursement. Although Vincent & Hayne were paid by the libelant not later than October 22, 1903, the present suit was not begun until May 5, 1905, nor was the claim brought to the respondent's attention meanwhile. No testimony was taken until December 12, 1905, so that, when the New Orleans witnesses were called, nearly 2½ years after the cotton was loaded, it is not surprising to find that without exception they had no recollection of the circumstances attending and preceding the shipment. No one remembered this particular cotton, or could testify directly about its condition. No one remembered the weather on the days when it was put on board the Darien, and the libelant's case in these important particulars depends wholly upon such inferences as may be drawn from the testimony of several witnesses concerning their custom in the transaction of business. For example, the actual condition of the cotton at the time it was delivered on the respondent's wharf is evidently an essential matter; but there is not a word of direct testimony upon this subject from any witness that was examined in New Orleans. Nearly all of the cotton was traced to or from various compresses; but no witness remembers it there, or gives us any first-hand information about its condition. What was offered upon the subject was this: Several witnesses were called through whose hands the cotton had passed, but none of them had any personal recollection about it. Two of

them were weighers, and testified concerning the character and extent of their duties. It appeared that they only examine the external appearance of each bale, and do not open it unless there is something on the outside to indicate that the contents have been damaged. If the bale is externally in good order, they go no further. This particular cotton, they say, must have been in good order, because they have no memoranda that it was in bad condition. The proprietors of several cotton presses were called, and they united in testifying that they had no personal knowledge of the cotton in question, but that it must have been in good condition, or it would not have been passed by their employes. They agreed that the examination made at a press goes no further than the outside of the bales, unless there is some external indication that the contents are not in good order.

Evidently this kind of testimony is not very convincing. It is concerned entirely with what "must have been," and is wholly based on the general course of business; but, even from the view point of the general course of business, it is plain that damaged cotton may successfully pass inspection, unless the outside of the bales invites attention to their contents. In the present case I think the weight of the testimony is decidedly in favor of the position that the bales were damaged before they reached the presses; for the testimony of ten witnesses (who were also called by the libellant) is to the effect that they examined the cotton on its arrival at Liverpool, where the bales were opened, and that the cotton was not only damaged on the outside, but also upon the inside—its condition at Liverpool being described from actual examination and personal recollection. This kind of testimony I regard as much more reliable than the testimony from New Orleans, and I have no hesitation in accepting it, and in finding therefrom that nearly all the cotton in question had already been injured when it was delivered to the ship, and that the injury was attributable to what is known as "country damage"—that is, damage that has been done by exposure to the weather at railroad stations, or at other places in the country, where bales are awaiting shipment—and that this may have been done several weeks before the cotton was delivered at New Orleans. In this connection it should not be overlooked that the insurance company's own surveyor at Liverpool attributed the injury to "country damage," and that the settlement of the loss was made upon this basis.

Thus far I have not referred to the testimony of G. W. Hayes, an inspector in the employ of the New Orleans Cotton Exchange. If it were not for his testimony, I think it is safe to say that the whole of the libellant's case would be very weak indeed; for, even with his testimony, there is still some doubt whether any part of the case has been made out. He made frequent reports to the Exchange, and a copy of his report concerning the *Darien* was offered in evidence without objection. The following is substantially a copy of his paper:

Date.		Bales.	Remarks.
1903.		received.	
July 9.	Night before: Cloudy.		Transferred from S/S Barbadian
	Morning: "		about 2,100 B/c on wharf and levee
	Evening: "	2,529	cov'd., commenced loading.
" 10.	Night before: Clear.		
	Morning: Cloudy.		About 1,500 B/c on wharf cov'd.
	Evening: Shower.		
" 11.	Night before: Rain.		Worked during rain about 900 B/c
	Morning: "		on wharf & levee cov'd. Worked Sun-
	Evening: Rain at 2 p. m.		day the 12th inst. during rain 167 B/c
" 13.	Night before: Clear.		marked Plow-6, Hop-4, Duck-2, Bass-8,
	Morning: Cloudy.		Fawn-9, Fish-4, Clay-7, Hter-1, Cleo-
	Evening: Showery.		11, Juno-8, Mars-5, Iris-6, Fowl-8,
			Buty-6, Eoe-5, Loaf-3, Lamb-7, Safe-3,
			Uron-2, Mech-7, Nero-2, Eric-3, Pipe-7,
			Look-2, Lake-2, Utan-2, Shad-3,
			Frog-4, Nine-1, Goat-5, Curb-3,
			Barn-6, Carp-4, Gold-6, wet on wharf
			by rain and loaded in that condition.
			Wharf clear.
" 14.	Night before: Clear.		Sailed last night with 2,529 B/c, not
	Morning: "		including 168 B/c in transit from Col-
	Evening: "		on.

In his examination in chief the witness seemed to be testifying, to some extent at least, from his personal recollection; but he explained on his cross-examination that he was relying wholly on his report (notes, page 16):

"Q. Therefore you know nothing about the cotton, except the dates on this page?

"A. Only on that page.

"Q. You have, 'On the eleventh worked during rain.' You don't say how long they worked. I don't suppose you remember anything about it beyond the entry here?

"A. No, sir.

"Q. Naturally, after the lapse of two years and a half, you have no recollection as to the dates it rained?

"A. The report of the Exchange shows the exact time it rained.

"Q. I am asking you about your memory?

"A. My memory? Couldn't go on that.

"Q. What you recall is what you see in your book?

"A. What is in that book.

"Q. And the extent of that rain, or duration of that rain, you don't remember anything of now, of your own knowledge?

"A. No, sir."

Giving his entries, therefore, the best effect they should receive, it appears that 167 bales were improperly loaded, because they were too wet to be prudently stowed. When they became wet the witness could not say. He did not know how long the cotton had been on the wharf, nor what its condition was when received, although, after it came into the ship's possession, it seems to have been covered with tarpaulins. He did not know how these 167 bales were stowed; but it is inconceivable that the damage to the other bales could have been caused by these, even if they had been saturated and had been deliberately stowed so as to touch as many dry bales as possible. As it seems to me, the testimony of the witness cannot possibly go farther than to show that 167 bales were stowed

in an unfit condition; and, after some hesitation, I have decided to hold the ship liable for this proportion of the damage that appeared when the cargo was unloaded at Liverpool. How far these wet bales may have affected the rest is too uncertain to be found as a fact, and I confine the vessel's liability, therefore, to <sup>167</sup>/<sub>1877</sub> of the loss for which the libellant settled with the consignees. I am bound to add that I do not regard the proof upon this point as very satisfactory, and, if the Hayes report had not been offered, the evidence would be so indefinite that no recovery could be allowed. But, as that report was accepted without objection, I cannot help giving it a good deal of weight. It is a memorandum made at the time, comprising numerous details that add to its force. It was made in the course of official duty, and the probable inference from the entries is, I think, that the inspector was noting what he believed at the time to be an instance of negligent loading on the part of the ship.

No weight has been given in this decision to the vessel's log, or to the Liverpool carters' receipts.

A decree may be entered in accordance with this opinion, the total costs to be divided between the parties in the same proportion; that is to say, <sup>167</sup>/<sub>1877</sub> thereof are to be paid by the respondent, and the remainder to be paid by the libellant.

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#### UNITED STATES v. GUTHRIE.

(District Court, S. D. Ohio, E. D. June 14, 1909.)

No. 570.

#### 1. INTERNAL REVENUE (§ 40\*)—WHISKY CONTAINERS—REUSE—OFFENSES—WILLFULNESS.

Act Cong. March 3, 1897, c. 379, 29 Stat. 626 (U. S. Comp. St. 1901, p. 2150), prohibits the reuse of bottles containing whisky bottled in bond, without removing and destroying the stamps. *Held*, that the criminality involved in the reuse of a bottle containing whisky bottled in bond, without removing and destroying the stamps, does not depend on its being knowingly and willfully done; the offense being complete if the bottle is reused without destroying the stamps.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 100; Dec. Dig. § 40.\*]

#### 2. INTERNAL REVENUE (§ 40\*)—REFILLING WHISKY BOTTLES—DESTRUCTION OF STAMPS—ACTS OF AGENTS.

A seller of whisky is guilty of violating Act Cong. March 3, 1897, c. 379, 29 Stat. 626 (U. S. Comp. St. 1901, p. 2150), prohibiting the reuse of bottles containing whisky bottled in bond without the removal and destruction of the stamp, though the refilling of the bottle, without destroying the stamp, is the act of the seller's bartender, or agent, acting within the scope of his employment.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 40.\*]

#### 3. CRIMINAL LAW (§ 561\*)—"REASONABLE DOUBT."

"Reasonable doubt," sufficient to justify an acquittal, must be a substantial one, in view of all the evidence in the case, and not a mere possibility of innocence. It must be a doubt arising out of the evidence, for

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which a reason can be given, and such as would exist in the mind of a reasonable man after free, full, and careful consideration of all the evidence, though the law does not require that the evidence should exclude all doubt and amount to absolute certainty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

4. CRIMINAL LAW (§ 308\*)—PRESUMPTION OF INNOCENCE.

A person accused of crime is presumed to be innocent, and such presumption runs in his favor as to every element of the crime charged, and abides with him throughout the case until removed beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731; Dec. Dig. § 308.\*]

5. CRIMINAL LAW (§ 309\*)—CHARACTER—PRESUMPTIONS.

A person accused of crime is not required to call witnesses as to his general good character, but will be presumed to be of good character until such presumption is removed beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 738; Dec. Dig. § 309.\*]

6. CRIMINAL LAW (§ 553\*)—EVIDENCE—CREDIBILITY OF WITNESS.

In considering the credibility of witnesses, the jury should consider their opportunities for knowledge, their intelligence, conduct on the stand, probability or improbability of their statements, prejudice, or interest, if any, corroboration, and facts and circumstances disclosed by the evidence which reflect on their credibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 553.\*]

Sherman T. McPherson, U. S. Dist. Atty.  
T. S. Hogan, for defendant.

SATER, District Judge (charging jury). The indictment is laid under Act March 3, 1897, c. 379, 29 Stat. 626 (U. S. Comp. St. 1901, p. 2150), which permits the bottling of distilled spirits in bond and also provides a means of raising revenue for the government and for protecting the consumer against inferior goods. The bottle mentioned in the indictment was filled with distilled spirits (whisky) and stamped under the supervision of the United States government, by passing over its mouth an adhesive engraved strip stamp, at the distillery of the Rossville Distillery Company, in Indiana. The stamp has been broken, but still adheres to the bottle. The whisky was intended for domestic use. The indictment charges that the defendant, without removing and destroying the stamp which had been affixed at the distillery, as required by law, unlawfully, knowingly, and willfully reused the bottle, thus previously filled and stamped, for the purpose of containing distilled spirits other than those placed in it at the distillery. It also charges that the bottle was found and taken by the government's agents upon the defendant's premises at his place of business, and when so found and taken contained whisky and spirits of the proof of 96 per cent., which, it is said, was not the whisky originally placed in

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the bottle at the time of the bottling and stamping at the distillery. The plea of not guilty puts in issue every averment of the indictment. If the defendant is guilty as charged, he committed an offense which subjects him to punishment.

The bottling, packing, and casing at the distillery was required to be done under the supervision of a United States storekeeper. Before spirits are bottled, the distiller is permitted, in the presence of such a storekeeper, to remove, by straining or filtering through cloth, felt, or other like material, any charcoal, sediment, or other like substance found therein, and, whenever necessary, to reduce such spirits, by the addition of pure or distilled water only, to 100 per cent. proof. The storekeeper, who was stationed at the distillery, and who is a man of considerable experience in his line of work, has told you of the mode of procedure in the bottling, packing, and casing of spirits at the distillery from which the bottle originally came, and that in all his experience he never knew of any liquor being sent out from there under 100 per cent. proof. Another gauger of large experience testified that he never saw any whisky bottled in bond below 100 per cent. proof, and there is evidence to show that bottles containing such whisky are not labeled if it is below that percentage. The effect of the addition of water to whisky is to reduce its proof, and the contention here is that the spirits found in the bottle when the government took possession of it, being below 100 per cent. proof, were not those placed in it at the distillery. The undisputed evidence is that the proof of such spirits is not more than 96 per cent.

After the liquor was filtered and bottled, it was examined at the distillery by boys from 16 to 18 years of age, who would hold the bottle between them and an electric light, to see whether the spirits were clear or not. If any sediment was detected in the bottle, it was customary to refilter the spirits to remove such sediment. The filtering of the spirits is a matter in which the distiller only is concerned, not the government. There is a sediment of some kind in the bottle in question. Its presence there is important only as it may or may not reflect on the reuse of the bottle. There is evidence to show that the distillery people washed their bottles before filling them with spirits. One of the government's experts has expressed the opinion that the liquor now in the bottle was drawn from a barrel. Whence came the sediment found in the bottle? Was the liquor put into an unwashed or imperfectly washed bottle? Was the sediment in the liquor at the time of bottling? Did the boys, whose duty it was to inspect it by the aid of the electric light, perform or fail to perform that duty? Was it drawn with the liquor into the bottle from a barrel containing such sediment? These are questions you must answer, if you can. The defendant kept barreled whisky on his premises and refilled bottles from it. He testified that he reused and refilled, as bar bottles, bottles which had contained distilled spirits in bond, but says that he had no knowledge of having in his possession any bottled spirits under 100 per cent. proof, and always removed the stamps and labels from them prior to refilling them from barrels of whisky. He does not know, so he states, whether the whisky now in the bottle was taken from a barrel or not. One of the bartenders testified that he never refilled a bottle without removing the stamps.

The other stated that he refilled no stamped bottles, but that there was whisky in barrels on the defendant's premises, and drinks were sold from refilled bottles.

You must determine from the evidence whether or not the liquor now in the bottle came from one of the defendant's barrels, and in that connection you should consider its percentage of proof, the sediment in it, and all the other evidence reflecting on the question. If the whisky now in the bottle was placed there at the distillery, the defendant is not guilty. If he did not reuse the bottle, he is not guilty, no matter what the proof of the whisky may be, or how the sediment in it happens to be there. On the other hand, if the whisky which was placed in the bottle at the distillery was removed, and the bottle was reused, as charged in the indictment, he is guilty.

The question has arisen: Is it necessary on the part of the government, in order to convict, to show that the defendant knowingly and willfully reused the bottle? On that point I charge you that the clause of the statute under which the indictment is laid does not make the criminality of the act forbidden to depend upon its being knowingly or willfully done, and the government is not therefore required to prove that he reused the bottle knowingly and willfully. The reuse, for the purpose of containing distilled spirits, of bottles which had been filled and stamped under the provisions of the act, was optional with the defendant. The statute threw on him the burden of keeping within its requirements in case he reused any of such bottles. The question is: Did he reuse the bottle mentioned in the indictment without removing and destroying the stamp that had been previously affixed to it? If he did, the offense charged was committed, whether he did so knowingly or willfully, or not.

Another question is: What is the attitude of the defendant if the bottle was refilled or reused, in violation of the statute, by one of his bartenders? His bartenders were his agents. The offense charged is of that class in which it is not necessary to prove guilty intent. The defendant, being engaged in the business of selling distilled spirits which had been bottled while in bond, whether he conducted it by himself or his agents, was bound at his peril to see that there was no reuse of any bottle, for the purpose of containing distilled spirits, which had once been filled and stamped under the provisions of the act in question, without removing and destroying the stamp previously affixed to such bottle. The bottle in question is only about half full. If it was refilled, it has been reused. If one of the defendant's agents, acting within the scope of his employment, reused the bottle without removing and destroying the stamp, the defendant's liability is the same as if he had reused it himself, for the reason that the reuse of the bottle, without the removal and destruction of the stamp, is forbidden by positive law, and neither ignorance of the statutory requirement nor failure to observe it through inadvertence excuses the defendant, whether such ignorance or inadvertence is that of himself or that of his agent acting within the scope of the agency with which he was intrusted. If, therefore, you find that the bottle was reused in violation of the law, and that it was one or both of his bartenders that so reused it, you

must then find that his agent or agents, as the case may be, were acting within the scope of his or their employment, in order to convict.

To convict, the government must convince you, and each of you, of the defendant's guilt beyond a reasonable doubt. A reasonable doubt must be a substantial one, with a view to all the evidence in the case, and not a mere possibility of innocence. It must be a doubt which arises out of the evidence—not a mere possible, or conjured up, or imaginary doubt, but one for which you can give a reason, such a doubt as would exist in the mind of a reasonable man after a free, full, and careful consideration of all the evidence. The law, however, does not require that the evidence should exclude all doubt, because absolute certainty is not required.

The defendant is presumed to be innocent. The presumption of innocence runs in his favor as to every element of the crime charged, and abides with him throughout the case until removed beyond a reasonable doubt. There is also in his favor a presumption of good character. This presumption also runs in his favor throughout the case until removed by evidence of the character mentioned. He was not required to call any witnesses as to his general good character, and his failure to do so raises no presumption or inference that it was bad.

You are the judges of the weight of the evidence and the credibility of witnesses. You should consider the opportunities of each for knowledge, his intelligence, his conduct on the witness stand, the probability or improbability of his statements, his prejudice or interest, if any, whether or not he is corroborated or uncorroborated in any way, and all the facts and circumstances disclosed by the evidence which reflect upon his credibility, and then determine the value to be given to his statements. You may retire, and when you have reached a verdict you may report.

The jury returned a verdict of guilty.

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In re JAMES DUNLAP CARPET CO.

(District Court, E. D. Pennsylvania. July 3, 1909.)

No. 2,741.

**1. BANKRUPTCY (§ 341\*)—CLAIMS—ALLOWANCE—STATUTES.**

Where the referee did not continue consideration of a claim on his own motion, the concluding clause of Bankruptcy Act of July 1, 1898, c. 541, § 57d, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), providing that all claims which have been duly proved shall be allowed on receipt by or on presentation to the court, unless objection to their allowance shall be made by parties in interest or their consideration be continued for cause by the court on its own motion, did not apply.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 341.\*]

**2. BANKRUPTCY (§ 340\*)—CLAIMS—PROOF.**

Under Bankruptcy Act July 1, 1898, c. 541, § 57d, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), providing that claims which have been duly

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



proved shall be allowed upon receipt by or on presentation to the court unless objection to their allowance shall be made by parties in interest, a sworn proof of claim against the bankrupt is prima facie evidence of its allegations in case it is objected to.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.\*]

**8. BANKRUPTCY (§ 331\*)—CLAIMS—VALIDITY.**

Where a bank had a valid claim against a bankrupt, the fact that another person had previously filed a claim as a creditor on the same account did not prejudice the bank's right to offer proof of its debt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 331.\*]

**4. BANKRUPTCY (§ 340\*)—CLAIMS—PROOF.**

A claimant's sworn statement declared that the goods were sold and delivered by claimant to the bankrupt who was indebted to claimant by reason of such sale and delivery. *Held* that the fact that the account attached to the claim and the affidavit also recited that the goods were sold for the account of R. brothers, a third person, in whose behalf another claim had been filed on the same account, did not destroy the probative force of the claim as prima facie evidence of its validity in favor of the claimant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.\*]

**5. BANKRUPTCY (§ 340\*)—CLAIMS—OBJECTIONS—EVIDENCE.**

On an issue as to the validity of a claim against a bankrupt presented for allowance, a previously allowed claim of another creditor on the same debt is inadmissible in support of the objections of the trustee and such other creditor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.\*]

In Bankruptcy.

See, also, 163 Fed. 541.

George Wentworth Carr, for Sovereign Bank of Canada.

Henry C. Huey and Porter, Foulkrod & McCullagh, for trustees.  
Carrington & Carrington, for Assets Realization Co.

J. B. McPHERSON, District Judge. This case presents a peculiar condition of affairs. The adjudication was entered on March 30, 1907, and on April 5th of the same year Reichardt Bros. filed the following proof of claim:

"At New York City in the county and state of New York, on the 28th day of March, A. D. 1907, came Joseph Reichardt of No. 5 Hanover street, New York City, in the county of New York, state of New York, doing business as Reichardt Bros. and made oath, and says that the said the James Dunlap Carpet Company, the corporation against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said deponent in the sum of eleven thousand two hundred twelve and  $\frac{11}{100}$  (\$11,212.11) dollars; that the said debt exists upon an account of which a statement is hereto annexed; that the consideration of said debt is as follows: Goods, to wit, wool sold and delivered by claimant to bankrupt at the request of the bankrupt at the times and in the quantities and for the prices mentioned in the statement hereunto annexed, which statement is a true and correct copy of the books of original entry of said claimant; that the said debt was due on December 14, 1906, March 15, 1907, and March 21, 1907, the average due date being February 1, 1907, and that no note has been received for the said debt nor any judgment rendered thereon except as aforesaid; that no part of said debt has been

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

paid; that there are no set-offs or counterclaims to the same; that deponent has not nor has any person by his order or to his knowledge or belief for his use had or received any manner of security for said debt whatever."

To this sworn statement was appended an account containing copies of three invoices, the items of which are as follows:

Dec. 14th, 1906.

The James Dunlap Carpet Co.,  
Philadelphia, Pa.

To Sovereign Bank of Canada,  
25 Pine Street, N. Y. City.  
% Reichardt Bros.

Terms  
Cash, less 2%.

10 Bales Afganistan Fleece Wool.

R. B.  
W. W. C.

153	.....	405 lbs.	
89	.....	375 "	
102	.....	343 "	
132	.....	406 "	
110	.....	362 "	
			1891 lbs.

R. B.  
W. W. M.

612	.....	380 lbs.	
631	.....	378 "	
637	.....	382 "	
642	.....	379 "	
616	.....	396 "	
			1915 lbs.

		3806 "
Tare 5 lbs. each,		50 "

3756 " at 23 cts. equals \$863.88

Jan. 15th, 1907.

The James Dunlap Carpet Co.,  
Philadelphia, Pa.

To Sovereign Bank of Canada.  
25 Pine Street, N. Y. City.  
% Reichardt Bros.

Terms,  
1% — 10 days.  
60 days net

100 Bales White Mongolian Fleece.

R. B.  
W. M.

Welghing as per attached,  
36357 lbs.

Tare 5 lbs. each 500 "

35857 " at 28 cts. equals \$10039.96

via Penn R. R.  
to Fairhill Station, Pa.

Jan. 21st, 1907.

The James Dunlap Carpet Co.,  
Philadelphia, Pa.

To Sovereign Bank of Canada.  
25 Pine Street, New York.  
% Reichardt Bros.

Terms,  
2% — 10 days.  
60 days net.

Two Bales Colored Boukhara Willowed.

R. B.  
G. G.

364 .....	407 lbs.	
80 .....	340 "	
	<hr/>	
	747 "	
Tare, 5 lbs.	10 "	
	<hr/>	
	737 "	at 23½ cts. equals \$173.19

Two Bales Ask, Aut. Washed.

R. B.  
A. A. W.

4005 .....	323 lbs.	
4010 .....	301 "	
	<hr/>	
	624 "	
Tare 5 lbs. ea.	10 "	
	<hr/>	
	614 "	at 22 cts. equals \$135.08
		<hr/>
		\$308.27

via Penn R. R.  
To Fairhill Sta.

This claim was duly allowed, and at least one dividend has been declared and paid upon it. The Assets Realization Company has become the owner of the claim by assignment.

On February 27, 1908, the Sovereign Bank of Canada presented to the referee a claim in the following terms:

"At Toronto, Canada, on the twentieth day of February, 1908, came Francis George Jemmett, of Toronto, Canada, and made oath, and says that he is general manager of the Sovereign Bank of Canada, a corporation incorporated by and under the laws of the Dominion of Canada, and carrying on business at Toronto, Canada, and that he is duly authorized to make this proof, and says that the said the James Dunlap Carpet Co., the corporation against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is, justly and truly indebted to said corporation in the sum of eleven thousand two hundred twelve and  $\frac{11}{100}$  (\$11,212.11) dollars; that the said debt is founded upon an account of which a copy is hereto annexed; that the consideration of said debt is as follows: Goods sold and delivered by the Sovereign Bank of Canada to the bankrupt as shown by said account; that the said debt was due on December 14, 1906, March 15, 1907, and March 21, 1907 (the average due date being February 1, 1907), and that no note has been received for the said debt nor any judgment rendered thereon except as aforesaid; that no part of said debt has been paid, although deponent is informed that Joseph Reichardt has filed proof of a claim similar to this claim, and that certain dividends have been declared and paid to Joseph Reichardt or his assignee; that there are no set-offs or counterclaims to the same; that said corporation has not nor has any person by its order or to the knowledge or belief of deponent for its use had or re-

ceived any manner of security for said debt whatever; that he is duly authorized by said Sovereign Bank of Canada to make this affidavit, and that the aforesaid debt was incurred as and for the consideration above stated, and that such debt to the best of his knowledge and belief still remains unsatisfied; that said corporation has no treasurer, and that deponent's duties include those of treasurer within Dominion of Canada."

To this sworn statement is appended an account identical in every word and item with the account attached to the proof previously filed by Reichardt Bros. That these two claims refer to the same property is so clear that no time need be spent in discussing that proposition. Indeed, it is conceded by every person concerned in the controversy that both accounts comprise the same merchandise, and that the real dispute (whenever it can be reached) is whether Reichardt Bros. or the Sovereign Bank of Canada is entitled to the benefit of the transaction, whatever it may have been, that resulted in transferring the merchandise to the bankrupt. But an important preliminary question must be determined before the real dispute can be attached, namely: Upon whom rests the burden of proving the validity or invalidity of the claim made by the bank? Before this question can be decided, certain other facts must be stated: When the bank's claim was presented to the referee, his clerk marked it: "Filed 3 P. M. February 27th, 1908—O'B." Of course, this was a mere notation of the time of presentation, and was neither allowance nor the equivalent of allowance. I need scarcely say that the allowance of a claim is not a perfunctory act that may be entrusted to an employé. It requires examination and consideration by the referee, and must be performed by himself. Ordinarily—I do not say, necessarily—it should be performed at some meeting of creditors, when the act may be done with a certain degree of publicity. The bank's claim, therefore, being in the custody of the referee, but not yet allowed, objections were duly filed by the trustee and by the Assets Realization Company, and these objections were heard in the following September. At this meeting, all parties in interest being represented by counsel, the notes of testimony show this brief proceeding:

"Attorney for Bank: Mr. Referee, I offer in evidence the proof of debt of the Sovereign Bank of Canada and ask for its allowance.

"Attorney for Assets Co.: We object.

"Attorney for Bank: We rest.

"Attorney for Trustee: We ask for additional proof of claim.

"Attorney for Bank: I want to ask the other side if it is their intention to offer any further proofs.

"Attorney for Assets Co.: At this point of the case I refuse to offer any evidence.

"Attorney for Bank: Then we move for dismissal of the objections.

"Attorney for Assets Co.: When I refused to offer any evidence, I did that with the utmost respect to the court and reserve to ourselves, if the decision of the court does not agree with us, the right to produce evidence or not after we hear the decision of the court."

Thereupon argument was had, and a few days later the referee filed an opinion, in which he stated the questions for decision as follows:

"(1) Is the proof of debt filed by the claimant herein prima facie proof of the indebtedness of the bankrupt to the claimant?"

"(2) Is the claim filed ambiguous or not, and, if ambiguous, is it so much so as to require further proof by the claimant of its allegations?"

"(3) Should the objections of the trustee and the Assets Realization Company be dismissed for lack of proof and the claim of the Sovereign Bank of Canada be allowed?"

"(4) Is the Reichardt proof of claim evidence of its contents in a proceeding to disallow the claim of the Sovereign Bank of Canada? And, if so, is it adverse evidence? And, if adverse evidence, is it sufficient to rebut the prima facie case made by the claimant's proof of debt (if such prima facie case shall be considered to have been made by it)?"

Without discussing these questions, the referee ordered:

"That the motion of the claimant to dismiss all objections be denied, and the claimant is directed to proceed with the taking of testimony in support of its claim if it so desires."

And he certified the questions to the district court for its decision thereon.

It will be observed that the order does not distinctly decide any one of the foregoing questions, and therefore leaves the court in the dark concerning the reasons that led the referee to his conclusions. In such a situation I can only suppose that some or all of the objections filed by the trustee and by the Assets Realization Company were regarded by the referee as sufficient to prevent the allowance of the claim, and accordingly it becomes necessary to examine these objections, although I think they need not be taken up seriatim. At this point, however, it should first be noted that the referee did not continue the consideration of the claim for cause upon his own motion, and therefore that the concluding clause of section 57, subsec. "d," Act July 1, 1898, c. 541, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), does not apply. It is the preceding clause of that subsection that requires attention:

"Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest. \* \* \*"

Was the bank's claim "duly proved"? Not, was it definitely and finally proved, but was it sufficiently proved, proved prima facie, so as to require its allowance "unless objection \* \* \* be made by parties in interest"? Or, as no evidence other than the claim itself was offered, did the claim constitute due prima facie proof? This is no longer an open question since the decision of the Supreme Court in *Whitney v. Dresser*, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584, in which it was distinctly ruled that a sworn proof of claim against the bankrupt is prima facie evidence of its allegations in case it is objected to.

The first question certified by the referee must therefore be answered in the affirmative, unless (as is suggested by the second question) there is something in the present case that requires the court to distinguish it from *Whitney v. Dresser*. The objectors find such difference in the claim itself, and point to the fact that the account which is part of the claim states that the goods were disposed of to the bankrupt for "a/c Reichardt Bros."; and that the claimant's

affidavit declares that the goods were sold and delivered "as shown by said affidavit," and declares, further, that

"Deponent is informed that Joseph Reichardt has filed proof of claim similar to this claim, and that certain dividends have been declared and paid to said Joseph Reichardt or his assignee."

The declaration that "deponent is informed," etc., may be at once dismissed as superfluous and irrelevant. If the bank has a valid claim, the fact that another person has previously come forward as a creditor upon the same account does not in the least affect the bank's right to offer proof of its debt. The two claims may come into conflict, from which only one may emerge, but that is a subsequent matter, and does not impair the bank's right to present its proof in the ordinary way. What, then, is the effect of the remaining statement in the account and in the affidavit that the goods were sold for "a/c Reichardt Bros."? It is argued that this is a "circumstance" that justified the referee in demanding further evidence (*Re Sumner* [D. C.] 101 Fed. 226); and also that the quoted phrase makes the claim "self-contradictory," so that *Whitney v. Dresser* no longer applies (*Re Castle Braid Co.* [D. C.] 145 Fed. 224). I think it is undoubtedly true that the words "a/c Reichardt Bros." are capable of several constructions, and, it may be, that, if the referee had found the condition of the claim to be unsatisfactory because these words may bear one of two or three meanings, he might have been justified in continuing the consideration of the claim upon his own motion until the claimant should have resolved the ambiguity. But he did not so continue it, and the question therefore remains whether, in an attack by other creditors, the ambiguous words should have the effect of destroying the probative force that the claim would otherwise have. In my opinion they do not have such effect, because the sworn statement of the claimant declares that the goods were sold and delivered by the claimant to the bankrupt, and that the bankrupt is indebted to the claimant by reason of such sale and delivery. The affidavit and the account must be taken together, and, while the account alone is capable of more meanings than one, the affidavit asserts what meaning the account should bear, and *prima facie*, therefore, this is the meaning which the entire claim is to have. Accordingly the second question should receive the answer that the bank's claim is not so ambiguous as to require further proof from the claimant at the present time.

The third and fourth questions may be considered together. The trustee and the Assets Realization Company offered no evidence, and it might be sufficient to close the discussion at this point, and to decide, without more, that the *prima facie* of the bank's claim must prevail. But, although the Reichardt claim was not formally offered in evidence, I think it would be taking a narrow view to hold that the referee was obliged to shut his eyes altogether to that account, especially in contemplation of the fact that the bank's claim itself calls attention to this matter and to the payment of dividends upon the duplicate account. What effect, then, if any should be given to the Reichardt claim in the present inquiry? In my opinion the an-

swer should be that no effect is to be given it in the pending proceeding. Perhaps the referee might have been justified in permitting the existence of this claim to have some influence upon his decision whether or not he would continue the consideration of the bank's claim upon his own motion; but I need not decide the point, since the consideration was not thus continued. The bank's claim is now before the court upon the objections of the trustee and of another creditor, and upon these objections alone; and the exact question is whether in such a situation the previously allowed claim of the other creditor is competent evidence to support the objections. In my opinion it is not competent. The claim is a mere ex parte affidavit, and, while the bankruptcy act gives it a certain degree of probative force in a particular situation—that is, when the claim itself is objected to—the general rules of evidence exclude it in other controversies.

It follows, therefore, that the fourth question should be answered in the negative, and that the answer to this question, taken in connection with the foregoing answers to the first and second questions, would ordinarily require a dismissal of the objections and an allowance of the bank's claim. The trustee's objection is:

"That said claim is a duplication of the claim already filed by Reichardt Bros. and upon which dividends have been allowed, and also for the reason that said claims do not appear upon the books of the bankrupt company as a creditor."

The objections of the Assets Realization Company are as follows:

"(1) That said claim is not allowable against this estate in accordance with the bankruptcy laws.

"(2) That the said Sovereign Bank has been guilty of laches in the filing of said claim.

"(3) That said claim is not on its face a valid claim against this estate.

"(4) That to allow said claim would be a fraud upon this exceptant and the other creditors.

"(5) That said Sovereign Bank has no provable claim against this estate.

"(6) That the said Sovereign Bank had knowledge of the filing of the claim by Reichardt Bros., and should be estopped at this time from filing any claim against the estate.

"(7) That said Sovereign Bank never had a provable claim against this estate.

"(8) That this exceptant, the Assets Realization Company, was an innocent purchaser for value without notice of any equities in favor of the Sovereign Bank of said claim of Reichardt Bros., and therefore to allow the claim of the Sovereign Bank would be a fraud upon this exceptant.

"(9) That said claim is a duplication of the claim already filed by Reichardt Bros., and upon which dividends have been allowed, and also for the reason that said claim does not appear upon the books of the bankrupt company as a creditor, and ask that formal proof of said claim be made."

But, as the intention of the parties was merely to raise the legal questions that have now been decided, and not to shut off the objectors from attacking the bank's claim upon such substantial grounds as may exist, the court hereby directs that the referee's order be set aside, and that the objectors to the claim be required to offer whatever evidence they may see proper to produce in support of their objections. Such evidence to be completed on or before October 5, 1909.

## AMERICAN CAN CO. et al. v. ERIE PRESERVING CO.

(Circuit Court, W. D. New York. February 20, 1909.)

No. 332.

## 1. RECEIVERS (§ 12\*)—INSOLVENCY—APPOINTMENT OF RECEIVER.

A federal court of equity has jurisdiction to appoint a receiver for an insolvent corporation at suit of a general creditor, where the objection that it is not a judgment creditor is waived by the corporation.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 18; Dec. Dig. § 12.\*]

## 2. RECEIVERS (§ 32\*)—INSOLVENCY—WHAT CONSTITUTES.

An allegation in a bill that a corporation cannot pay its current obligations as they mature, and is unable in the ordinary course of its business to pay its liabilities, is a proper and sufficient allegation of insolvency in a suit in equity.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 46; Dec. Dig. § 32.\*]

## 3. RECEIVERS (§ 90\*)—REPRESENTING CREDITORS.

A receiver appointed for an insolvent corporation in a suit for its dissolution and the winding up of its affairs may contest the validity of liens or pledges made by the corporation in behalf of its general creditors.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 164; Dec. Dig. § 90.\*]

Actions by and against receivers of federal courts, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.]

## 4. PLEDGES (§ 11\*)—NATURE AND ESSENTIALS—DELIVERY AND POSSESSION.

It is essential to the validity of a pledge that the pledgee take and maintain an open, exclusive, and unequivocal possession such as to give reasonable notice to third parties that the ostensible ownership of the property is in him.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.\*]

## 5. PLEDGES (§ 11\*)—NATURE AND ESSENTIALS—DELIVERY AND POSSESSION.

A preserving company leased the warehouses at its factories to a warehousing company under an agreement that all of its products which were placed therein should be subject to a lien to such warehousing company. From time to time, on requisitions from its superintendent, who was also made custodian of the warehousing company, the latter issued warehouse receipts for certain of the goods, which receipts the preserving company pledged as collateral security. The warehouses were not marked, nor was anything done to indicate their possession by the warehousing company, except to record the leases, which were not required to be recorded, nor were the goods covered by the receipts separated from the others or in any way marked. *Held*, that there was not such visible possession of the property by the warehousing company as to render the receipts negotiable or to constitute a valid pledge as against receivers of the preserving company.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.\*]

## 6. PLEDGES (§ 11\*)—INVALID PLEDGE.

Where the parties to an attempted pledge omit an essential element, such as a visible delivery of possession to the pledgee, resulting in a secret incumbrance of the property, no equitable lien arises in his favor as against general creditors of the pledgor or a receiver representing them.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**7. WAREHOUSEMEN (§ 15\*)—WAREHOUSE RECEIPTS—TRANSFER AS PLEDGE.**

Warehouse receipts issued by the treasurer of a corporation and delivered as collateral security for money borrowed by the corporation, covering goods of its manufacture, which remained in its warehouses mingled with its other goods and without any visible change of possession, indorsed by the corporation as collateral security, did not constitute a valid pledge nor create an equitable lien as against general creditors.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 15.\*]

**8. WAREHOUSEMEN (§ 15\*)—WAREHOUSE RECEIPTS—NATURE AND REQUISITES.**

To constitute a negotiable warehouse receipt it must have been issued by one engaged in the business of warehousing.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 31; Dec. Dig. § 15.\*]

In Equity. On exceptions to master's report.

Rogers, Locke & Babcock (Chauncey J. Hamlin, on the brief), for claimants.

Hull & Comstock, for receivers.

Love & Keating, for intervening creditors.

HAZEL, District Judge. This controversy relates to the validity of warehouse receipts issued by the American Warehousing Company upon the assets of the Erie Preserving Company, consisting of a large quantity of canned vegetables and fruits stored in the factories of the latter company at Irving, North Collins, and at Model City, in the state of New York. The material questions to be decided are: First, whether upon the elicited facts the different warehouse receipts indorsed by the defendant to Arbuthnot, Latham & Co., the New York County National Bank, Conrad Heinrich Donner, and Ladenburg, Thalmann & Co., as security for loans and advances, were in fact pledges of the goods covered by the receipts, and, if so, were such pledges valid against the general creditors? Second, whether, if the warehouse receipts in evidence did not constitute valid pledges of the property, have the claimants equitable liens which are superior to the title of the receivers? And, third, whether the receivers merely represent the Erie Preserving Company, and therefore cannot controvert the validity of the warehouse receipts, a right not possessed by the defendant.

The proposition last stated will be considered first. Briefly stated, the bill alleges the jurisdiction of the court from a diversity of citizenship of the parties, the insolvency of the defendant, and that unless receivers are appointed by the court the property will be sacrificed, and it prays for the dissolution of the corporation. The answer of the defendants admitting the insolvency, and the material allegations of the bill consented that receivers be appointed to take charge of the assets of the corporation.

The complainants are contract creditors. Ordinarily a receiver cannot be appointed for a corporation at the instance of a creditor who has not recovered judgment upon his claim and exhausted his legal remedy, yet, where a defendant who is confessedly insolvent has waived the objection that a complainant is not a judgment creditor, there is no longer room for doubting the jurisdiction of a federal court of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

equity to appoint a receiver. *Metropolitan Railroad Receivership*, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403; *Cook on Corporations* (6th Ed.) § 863; *Tompkins v. Catawba Mills* (C. C.) 82 Fed. 780. The allegations in the bill that the defendant could not pay its current obligations as they matured, and that it was unable in the ordinary course of its business to pay its existing and enforceable liabilities, was a proper and sufficient allegation of insolvency. *Brouwer v. Harbeck*, 9 N. Y. 593; 16 *American & English Ency. of Law*, 636; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Herrick v. Borst*, 4 Hill (N. Y.) 652.

"Insolvency," as the term is used in equity, is clearly differentiated from the meaning which is given it by the bankruptcy act. It is insisted by claimants: That the receivers stand solely in the shoes of the insolvent corporation, which could not dispute the validity of its pledges; that such receivers were appointed to protect and conserve the property of the defendant; but that they are entirely devoid of the relation to the general creditors that a trustee in bankruptcy occupies, and therefore cannot urge the invalidity of the warehouse receipts. But this is not a tenable proposition. The cases cited by counsel for complainants are not applicable to the facts under consideration. The receivers herein were appointed not merely to preserve and protect the property of the defendant during the pendency of the action, but were charged with such additional powers and duties as a court of chancery may specially confer upon them. It is true that a receiver takes the property subject to all valid liens, and in matters of title represents the corporation; but there is an exception to this rule. Such is not only the law of this state as announced in *Pittsburg Carbon Company v. McMillin*, as Receiver, 119 N. Y. 46, 23 N. E. 530, 7 L. R. A. 46, but in *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779, the Supreme Court applied the doctrine in an action wherein a receiver was appointed of a national banking institution. In the case of *Pittsburg Carbon Company v. McMillin*, supra, it was claimed that the receiver occupies no different position than that of the corporation whom he represents. The court, by Andrews, J., says:

"The receiver unites in himself the right of the trust combination, and also the right of creditors, and that he may assert a claim as the representative of creditors, which he might be unable to assert as a representative of the combination merely. The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is, and that any defense which would have been good against the former may be asserted against the latter; but there is a recognized exception, which permits a receiver of an insolvent individual or corporation, in the interest of creditors, to disaffirm dealings of the debtor in fraud of their rights."

And in *U. S. v. Church of Jesus Christ*, 5 Utah, 538, 18 Pac. 35, it was held that a receiver may resist an illegal assignment as to creditors of a corporation made before the dissolution. See, also, *Beach on Equity*, vol. 2, § 945; *Citizens' Bank & Trust Co. v. Union Mining & Gold Co.* (C. C.) 106 Fed. 97; *Gluck & Becker on Receivers of Corporations*, p. 2.

In *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, the court had before it a contract of a conditional sale,

which, according to the statute of this state, is not void as to creditors. The court said:

"A lien which is good against the bankrupt and as to all its creditors is good against the trustee."

The language quoted emphasizes the view that a trustee in bankruptcy may urge that a lien is not valid against a bankrupt. Certainly this principle applies to a receiver charged with the responsibility of winding up the affairs of a corporation and making equitable distribution among the creditors. The possession and control by the receivers of the property of the insolvent corporation estopped the recovery of judgment liens against the property by creditors, and it would indeed be an astonishing proposition that the receivers cannot in behalf of the creditors assert the illegality of the pledges in controversy. See, also, *Savings & Trust Company v. Bear Valley* (C. C.) 93 Fed. 339; *Mercantile Trust Co. v. Southern Co.*, 86 Fed. 711, 30 C. C. A. 349; *Gutterson v. Gould* (C. C.) 151 Fed. 72.

The next question was whether there was an actual or constructive transfer of the property to the warehousing company by the defendant. The proofs show that the warehousing company leased in writing of the defendant its three warehouses. Under the contract the defendant was to deliver at the factories to the warehousing company all the canned goods therein contained, and it was to have a first lien upon all such goods, whether covered by the warehouse receipts or not. A custodian was employed, who, however, was also the superintendent of the preserving company, and who was to receive for his services as custodian the sum of \$200 per month. The custodian, Wode, swore that a check for the said amount was regularly received by him, but that pursuant to previous arrangement with the defendant he indorsed the said checks over to the defendant, and no compensation was retained by him for his said services as custodian.

In explaining his duties as custodian he says that he commonly made requisitions in behalf of the defendant upon the warehousing company to issue warehouse receipts covering the property and made weekly reports of his transactions to the warehousing company showing that the goods specified in his requisition were in storage at one of the factories. Later the different warehouse receipts were on delivery indorsed by the defendant and negotiated with the claimants. There was a mingling of the pledged and unpledged goods at the factories; but the specified stock for which warehouse receipts were issued was not at any time reduced below the quantity indicated in such receipts or in the filed reports of the custodian. The custodian visited some one of the factories almost daily, except the factory at Model City, which he visited about once every month. The employes at the factories were under his charge and direction solely as superintendent of the defendant, and not as custodian. He testified that before issuing a requisition for a warehouse receipt he would communicate with the factories to ascertain from an employe of the defendant whether a certain quantity and kind of canned goods were in storage. None of the said goods were set aside or segregated from what had not been pledged. No marks or tags to give notice of the pledge were affixed

to the goods or building in which they were contained, save as indicated in the following excerpt from his testimony:

"Q. Now, in any of the cases covered by these requisitions, did you put any mark on the goods alleged to be covered by those papers, indicating to whom they belonged, or whether they were set apart, pursuant to these papers, or any other? A. Why, I did occasionally, but not very often; no. Occasionally I simply put a little board on there and say 'A. W.,' which happened to be my initials, 'Adam Wode,' as well as the American Warehousing Company's initials, and I did not think it necessary, and did not want to make any great display on account of employes, etc., so I did not put any designating mark on them as a general thing; no. And when I did put this mark on, 'A. W.,' it did not indicate the number of cases of the kind that I intended to be covered by it. So that in all cases referred to in my direct testimony there was no physical change of the goods after receiving the papers and sending them in to the warehousing company; no change after that. They were left in the same position they were before, exactly."

True, after the receivers were appointed, tags and marks were placed by the warehousing company upon a portion of the pledged property; but such belated action is now unavailing. The good faith of the claimants in negotiating the warehouse receipts or in loaning the money to the defendant is not entitled to much weight, if in fact there was no actual or constructive delivery of the property pledged. The mere intention to comply with the essence of a pledge or a negotiable warehouse receipt is insufficient. *Hook v. Ayers*, 80 Fed. 978, 26 C. C. A. 287. For it is quite well settled that the requirements of the general law oblige the pledgee to give reasonable notice to third parties that the ostensible ownership of the property pledged is in him; and, moreover, to obey its legal requirements he must resort to such reasonable means as the circumstances demand in order to give to third parties such information.

In the case at bar the pledgor did not surrender the possession of the property pledged in such a way as to acquaint others with whom it dealt as to the real possessor of the property. The adjudications hold that a pledgee must take and maintain an open, exclusive, and unequivocal possession. *Security Warehousing Co. v. Hand*, 143 Fed. 32, 74 C. C. A. 186, affirmed 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117. In the cases cited by counsel for claimants the facts to show delivery of the property pledged were palpably stronger than here. It is not required that there should be a transference from one locality to another; but where a constructive delivery is relied upon there must be more than a mere "semblance of an attempt at such change of possession." In *Bush v. Export Storage Co. (C. C.)* 136 Fed. 918, the property pledged was inclosed separate from other property of a similar kind and marked off by placards and other indicia to indicate possession in the Warehousing Company. In *Love v. Export Storage Co.*, 143 Fed. 1, 74 C. C. A. 155, a conspicuous placard was attached to the fence surrounding the pledged lumber, giving notice of possession by the storage company. So, also, in *Union Trust Co. v. Wilson*, 198 U. S. 535, 25 Sup. Ct. 766, 49 L. Ed. 1154, the facts indubitably disclosed possession in the trust company. In *Philadelphia Warehouse Co. v. Winchester (C. C.)* 156 Fed. 600, there were signs and placards placed by the warehouse company on the leased premises in such a way as to attract the attention of persons of ordinary intel-

ligence and of such creditors and others as were likely to visit the leased premises. In *re Rodgers*, 125 Fed. 169, 60 C. C. A. 567, a case relied upon by the receivers in support of their contention, signs were placed on the walls of separate floors of the building showing that the storage company was in possession of the premises; but there were no notices on the outside. The court said that the signs were obscure and not readily observed, and, as the pledged property remained in the possession of the bankrupt and under his control, the court believed that the entire arrangement was a device to enable the bankrupt to borrow money upon secret liens. In *Security Warehousing Co. v. Hand*, supra, the Supreme Court, speaking of the changed possession of the property in that case, emphasized the fact that no signs were displayed to the passers-by, and held that, unless there is delivery, the warehouse receipts are not entitled to pass as negotiable instruments. In that case the question arose under the warehousing statute of the state of Wisconsin that warehouse receipts should represent property stored in a public warehouse.

Although under the warehousing act of this state it is not required that the property pledged should be stored in a public warehouse, nevertheless the principle laid down in the *Hand Case* relating to the delivery and change of possession of pledged property or the negotiability of a warehouse receipt is applicable to the case at hand. I am convinced that, where an arrangement existed between the parties by which the pledged property was to remain under the control of the bailor, conspicuous notice showing the actual relations of the contracting parties is required, so that it would not be supposed by persons dealing with the bailor that the property was secretly incumbered. The defendant was given permission by the warehouseman to sell the pledged property subject to its replacing the goods sold with others. From the repayment by the defendant to the warehousing company of the monthly wages paid to the custodian the inference would seem to be warranted that the claimed delivery of the property to the custodian was scarcely such as the law contemplates to effectuate a change of possession to constitute a valid lien against creditors.

The evidence in its entirety is open to the impression that the preserving company was desirous of concealing the true ownership of the canned goods without imparting to the public the actual situation. That the premises were leased for one year to the warehousing company, and said lease recorded in the office of the clerk of the county where the property was stored, is unimportant. The statute does not require such recording, and consequently to do so voluntarily cannot be considered as a notice to creditors of the liens or of change of possession from the preserving company to the warehousing company. A person dealing with the defendant or extending credit to it is not required to first examine the records to ascertain if the premises and the factory under its control and wherein it daily conducts its business had not been leased to another. This is not a case where the title has been transferred to the creditor and the property sold by the debtor for his benefit. The property was sold from time to time by the defendant, who in each instance substituted other property of a like kind for that sold.

This is a case where the essential elements of the pledge failed, in that the pledgee never parted with the possession of the property. It is not intended to hold that property pledged as collateral security may not be stored by the pledgee at such place as he selects, or that the warehousing company cannot designate as custodian an employé of the pledgor; but, where the possession in the pledgee is claimed to be constructive, to give negotiability to a warehouse receipt the acts of the parties must clearly point to it, and not leave the transaction open to the impression that the pledge was false or fictitious. If delivery is effected by storing the property in the warehouse of the pledgor under an agreement that the warehouseman shall for his convenience store it therein, then all the more reason why the warehouseman should give reasonable notice of his lien. In such circumstances the pledged property should be segregated from the unpledged and proper notice posted evidencing the lien. In short, the acts of the warehousing company must be such that it may reasonably be perceived that it has power and control over the property.

In the present case a constructive delivery certainly was not impossible of performance; but in the essential requirements of a valid pledge or a negotiable warehouse receipt there has not been such compliance with the law as the situation and circumstances demanded. The contention that a large sum of money was advanced in good faith to the defendant in consideration of the supposed validity of the pledge and warehouse receipts which increased its assets is without special force. There was nothing to prevent the acceptors of the warehouse receipts from legally protecting themselves, and, having omitted so to do, they can have no greater right than the general creditors. *Casey v. Cavaroc*, *supra*. The case of *Parshall v. Eggert*, 54 N. Y. 18, cited by the claimants, is not in conflict with the views herein expressed. In that case the identical property pledged to the bank came into its possession before the sheriff made a seizure under an attachment at the instance of an intermediate creditor.

No equitable lien enforceable against the receivers was created in favor of the claimants by the transaction under consideration. As the essential elements of a pledge must be perfected by delivery of the property to the pledgee, no equities can be invoked against the general creditors where such element is absent, and where the property was not mixed beyond tracing or identification. Quoting from Mr. Justice Bradley in *Casey v. Cavaroc*, *supra*:

"Equity will not regard that as done which has not been done, when it would injure third parties who have sustained detriment and acquired rights by the acts that are done."

It has been fairly established by the undisputed evidence that the warehouse receipts indorsed by the defendant to Arbutnot, Latham & Co. and the New York County National Bank were constructively fraudulent as to creditors of the insolvent corporation, and that the indebtedness arising from such warehouse receipts are not entitled to priority of payment by the receivers. Moreover, under section 67 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), a lien not valid against general creditors for want of recording or for other reasons cannot remain effectual or subsisting

against the trustee of the bankrupt or a receiver representing such creditors. So here an equitable lien does not exist where the parties omit an essential element of the pledge or lien resulting in secretly encumbering the property.

In re the claims of Heinrich Donner and Ladenburg, Thalmann & Co., the material facts are substantially as follows: It was the custom of the defendant corporation to have its notes discounted by claimants, and at each time to execute a writing purporting to warehouse a certain amount of its product with one Sheridan, who was its treasurer, and who forwarded the receipts specifying the amount and character of the canned goods to the claimants. In the course of dealing, receipts which had been negotiated by claimants were surrendered from time to time; but Sheridan replaced them by others covering goods of similar brand and grade to protect the defendant's renewal drafts. Sheridan was not an independent warehouseman. The evidence discloses that the goods specified in the documents were not set apart or marked to indicate that a lien had been placed on them. Before issuing a warehouse receipt, Sheridan testifies that he invariably examined the books of the defendant to satisfy himself that the goods were in the warehouse. Such a supposititious delivery certainly was not sufficient to give negotiability to the warehouse receipts.

As a "warehouseman" concededly is a person who receives goods and merchandise to be stored in his warehouse for hire, it is manifest that Sheridan does not come within this definition. The authorities hold that, to entitle claimants to a lien upon the property specified in the documents purporting to be warehouse receipts, it must be shown that such receipts or documents were issued by one engaged in the business of warehousing. *Yenni v. McNamee*, 45 N. Y. 614; *Farmers' & Mechanics' Nat. Bank v. Lang*, 87 N. Y. 209; *Franklin National Bank v. Whitehead*, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302. The purported warehouse receipts, in view of the evidential facts, cannot operate as a parting of possession by delivering the property to Sheridan either as bailee or custodian for the bailee. In form there is a pledge of the property with the claimants as collateral security; but such receipt in my judgment cannot be given any other or different effect than as a security for the payment of the amount loaned upon it. The document was, I think, a mere pledge unaccompanied by delivery or mortgage covering the property, and was void for lack of filing in compliance with the statute. *Yenni v. McNamee*, supra; *Siedenbach v. Riley*, 111 N. Y. 567, 19 N. E. 275; *Willets v. Hatch*, 132 N. Y. 46, 30 N. E. 251, 17 L. R. A. 193. Nor can the claimants have declared an equitable lien upon the canned goods, inasmuch as any right which they had in the property as hereinbefore stated could not affect the general creditors in view of the situation after the defendant's insolvency and the appointment of receivers. See, also, 1 *Pomeroy*, Eq. Jur. § 165; *Seymour v. Falls*, etc., 25 Barb. (N. Y.) 284; *Peck v. Jenness*, 7 How. 620, 12 L. Ed. 841. It is true that possession is not essential to the existence of an equitable lien; but the rule is different where it appears, as here, that the property claimed to have been pledged was mixed with the unpledged, or that it was disposed of in such a way that it cannot be traced or

identified. *Person v. Oberteuffer*, 59 How. Prac. (N. Y.) 293; *Allen v. Loring*, 34 Iowa, 499; *Mervin on Eq. & Eq. Pleading*, § 716; *Lighthouse v. Third Nat. Bank*, 162 N. Y. 336, 56 N. E. 738.

It was contended at the hearing that, as the American Warehousing Company had a lease of the premises and consented to the storage in question, the mere issuance of the document was a delivery of the property therein specified, and that Sheridan assumed possession as bailee. In support of this contention *Union Trust Co. v. Wilson*, 198 U. S. 530, 25 Sup. Ct. 766, 49 L. Ed. 1154, is cited by claimants; but in that case it appears that the bailor separated the goods and walled off the part of his store wherein the goods were stored and which had been let by him to the warehouse company. The warehouse company alone had access to the storage part of the premises, and conspicuous signs indicating its occupancy and possession of the goods were posted. According to the Supreme Court, this was a real delivery to the same extent as if the goods had been removed to another warehouse at the instance of the pledgee.

Importance is also attached to the claim that no actual intention to defraud creditors is shown, that no claimants parted with their money in good faith believing the warehouse receipts and the property therein specified to have legally come into their possession; but, if I am correct in my view of the elicited facts, the transaction as hereinbefore indicated was presumptively fraudulent as against creditors. The case of *Niagara County National Bank v. Lord*, 33 Hun (N. Y.) 557, is not in point. There the pledgor removed from storage a portion of the property pledged without the consent of the pledgee, and upon hearing of the removal the latter assumed sole control and custody of the property. Unquestionably this act of the bank was a taking of the property into its possession, and as the transfer was in good faith, and rights of other creditors not having intervened, the original intention of the parties was effectuated, even though the possession was taken by the bank subsequent to the issuance of the warehouse receipts.

The exceptions to the report of the special master in re the claims of *Arbuthnot, Latham & Co.*, the *New York County National Bank*, *Conrad Heinrich Donner*, and *Ladenburg, Thalmann & Co.*, are sustained.

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#### AMERICAN CAN CO. et al. v. ERIE PRESERVING CO.

(Circuit Court, W. D. New York. February 20, 1909.)

No. 332.

#### PLEDGES (§ 11\*)—NATURE AND ESSENTIALS—DELIVERY AND POSSESSION.

A valid pledge may be made by a corporation, although the property remains in its warehouse and one of its officers is made custodian for the pledgee, where it is set apart, distinctly marked, and where the pledgee in fact exercises full control over it.

[Ed. Note.—For other cases, see *Pledges*, Cent. Dig. §§ 31-35; Dec. Dig. § 11.\*]

In Equity. On exceptions to master's report.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



Ernest F. Kruse, for claimant.  
Hull & Comstock, for receivers.  
Love & Keating, for intervening creditors.

HAZEL, District Judge. The facts of this case as found by the master are approved. Such elicited facts in my estimation are sufficient to warrant the holding that to effectuate a legal pledge the specified goods were warehoused, and that there was an actual delivery of possession to the Bank of North Collins. The specified property was delivered as a pledge to secure the payment of a debt, and in consideration thereof the said bank released collateral notes to the Erie Preserving Company amounting to \$10,000, which had previously been deposited with it. It was a valid debt, and there is nothing in the record to indicate the presumption that the parties intended to carry out any other object than to substitute the pledge for the collaterals released.

Upon the subject of the delivery of possession of the fruits, vegetables, and seed to the bank, it is shown by several witnesses that such articles were conspicuously marked as belonging to the bank. They were set apart from the unpledged and were not mixed with the other goods, but were assorted in such a way that identification was not difficult. Although Wode was an employé of the pledgor, he nevertheless in good faith and at the request of the bank became the custodian of the property pledged. The testimony of the witness Twitchell strongly indicates that the bank exercised exclusive dominion and control over the property. He, as its representative, supervised the separation of the pledged property from the unpledged, and he placed appropriate and sufficient designation thereon claiming ownership in the bank. There was no legal objection to the employment of Wode by the bank as custodian of the property or to the storing of the property in defendant's warehouse. If, as claimed by the receivers, the transfer was made simply to secure the payment of an existing debt, and if there had been merely a paper possession, then it is true the bank could not now maintain that its lien was valid. The possession of the goods, however, was not merely apparent or colorable. On the contrary, the proofs are, as already indicated, that the bank became the owner of the property specified in the written document and controlled its disposition.

It is perhaps true, as contended, that there was an understanding that the pledged property would be released when the debt was paid, if then unsold by the bank; but this is not of controlling significance. There was nothing to interfere with the bank selling the property and applying the proceeds on the debt. I think in principle the case of *Niagara County Bank v. Lord*, 33 Hun (N. Y.) 557, may be safely applied to this case. There barrels of whisky contained in a warehouse were specified in the documents issued by the owners to the bank as a continuing collateral security for notes and debts. Thereafter the firm withdrew from storage a portion of the pledged whisky, but later the keys of the storage warehouse were delivered to the bank, and no one else had access thereto. Subsequently the whisky was sold, and the

proceeds applied on the note; but before such sale the pledgees made an assignment for the benefit of creditors. In an action by a judgment creditor attacking the validity of the pledge, the court held that the transfer was in good faith and the delivery of the receipt vested the title of the whisky in the bank. See, also, *Securities Co. v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117.

In the present case the writing was delivered, the property came into the possession of the bank, a custodian acting for the bank was in charge, the property was separated from the unpledged and tagged as to ownership, the bank had free access to the warehouse, and, as the transaction was in good faith and not in fraud of creditors, it follows that the exceptions to the report of the master must be overruled.

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### ELECTRIC GOODS MFG. CO. v. KOLTONSKI.

(Circuit Court, D. Maine. July 28, 1909.)

No. 637.

#### 1. REFORMATION OF INSTRUMENTS (§ 39\*)—MISTAKE—CONSTRUCTION.

On demurrer to a bill to reform a written contract for mistake or to cancel it and to enjoin an action at law brought thereon, it is not necessary to construe the contract.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 39.\*]

#### 2. REFORMATION OF INSTRUMENTS (§ 36\*)—MISTAKE—BILL.

Where a bill to reform or cancel the memorandum of a contract for the payment of royalties for the manufacture and sale of a patented article, and to restrain the prosecution of an action at law thereon, alleged an agreement and the making of a written memorandum thereof which was made a part of the bill, and which was the memorandum sued on in the action at law, but did not plead that there was a prior contract which constituted the true agreement, nor allege that the written contract was intended to evidence the oral agreement, but by mistake and inadvertence failed to do so, it was insufficient, either as a bill for reformation or for cancellation.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 36.\*]

#### 3. EQUITY (§ 145\*)—BILL—DOUBLE ASPECT.

Under the federal equity rules, a bill may be properly framed with a double aspect for the reformation of a written contract, or, if that cannot be allowed, for cancellation thereof.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 145.\*]

#### 4. EQUITY (§ 142\*)—BILL—CERTAINTY.

Relief in equity cannot be granted on facts merely suggested in the prayer and not charged with reasonable distinctness, under the rule that pleadings must be taken most strongly against the pleader.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 142.\*]

#### 5. EQUITY (§ 145\*)—BILL—DOUBLE ASPECT.

A bill in equity with a double aspect must state each separately and distinctly.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 339; Dec. Dig. § 145.\*]

In Equity. On demurrer to bill.

Edward P. Payson, for complainant.

Warner, Warner & Stackpole, for respondent.

HALE, District Judge. This case comes before the court on the respondent's demurrer to the bill in equity. The bill is brought to prevent the prosecution of an action at law upon a written contract which undertakes to guarantee certain payments or royalties to the respondent, in consideration of a license to make and vend lamp sockets under a patent issued to him. The bill is framed with a double aspect. It is directed to obtaining a decree that the respondent is not entitled to royalties or other payments under his alleged contract, for the reason that the contract, properly construed, does not give him royalties unless and until gross profits shall accrue to the complainant from the manufacture and sale of the sockets. The bill prays, in the alternative, that, in case the court shall sustain the contention of the respondent in the suit at law, then there may be a decree that the contract be reformed to show the true agreement between the parties or that it be canceled.

1. Do the allegations in the bill warrant the court in exercising its jurisdiction in equity to reform the written contract on ground of the mutual mistakes of the parties, or to decree its cancellation?

Upon this point it is not necessary to construe the written contract declared upon in the action at law and set out in the bill. All questions relating to the construction of the contract, and to failure of consideration for the payment of royalties under it, are clearly cognizable at law. For the purpose of considering those aspects of the bill which relate to the reformation or cancellation of the contract, let us assume that the contract is to be interpreted as alleged by the respondent. The allegations which look to a reformation of the contract are as follows:

In paragraph 2 the complainant refers to a certain contract of employment, and then proceeds:

"Your orator made a further agreement with defendant relating only to electric incandescent lamp sockets, defendant's patent for a certain slight improvement therein, No. 692,458, of February 4, 1902, to which, or a certified copy of which, your orator craves leave to refer, and prospective improvements by him thereon necessary to make his patented socket merchantable; and a memorandum thereof made in behalf of orator by its president, since deceased, and its general manager was reduced to writing, signed, and dated May 20, 1902, a copy whereof is hereunto annexed as part of this bill.

"In and by said agreement and contract as to sockets, and in and by its reduction to writing in said written contract, hereinafter called the 'socket contract,' your orator intended to undertake and agree, and as it is advised did undertake and agree, to pay, and defendant agreed to claim and receive, the royalty therein mentioned, namely, '15 per cent. of the gross profits resulting to it from the manufacture and sale of said sockets,' only in case it should actually manufacture sockets covered by defendant's said letters patent, sell the same, and receive some 'gross profits' therefrom; and any payment of a royalty of 15 per cent. of 'gross profits' under said socket contract was dependent upon receipt by your orator of 'gross profits' from its actual manufacture and sale thereof."

It is also alleged at the end of the ninth paragraph:

"The defendant is proceeding at law against your orator to establish a different meaning of, and different liability under, said socket contract as the same is worded; and that, if defendant has a right to so proceed at law upon the said socket contract so worded, then your orator has a right in equity to have said socket contract reformed, in order that it may plainly state the real agreement between the parties."

The prayer of the bill relating to this subject is that:

"Said contract may be decreed to be reformed to show the true agreement that no royalties were to become due thereunder unless and until 'gross profits' should accrue to orator from the manufacture and sale of said sockets, or that, in the alternative, said socket contract may be decreed to be delivered up to your orator to be canceled."

From a careful reading of these allegations it will be seen that the complainant pleads an agreement made by the parties, a memorandum of which was reduced to writing and is made a part of this bill; and it appears, further, that this is the memorandum sued upon in the action at law. The obvious meaning of the first part of the second paragraph seems to be that whatever agreement was entered into by the parties was reduced to writing, and is the written agreement sued upon in the action at law, and brought before the court in this bill of complaint. The complainant does not plead that there was a prior contract which constituted the true agreement of the parties, although the bill suggests this in the ninth paragraph and in the prayer for relief. It may be that the learned counsel for the complainant intended to set up an oral agreement, and to say substantially that the written contract was intended to be made in pursuance of this oral agreement, which, by mutual mistake, was not reduced to writing. By some inadvertence he has failed to do this in sufficiently explicit language to comply with the rules of pleading in the federal courts. Nor has the pleader set out in clear terms, under another alternative, that there was no meeting of the minds of the parties; that the written contract was expressed in terms different from what the complainant understood to be the antecedent oral agreement; that by its being so written down an unconscionable contract and a case of great hardship have resulted; and that hence the court should grant a cancellation of the written contract. The double aspect of the bill is within the rules of the federal court. Bills are properly framed so that, if the court cannot grant relief to the complainant on one view of his case, it may afford him assistance in another. *Story's Equity Pleading*, 426; *Hobson v. McArthur*, 16 Pet. 182, 195, 10 L. Ed. 930; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158.

It is true that, under our liberal rules of pleading in equity, material facts may be set forth in terms reasonably certain in their import; and sometimes, where an essential fact appears by necessary implication, such a statement of the fact is good, even as against a demurrer. But relief cannot be granted for facts not charged with reasonable distinctness, although they may be suggested in the bill; for the old rule still prevails that pleadings must be taken most strongly against the pleader. It is for the protection of both complainant and respondent that, before proceeding to proofs, the bill should present clearly every

issue to be raised; otherwise, great hardships may be met in presenting the proofs; and difficult questions may arise in framing the decree; for the decree can only be *secundum allegata et probata*. Story's Equity Pleading, 257 et seq. Where a bill is framed with a double aspect, it is always necessary, although it is sometimes difficult, to state separately and distinctly each different aspect of the bill. Foster's Fed. Practice, 202; Story's Equity Pleading, 254.

In the bill before me, the mutual mistake, suggested under one aspect, is not made reasonably certain, even by necessary implication. Nor do the pleadings clearly present a state of facts where a merely unilateral mistake has been made, but where the contract was written down differently from the complainant's intention, and thereby an unconscionable agreement has resulted, or a great hardship has been caused. Either of these aspects should be set out with distinctness, in order to be cognizable in equity, and in order that a suitable decree may finally be drawn; for the jurisdiction of the court in such matters is always exercised with caution, and only in cases where the pleadings are distinct and the proof is entirely satisfactory. Story's Equity Jurisprudence (Bigelow's Notes) 146; *Ivinson v. Hutton*, 98 U. S. 79, 25 L. Ed. 66; *Finley v. Lynn*, 6 Cranch, 249, 3 L. Ed. 211; *Oliver v. Insurance Co.*, 2 Curt. 295, Fed. Cas. No. 10,498; *Daniel v. Mitchell*, 1 Story, 172, Fed. Cas. No. 3,562; *Goddard v. Jeffrey*, 51 L. J. Ch. 57. Under any aspect, the bill in the case at bar does not present sufficient allegations either for reformation or cancellation of the contract. As I have pointed out, the language of paragraph 9, and of the prayer, suggests what the pleader may have had in mind; but by some inadvertence he has not, directly or by necessary implication, stated a case cognizable by an equity court.

The demurrer is sustained. Leave to amend is granted to the complainant. All questions of costs on demurrer are reserved until the final decree.

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## CITIZENS' LIGHT, HEAT & POWER CO. v. MONTGOMERY LIGHT & WATER POWER CO.

(Circuit Court, M. D. Alabama, N. D. July 22, 1909.)

### 1. INJUNCTION (§ 98\*)—LIBEL AND SLANDER.

Equity has no jurisdiction to enjoin written or spoken words defaming the credit and business standing of an individual or corporation; the remedy being by action at law or criminal prosecution.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 169-171; Dec. Dig. § 98.\*]

### 2. INJUNCTION (§§ 63, 98\*)—BUSINESS COMPETITION—FALSE STATEMENTS.

False representations concerning complainant's credit, ability to do business, and solicitation of complainant's customers to break their contracts and trade with defendant, unaccompanied by incitement to violence to the customer's person or property, or illegal interruption of his contracts or relations with others, is not ground for injunction.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. §§ 63, 98.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

### 3. INJUNCTION (§ 104\*)—CONSPIRACY.

Concert of action or agreement between defendant and his solicitors to spread defamation against complainant, its business rival, could only result in libel or slander, and hence could not be enjoined, though it amounted to a conspiracy to destroy complainant's business.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 177; Dec. Dig. § 104.\*]

### 4. TORTS (§ 10\*)—INTERFERENCE WITH BUSINESS.

At common law a trader or person in any calling, in order to get another man's customers, could use any means not involving violation of criminal laws or amounting to fraud, duress, or intimidation, or wrongful inducing a breach of contract.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. § 10.\*]

### 5. INJUNCTION (§ 63\*)—BREACH OF CONTRACT.

Where complainant and defendant were business rivals, complainant was entitled to an injunction restraining defendant, its officers and employees, from inducing complainant's customers to break their contracts with complainant by agreeing to indemnify them against liability for damages to induce them to do so, when it is apparent, from the conduct of defendant in other respects, that the injury to complainants from loss of customers, thus destroying its ability to compete, could not be adequately compensated by damages at law.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 63.\*]

### 6. MONOPOLIES (§ 8\*)—UNLAWFUL COMPETITION—CONSTITUTIONAL PROVISIONS.

Const. Ala. 1901, § 103, providing that the Legislature shall have power to regulate and prohibit or reasonably restrain associations, trusts, monopolies, and combinations of capital, so as to prevent them from making any article of trade or commerce scarce, or from increasing unreasonably the cost thereof, or preventing reasonable competition in any calling, trade, or business, has not "restricted the law of competition," as defined by the common law.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 8.\*]

### 7. MONOPOLIES (§ 8\*)—WHAT CONSTITUTES.

The control of a pursuit or trade in a locality is not forbidden by Const. Ala. 1901, § 103, though it be lodged in a single hand, if that be the result of competition waged by lawful means, as such a monopoly is a lawful one.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 8.\*]

### 8. MONOPOLIES (§ 12\*)—CONTRACTS—ENFORCEMENT.

Contracts between two or more persons to obtain control of a pursuit or trade in a locality, or to keep up prices, are unenforceable.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.\*]

### 9. MONOPOLIES (§ 8\*)—RESTRAINT OF TRADE—REASONABLE COMPETITION.

Under Const. Ala. 1901, § 103, authorizing the Legislature to provide for reasonable competition, one man may take over all of another man's customers, and thus control the business, if he does so as a result of competition within legal limits.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 8.\*]

### In Equity.

This case is submitted on bill and amended bill and affidavits on motion for a preliminary injunction. The bill is filed by the Citizens' Light, Heat & Power Company against the Montgomery Light & Water Power Company. The former is a corporation chartered under the laws of Alabama, and the latter under the laws of New Jersey. For convenience, they are hereafter respectively styled the "Citizens' Company," and the "Water Power Com-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany." They are competitors in the business of furnishing light and power by electricity to the people of Montgomery. The Water Power was first in the field, and the Citizens' Company was organized later, and from the start each has solicited the customers of the other, as well as the business of the people generally. Of late this competition has become intensified. According to the bills, the Water Power Company has lately put a corps of solicitors in the field to persistently seek the customers of the Citizens' Company and induce them to leave it, many of whom are known to be under contract with it, and has persistently stated, falsely and maliciously, that the Citizens' Company is insolvent, that there were dissensions in its management, that it would shortly go into the hands of a receiver, or go out of business, and they would have to become customers of the Water Power Company, when they could not get as favorable terms as now offered by it, if they would quit the Citizens' Company. It is further alleged, notwithstanding the falsity of these statements, and that the Citizens' Company has brought its action at law against the Water Company to recover damages for these defamatory statements, the latter company has since redoubled its efforts to take over the customers of the Citizens' Company, and still persists in circulating the defamatory matter, and through its officers and special corps of solicitors persistently offers to indemnify customers of the Citizens' Company, who are bound to it for a definite term, against breaches of their contracts, if they will go to the Water Company, and cease to do business with the Citizens' Company; that the Water Power Company has frequently taken business at less than cost to induce customers not to contract with the Citizens' Company, and has made repeated publications in the local press to the effect that there was no room here for two companies; that the Water Power Company was here to stay; and that by the means stated the Water Power Company is pursuing a systematic purpose to ruin the credit of the Citizens' Company, to demoralize and frighten its customers, to destroy the good will of the business, and thus to drive it out of the field, and to secure a monopoly of the business for itself.

The bill was afterward amended, giving the particulars as to the number of customers who were bound by contract for a definite term, and those who were taking electricity at will, but were not bound for a definite term, the income, etc. The effect on its business of the conduct complained of, and the ability of the Water Power Company, by the unlawful means pursued, to terrorize, frighten, or drive off, enough of the Citizens' Company's customers to make the patronage of the remainder insufficient to pay operating expenses, and thereby put the complainant out of business, or at grievous disadvantage, while its waiting to recompense itself by judgment in the law court, for the damage by the wrongful conduct of the defendant, is elaborately detailed. It is further alleged that the damage to the good will of the business cannot be accurately ascertained at law or compensated in damages, and that by reason of the premises complainant is without adequate remedy at law, and entitled to injunctive relief.

Aside from the prayer for general relief, the bill prays specially that the Water Power and its servants be enjoined and restrained, "from any effort, directly or indirectly, to induce or persuade any of the customers of the Citizens' Company to violate any subsisting contract to furnish electricity for a definite term," and the same relief is prayed as to customers who have not bound themselves to take the electric current for any definite term. The bill further prays that the Water Power Company, and its representatives, be enjoined and restrained "from making, either directly or indirectly, for the purpose of injuring or destroying the credit and financial standing or business of complainant, or giving out any statement, either oral or written, to the effect that the orator is insolvent, or in great financial straits, or on the verge of bankruptcy, or that it will very soon be out of business, or in the hands of a receiver, or that there are dissensions among its managing officers, or that it will not be able long to furnish electricity to said customers." The amended bill also prays that the Water Power Company and its representatives be enjoined from "attempting or undertaking by false or fraudulent representations as to the condition of the complainant, or its ability to perform its contracts, or by agreement to indemnify and hold harmless customers of

the Citizens' Company from liability for damages to complainant for breaches of contracts, and to induce any firm or corporation having a specific contract to take electricity from complainant for a fixed period, as aforesaid, to violate or breach said contract."

Fred S. Ball, J. M. Chilton, Gregory L. Smith, and R. T. Goodwyn, for plaintiff.

Steiner, Crum & Weil, for defendant.

JONES, District Judge (after stating the facts as above). This case has been ably and elaborately argued and has had most painstaking consideration. The public, as well as the parties, are deeply concerned in the important questions it involves, and no apology is needed for extended examination and discussion of them.

1. At the threshold of the case, we are met with the question of the power of the court of equity to enjoin written or spoken defamation of a man's credit and business standing. The difficulties in the way of affording such relief are insurmountable. They grow alike out of constitutional provisions, and want of jurisdiction in the court of equity. If the statements complained of are not false, defendant has a right to make use of them in getting business for itself. It affirms that these statements are true, while complainant insists they are maliciously false. Defendant has a right to have the truth or falsity of the issue determined by a jury trial as at common law. That it cannot get in a court of equity. A person cannot be enjoined from doing any act unless it is fairly apparent the act is wrongful, or the person sought to be enjoined has no right to do that act. How can a court of equity be satisfied where the right lays in the matter of the alleged false statements? It cannot try the question for itself, or determine the right in advance of the law court. Again, the Constitution forbids any law "to curtail or restrain the liberty of speech or of the press," and declares that:

"Any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Const. Ala. 1901, art. 1, § 4.

Neither a court of equity, nor any other department of government, can set up a censorship in advance over such matters, and prevent a person from exercising this constitutional right. He has the right to publish, if he chooses to take the consequences. After he has spoken or written falsely, the criminal law can punish him, and the civil courts amerce him in damages. That such redress may not be adequate in all cases, and in some cannot be, is quite apparent; but the remedies named are all that the Constitution permits any court to employ against slanders upon a man's credit and business standing. The court cannot go outside of the Constitution, or hold that to be an inadequate remedy which the Constitution has declared to be the sole remedy. The wrongs and injury, which often occur from lack of preventive means to suppress slander, are parts of the price which the people, by their organic law, have declared it is better to pay, than to encounter the evils which might result if the courts were allowed to take the alleged slanderer or libeler by the throat, in advance. It is bootless now, to inquire whether the courts, which first dealt with this matter, did not



unduly extend the privileges the constitutional provision intended to secure, by denying all power to deal in advance with the emanation of slander and libel by one private person upon another, where the only purpose of uttering them is to acquire personal gain, by wrongfully and wantonly aspersing a fellow man's reputation and business standing. However that may be, it was the law in England until changed by statute, and is the settled doctrine in this country, that a court has no such power. *Raymond v. Russell*, 143 Mass. 295, 9 N. E. 544, 58 Am. Rep. 137; *Kidd v. Horry* (C. C.) 28 Fed. 773; *Francis v. Flinn*, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165; *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310; *Flint v. Smoke Burner Co.*, 110 Mo. 492, 19 S. W. 804, 16 L. R. A. 243, 33 Am. St. Rep. 476; *Edison v. Edison Chemical Co.* (C. C.) 128 Fed. 957.

Nevertheless it is insisted the court has jurisdiction to enjoin the making and circulation of the false statements, in order to defeat a fraud upon complainant's customers, whereby they are wrongfully induced to breach their contracts with it, thus working a fraud upon complainant itself. We have seen the constitutional trammels which prevent the court of equity from enjoining the making or circulation of the defamatory or libelous statements. These trammels cannot be shaken off, and the jurisdiction of equity enlarged, by denouncing a mere libel as a fraud, no matter what the injury. In *Pomeroy's Equity Jurisprudence*, § 630, it is said: "The grounds of interference must be more than injury to the property arising from the libelous character of the publication. Thus the publication of the libelous circular will not be enjoined when the injury to the property arises from the falsity of the charge." No question of disclosure of confidential matter is involved, and no relation exists between the parties except that of rivals fighting each other at arm's length. The "intimidation" and "frightening" of complainant's customers, which complainant insists is effected by the false statements, does not amount to coercion or intimidation in the eye of the law. In their circulation it is not alleged that violence was threatened to the customer's person, or injury to his property or business, or interruptions of his relations with other persons. Appeals to self-interest only, based on a statement of facts, false though they may be, are addressed to the customer, from which he may deduce the conclusion that it is more to his advantage to deal with the solicitor than to remain with the complainant. The customer is left free to form his own judgment and take his own choice. He has been deceived, it may be; but he has not been threatened, intimidated, or coerced. Surely no one would claim that a person who was deceived in swapping horses by willfully false representations as to the superior quality of the horse he got, compared with the horse he parted with, or the benefit to result in consequence of the bargain, had been coerced or intimidated, or frightened into making the swap. He has merely been outwitted and deceived. Hence the case does not fall within the influence of *Beck v. Railway Teamsters' Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421, and kindred cases, wherein it is properly held that the constitutional provision as to the freedom of the press and liberty of speech cannot prevent injunctive relief against the circulation of printing, or the speaking of words, the natural effect of

which, under the circumstances, is to convey a threat to bring about violence to person or property, or boycotts, or the like injury to the business of those to whom the writing or words refer, or will naturally be applied.

It is strenuously insisted, in view of defendant's alleged purpose to compass the ruin of complainant's business, by the several means recited, that the employment of solicitors to spread the objectionable matter, and their constant iteration of it to complainant's customers, amounts to a conspiracy to destroy a property right under such circumstances that a court of equity must intervene to prevent irreparable injury. Concert among a number of persons to effect an unlawful purpose will frequently authorize a court of equity to intervene, when it could not grant such relief against like acts of a single individual. The right of the court of equity to interfere at all turns upon the consideration whether the conduct complained of would result in a wrong which a court of equity has power to prevent at any stage of its accomplishment. A court of equity has no power to prevent the invention or circulation of slanders upon men's business standing and credit. Concert or agreement between defendant and its solicitors to spread the defamation complained of can only result in libel or slander, and that a court of equity cannot prevent whether effected by one or many persons.

2. The next important question is, what play is allowed, under our laws as they stand, to the operation of what is indiscriminately termed in the books the "law of trade," the "law of competition," and the "law of supply and demand," and how far the Legislature can interfere? These are questions which have vexed the legislator and the political economist for centuries, and they daily become more acute under the influence of the forces, good and bad, which shape modern industrial development, and the struggles between man and man which they call forth. Hence, in this class of cases, not only legislators are appealed to for new remedies, but there is constant pressure upon courts of equity to enlarge the application of the principles upon which its justice has been heretofore administered regarding the invasion of property rights. It is said modern conditions differ so essentially in those matters from the old conditions, under which these rules originated, that courts of equity should keep pace with the changed conditions by more freely granting injunctive relief. It is urged, if one individual or the other falls by the wayside in the struggles of competition in the ordinary private callings, it matters little to the community, for others will take their places and serve its wants; while, on the other hand, competition between enterprises affected with a public interest may inflict great harm upon the community. When the struggle is between enterprises, which in the nature of things require large outlays, and only a few can engage or work in them with profit, in a given locality, and they exercise franchises, under which they supply the wants of a community in things like water, heat, power, or transportation, that community is profoundly interested and may suffer great harm from the outcome of the struggle. When one competitor drives another from such a field, the victor often becomes the sole master of it, and then, not only a competitor is ousted, but the law

of competition is itself "put out of business." Courts of equity therefore, it is insisted, should, when called upon to intervene against wrongs in such struggles, abandon, in view of the great public interests, some of their ancient rules as to what constitutes adequacy of remedies at law, and freely grant preventive remedies in this class of cases to prevent success of efforts to monopolize trade, though it might not be appropriate in the prevention of torts and wrongs in other relations of life.

However captivating such a theory, and I confess it appealed to me somewhat, at first blush, in view of the nature of the grievances alleged in the bill, a little reflection will convince one that it should be rejected. Granting the wisdom of the courts to grapple with such problems, the practical operation of the doctrine would be disastrous in the extreme. Each judge would have his own policy. The policy of the law would swing like a pendulum, hither and thither, in cases as they arose, as the particular judge made choice between the teachings of the different schools of political economy. Confusion and uncertainty would reign where uniformity and certainty are above all things desirable. Courts in this, as in all other matters, can take no safe path save to follow the policy of the law only, as the Constitution, statutes, and common law disclose it, and enforce it, as thus disclosed, regardless of their own notions, whatever may be the hardships of particular cases.

What is the policy of our laws as to competition in matters of this sort, and what results may lawfully be effected under it? The answer necessitates an examination of the common law, and how far it has been changed by our Constitution and statutes. What was the rule at common law?

As Lord Chief Justice Coleridge observed in *Mogul Steamship Co. v. McGregor*, 21 Queen's Bench Division, Law Reports, 553:

"It must be remembered that all trade is, and must be, in a sense, selfish; trade, not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand to hand war of commerce, as in the conflicts of public life, whether at the bar, in Parliament, in medicine, in engineering (I give examples only), men fight on without much thought of others, except a desire to excel or defeat them. Very lofty minds like Sir Philip Sidney, who with his cup of water will not stoop to take an advantage if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business. \* \* \* The defendants are traders with enormous sums of money embarked in their adventures, and naturally and allowably desirous to reap a profit from their trade. They have a right to pursue their lawful trade by all lawful means. They have a right to endeavor by lawful means to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable offers customers to deal with them rather than their rivals. It follows that they may, if they think fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of the profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted on those who withdraw them by the customers who decline to deal exclusively with them, dealing with other traders. It is a bargain which persons in the position of defendants here had a right

to make, and those who are parties to the bargain must take it or leave it as a whole."

At common law a trader, or person in other callings, in order to get another man's customers, could use any means not involving violation of the criminal laws, or amounting to "fraud," "duress," or "intimidation," as the law understands and applies those terms to transactions between man and man, or to his becoming a wrongful party to a breach of another man's contract. The trader may boast untruthfully of the merits of his wares, so long as it does not take the form of false statements, amounting to slander or willful misrepresentation of the quality of a rival product, or a libel upon the character, business standing, and credit of his rival, or an effort to induce the public to believe that the product he sells is that manufactured and sold by the rival. He may send out circulars, or give information verbally, to customers of other men, knowing they are bound by a contract for a definite term, although acting upon the expectation and with the purpose of getting the trade of such persons for himself. He may use any mode of persuasion with such a customer, keeping within the limitations stated, which appeals to his self-interest, reason, or even his prejudices. He may descant upon the extent of his rival's facilities compared with his own, his rival's means, his insolvency, if it be a fact, and the benefits which will result to the customer in the future from coming to the solicitor rather than remaining where he is. He may lawfully, at least so far as his rival is concerned, cut prices to any extent, to secure his trade. So long as what he does is done to benefit his own trade, and, in taking over the customers of another, he keeps within the limitations heretofore defined, he is safe from legal restraint at the instance of a competitor in following "the law of competition," which takes little note of the ordinary rules of good neighborhood or abstract morality. The person whose customers are thus taken from him cannot complain, for no right of action lies in his favor against him who solicited his customer, since the solicitor exercised a legal right in a legal way, and the exercise of a legal right in a legal way, for a lawful purpose, will not give a cause of action. *Allen v. Flood*, Law Reports, Appeal Cases, 1898, p. 1, which on this point is not disturbed by the later judgment of the House of Lords, in *Quinn v. Leatham*, Law Reports, Appeal Cases, 1901, p. 495.

It may be difficult for the mere casuist to distinguish between the nonactionable character of a man's acts, when he solicits another man's customer whom he knows is bound by a subsisting contract, expecting and intending thereby to take over the business, when the ordinary, natural, and intended result of such conduct is the breach of a contract, and the actionable character, on the other hand, of such conduct with another man's customer when the solicitor goes further than mere solicitation, and in the words of Lord Brampton, in *Quinn v. Leatham*, *supra*, is guilty of "active interference." The distinction, however, is perfectly logical. The trader who has made a contract with another person has a right, which the law will protect, to have that other keep it. Other traders have the correlative right to solicit the custom to which the contract relates. Whatever damage results to

the first trader by the mere solicitation is privileged, so far as the solicitor is concerned, in the interest of proper freedom of competition. Were the law otherwise, the first person occupying the field of public service in many localities, by procuring long contracts to take water, light, and the like from him, might intrench himself in a monopoly there for years, because another thereafter could not solicit customers, thus bound, to change their patronage to him, and thereby enable a rival enterprise to enter the field. The faithful observance of contracts, however, is as essential to the public welfare as the right of competition. Property rights, public and private morality, and liberty itself, are insecure, when the law encourages the nonobservance of contract obligations. Hence, while the law allows a trader, by mere solicitation, to persuade customers to change their business relations, without actionable liability therefor, though a broken contract is the result, it does not permit such a solicitor even in the interests of competition, to go further, intervening actively between the contracting parties, as a dominant agency in producing a breach, by promise of indemnity to one of them to induce the breach. When the solicitor knowingly and intentionally goes beyond mere solicitation, to induce another man's customer to do business with him, and promises to hold that other man's customer harmless for the breach of a contract with him, he transcends the rights of the law of competition, has no "sufficient justification," and thereby becomes liable to him whose customer is taken over. Such conduct is an unlawful interference with another man's rights, for which he may maintain an action and recover nominal damages, although the contract be not actually breached in consequence of the solicitation. While there are some authorities to the contrary, the current of authority in this country and in England is that:

"The violation of a legal right committed knowingly is a cause of action, and that it is a violation of a legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference." *Quinn v. Leatham*, supra, 510; *Angle v. Chicago, etc., Ry. Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Bitterman v. L. & N. R. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171; *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232; *South Wales Miners' Fed. v. Glamorgan Coal Co.*, Appeal Cases, 1905, p. 239. See, also, *Nims on Unfair Business Competition*, pp. 351-371.

3. Our state Constitution and statutes have not narrowed the play of the law of competition as defined at the common law. Const. Ala. 1901, § 103, declares:

"The Legislature shall have power to provide by law for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade or commerce, or from increasing unreasonably the cost thereof to the consumer, or preventing reasonable competition in any calling, trade or business."

The section is aimed at combinations of capital, to prevent them from making scarce articles of necessity, in order to "unreasonably" increase the cost to the consumer, and, further, to prohibit anything which prevents "reasonable competition" in any calling or business. Combina-

tions of capital as such are not denounced. To fall within the purview of the section they must be formed to "unreasonably" increase the cost. The section is not aimed at everything which restricts competition. Its purpose is not that there shall be no restraints of competition, arising from the workings of the laws of trade, but only that whatever is done in trade must leave the field open to "reasonable competition." The indirect effects of fair competition, though in the end it may result in restraining competition, by lessening the number who compete, or in some instances throwing all the trade into the hands of one man, are not outlawed as going beyond the limits of "reasonable competition." That competition is the life of trade has passed into "a proverb of the law." The section intends to preserve its full operation. Putting the qualifying word "reasonable" before the word "competition" could have no other purpose than to declare the intent that restrictions arising from the inevitable effect of competition, lawfully conducted, were not intended to be prohibited—that the "reasonable competition" for which the Constitution provides did not intend to free competition from the effects, direct or indirect, of any rivalry in trade waged within the bounds of law. If it meant more, competition would be impossible, since all competition, more or less, diminishes, restrains, or restricts the trade of others. The terms "reasonable" and "unreasonable" were used with reference to the meaning of these words, as understood and applied in our jurisprudence in the past, in defining what was noxious interference with trade and commerce, as distinguished from lawful rivalry. To give the section any other meaning would defeat its dominant purpose to have "reasonable competition."

Section 2487 of the Code of Alabama of 1907 sheds no light upon the question here. Without attempting any definition of "unreasonable restraints," or "reasonable competition," the section simply gives a penalty and right of action for any injury, "direct or indirect," resulting from the violation of the law. Section 7581 of the Code reads:

"Any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production, control or sale of a commodity, or prosecution, management, or control of any kind, class, or description of business; or which shall destroy, or attempt to destroy, competition in the manufacture or sale of a commodity, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred nor more than two thousand dollars for each offense."

It will be noticed at a glance that it goes far beyond the Constitution, which, by the affirmative terms in which it confers the power, inevitably negatives any legislative power to enact anything contrary to the policy of the fundamental law. It makes no distinction between "reasonable" and "unreasonable" restraints. It forbids any "attempt" to restrain the freedom of trade, whether direct or indirect, whether accomplished by illegal means, or as the inevitable result of competition lawfully conducted. It forbids any "attempt" to "control" any kind of business, or any "attempt" to "destroy competition," no matter by what means effected. According to the letter of the section, free competition would be impossible, since all competition, however lawfully conducted, necessarily results in a large measure in restricting competition, or interfering with another man's ability to compete, and hampers the practical

enjoyment of the right to compete in many instances. When only two are engaged in a business in a locality, the effect of competition is often to put the whole business into the hands of one, thereby creating a monopoly. It puts the "control" of the business in one man's hands. Yet this monopoly is the child of "reasonable competition," which the Constitution intends shall have full play. Under this section, if it be taken at its word, such competition, from its known and direct tendency in restraining trade, would be forbidden. This section can throw no possible light upon the meaning of the Constitution, or be useful in any way in ascertaining the meaning of its terms. If it means only to forbid things the Constitution forbids, we must look to the Constitution, rather than to it, to discover the purpose of its framers. If it means more or is in any wise antagonistic to the Constitution, it is void. Finding no definition of the meaning of "unreasonable restraints" and "reasonable competition" in our Constitution and statutes, resort must necessarily be had to the common law. At the common law all competition in trade, conducted within the limits of the law, was "reasonable competition." *Mogul Steamship Co. v. McGregor*, *supra*. The "control" of a pursuit or trade in a locality is not forbidden by the Constitution, though it be lodged in a single hand, if that be the result of competition waged by lawful means. Such a monopoly is not an unlawful monopoly. Contracts or agreements between two or more persons to obtain such a result, or to keep up prices, are, of course, unenforceable, and statutes frequently make them not only illegal, but criminal; but fiercely waged competition between rivals, within the limits of the law, may bring about just such results. The law does not condemn them, for they are, in the nature of things, the inevitable results of the "reasonable competition," which the Constitution secures to all alike. If, as we have seen, one of these competing companies, keeping within lawful means, may continue to compete with the other until it drives it out of business altogether, and thus lawfully secures a monopoly to itself, advertisement in the newspapers or in other ways, of a purpose to continue the struggle until that result is secured, cannot make that an unlawful monopoly, which without that announcement would be lawful. *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648. The reason, of course, is that the doctrine has been generally accepted that competition is worth more to society than it costs, and that on this ground the infliction of damages is privileged. *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111-134, 38 Am. Dec. 346.

4. It has been pressed upon the court at every turn of the argument, that while ordinarily it might not have power to interfere by preventive writs, yet that in a grievance of this kind, presenting a case of peculiar hardship, a court of equity has the power, and is under duty, to interfere by injunctive relief, because in so doing it would be enforcing the policy of the Constitution and prevent the accomplishment by one competitor of an avowed and undoubted purpose, by means fair or foul, to drive his rival to the wall, and thus defeat the very purpose of the Constitution in securing "reasonable competition." As we have seen, there are constitutional difficulties in the way of suppressing the *injury* resulting either from circulation of defamation, or of lawful solicitation of customers. Under the Constitution, and in the absence

of statutes defining the power of the state, under section 103 of the Constitution, to regulate competition, one man may take over all of another man's customers, and thus control a business, if it results from competition within legal limits. If we assume the power of a court of equity to prevent such a result by defining limits beyond which even lawful means shall not be used to get control of a business, thus stifling competition in it, upon what principle can the court proceed? If the taking over of a certain number of customers, though by illegal means, does not create monopoly, while the taking over of a greater number does, how is the court to determine what number falls within and what number falls without the rule? Is the taking over of the individual customer to depend on the motive of the solicitor to get all the trade, or only a fair portion? Can the court apportion the business among the rivals? Can it say, in order to prevent monopoly in a business, that one company should be confined in a business to one part of the town, and another to another part, in order to prevent one from destroying the business of the other? If the court could enter upon these inquiries, the difficulties in their practical application would be insuperable. The exercise of the power would be an attempt to direct "reasonable competition" by regulations which the Legislature alone can lawfully provide. The Legislature has not provided them. The court would simply be legislating, using its injunction to promulgate and enforce its enactment.

5. We have here a case where it may or may not be true: that the defendant has inflicted great harm upon complainant's business by the alleged defamatory statements. The course of conduct pursued towards it by its rival in offering indemnity against breaches of its customers' contracts, combined with the effect of the other grievance alleged, if it exists, may result in reducing the number of its customers below that at which the business could be run at a profit, thereby forcing it to run, for a time, at least, below cost; and finally putting it out of business or grievously taxing its resources, while it is waiting the slow process of the law to recover damages for the alleged defamatory statements, and of customers who breached their contracts with it, and from the persons who have wrongfully induced them to do so. Necessarily there must be considerable delay at law. If many suits be brought, and the dockets of the courts be crowded, months must elapse before complainant could get its numerous suits tried. If complainant be successful, and its adversaries be litigious, they would carry the cases to the appellate court, and a year or two, even under the most favorable circumstances, must elapse before complainant could be recompensed by receipt of damages, to say nothing of the cost and expense to complainant in its numerous suits at law. Meanwhile the opportunity to increase its business and build up its good will is wrongfully put in jeopardy.

Can one competitor say, in effect, to another, and, without any effective check, carry out the threat: "I will libel your credit and business standing, and indemnify your customers for breaches of your contracts, as often as I choose, and risk your suits for defamation and for causing breaches of your contracts, and pay the damages, if by so doing I can put you out of business. I intend to persist in such



means until I force you to sell or perish and leave the field for me." What chance of life has the weaker against the stronger under such conditions, if the weaker must wait the slow aid of the law court? True it is, by suits at law against its customers, and those who procure them by unlawful means to leave it, the weaker competitor could recover damages by way of loss of profits against the customer, and all actual damages, as of right, and it may be smart money, against the main tort-feasor; but is that adequate compensation for the wrong? The wronged competitor may be forced to succumb from loss of customers under the constant hammering of them accompanied by offers of indemnification. The difference in the value of the good will of the business if it be conducted in the face of continued unlawful assaults, as compared with what would be its value and extent if battling only with lawful competition, is largely speculative, incapable of accurate ascertainment, and cannot therefore be measured or fitly compensated in damages. The complainant has a right to conduct its business, and extend it as far as it can, free from illegal assaults by a rival. It is to the public interest that it enjoy that right. Complainant has the right to choose for itself whether it will wait the slow process of the law courts, and submit to all the disadvantages which will thereby be entailed upon it, or whether, in its own interest, and for the promotion of its business, it will resort to the court of equity to minimize the damage from the continuation of the wrongful assaults, by preventing the recurrence of them in the future. The inadequacy of the remedy at law under such circumstances binds a court of equity to interpose its preventive remedies to that extent. If there were doubt, the public interest and the duty to uphold the constitutional policy of "reasonable competition" should turn the scale.

I do not find the defendant's contention that complainant does not come into court with clean hands is sustained. A number of affidavits have been offered that complainant repeatedly solicited defendant's customers to come to it; but it is not shown in any of these solicitations that complainant exceeded the limits of loose morality of the law of trade, or that they were accompanied by offers of indemnification if customers would break their contracts with defendant.

The court cannot grant the prayer of the complainant to stop the solicitation of its customers within lawful limits, for that would be offensive to the policy of the law, and would be building up, rather than destroying, monopoly. To enjoin such solicitation would be to enjoin the "reasonable competition" the Constitution secures to every one. The court cannot say to the defendant it shall not make lawful solicitations in the future of complainant's customers, because defendant in the past has attempted to build up its business and compete in an unlawful way. It cannot prevent the circulation of the alleged defamatory matter, because it has no jurisdiction to determine such questions in advance of a trial at law. Under the circumstances the court should prevent the wrong of indemnifying complainant's customers for breaching their contracts, and has the power to do so.

All the prayers for relief must be denied, save in the matter of indemnifying complainant's customers against breaches of their contracts, as to which a preliminary injunction will be granted.

## SAVAGE v. SCOVELL.

(Circuit Court, E. D. Kentucky. July 16, 1908.)

## 1. FOOD (§ 2\*)—STATE REGULATIONS—"FOOD."

The fact that a "food" may also be a medicine or possess medicinal properties does not exempt it from the operation of a state statute regulating the sale of foods.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2856.]

## 2. FOOD (§ 2\*)—"CONDIMENT."

A "condiment" is a food and not a medicine.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 2.\*]

## 3. FOOD (§ 2\*)—STATUTORY REGULATIONS.

A manufacturer, who designates an article made and sold by him as a food, is estopped to deny that it is such within the meaning of a statute regulating the sale of food.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 2.\*]

## 4. FOOD (§ 2\*)—STATUTORY REGULATIONS—ARTICLES WITHIN STATUTE—"FOOD OR CONDIMENT."

The "International stock food" is a "food or condiment" within the meaning of the Kentucky pure food law (Laws 1906, p. 282, c. 48), and its sale is subject to regulation thereunder.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 2.\*]

## 5. FOOD (§ 1\*)—STATE INSPECTION LAWS—CONSTITUTIONALITY OF KENTUCKY STATUTE.

The Kentucky pure food law (Laws 1906, p. 282, c. 48), which requires articles of food sold in the state to be labeled to disclose their ingredients and authorizes the director of the agricultural experiment station to take samples from each package for analysis, is not unconstitutional, but is valid as an inspection law. Nor was it rendered invalid by the enactment of the national food and drugs act, which does not conflict with its provisions.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 1.\*]

In Equity. On motion for preliminary injunction.

J. N. Elliott, for complainant.

N. B. Hays, Ky. Atty. Gen., R. M. Allen, and Chas. H. Morris, for defendant.

COCHRAN, District Judge. This cause has been submitted on motion for a preliminary injunction and demurrers, special and general, to the bill.

It is claimed by plaintiff that he is entitled to the relief he seeks because the article manufactured and sold by him is not covered by the Kentucky act involved herein. Laws 1906, p. 282, c. 48. He maintains that said act covers only that which is a food, and said article is not a food, but a medicine. I think the distinction between what is a "food" and what is a "medicine" is clear, and there can be no question that said act covers the former, and not the latter. A "condiment" is a food, and not a medicine. It is therefore covered by the act, and that by express terms, but the act is not prevented from covering that

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

which is a food because it is a medicine also. Conceivably an article may be a food and a medicine both, and that when used in the same way, i. e., when taken internally. Such an article is covered by the act notwithstanding its medicinal quality.

I have considered the evidence carefully and have reached the conclusion that the article of plaintiff's manufacture is a food—probably it is better to say that it is a condiment—and that such is the effect of his representations and claims in regard thereto. Undoubtedly he claims it to be a medicine also, and it may be said that the stress of his claims lies here; but in a real sense it must be said to be at least a "condimental food," and hence that it is covered by the act. Plaintiff is in no position to complain of his article being treated as what he calls it. The evidence shows that his action in naming it a food was not purely arbitrary, but based on reality.

The act itself is not unconstitutional. It is an inspection law, and the states have the right to pass inspection laws. This is expressly recognized in the second clause, § 10, art. 1 of the federal Constitution; but, this apart, a state has power to enact inspection laws, even though it affects interstate commerce, at least in the absence of congressional legislation making a difference in the situation. This is on the ground that Congress by its nonaction has impliedly consented to the enactment thereof, i. e., Congress, instead of regulating interstate commerce in such particular directly, does so through the state Legislature enacting the law. At the time of the passage of the Kentucky act and its going into force, the federal pure food law (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1907, p. 928]) had not been enacted.

The position that the act is valid as an inspection law finds direct support in the case of *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 351, 18 Sup. Ct. 862, 43 L. Ed. 191. The case of *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, is not to the contrary. The law involved there was not an inspection law.

It is claimed that said act is unconstitutional, in that it authorizes the director of the Agricultural Experiment Station to take as much feeding stuff as he might desire, provided he confined himself to two pounds from every package. I do not think that such is the meaning of this provision of the act. An inspection law can properly provide the taking of so much of an article covered by it as is necessary for analysis in order to determine its true nature. This is just as proper as a fee for the inspection. The meaning of this act is that said director may take as much, not as he desires, but as much as is necessary for analysis; but in no event shall it exceed two pounds. It was not intended that the director should have the right to take two pounds in every instance out of every package, whether necessary to make an analysis or not. It is not alleged that in the execution of the law defendant has taken, or intends to take, more from the packages containing plaintiff's article than is necessary to make an analysis.

Again, it is urged that said act has been done away with by the federal law before referred to. It is questionable whether Congress can affect a state inspection law simply by legislation covering the same

subject—whether in order to do so it must not enact legislation under clause 2, § 10, art. 1, of the federal Constitution, expressly revising and controlling same. But, this apart, the two laws do not cover the same territory. The federal law simply covers the subject of adulteration and misbranding. The state law has nothing to do with either. It has to do with the subject of disclosing the ingredients of the articles covered by it. Its policy is to compel a statement of ingredients so that purchasers thereof in Kentucky may know exactly what they are buying. There may be no adulteration or misbranding, i. e., no violation of the federal law, and yet there may be a violation of the state law in not disclosing ingredients.

It follows therefore that the motion for a preliminary injunction must be denied.

Inasmuch as the bill alleges that plaintiff's article is a medicine, and not a food or condiment, and hence not covered by the act, the bill sets forth a good cause of action, unless defendant's point that this is a suit against the state of Kentucky, and hence within the prohibition of the eleventh amendment, is well taken. I do not think that this point is well taken. This is not a suit against the state, but against M. A. Scovell. If the plaintiff's article is not a food, but a medicine, as alleged in the bill, then said defendant has no right to set on foot prosecutions against plaintiff and dealers in his article under said act, and he owes plaintiff a duty not to do so, and plaintiff is entitled to have this duty performed. I have covered this whole subject in a paper read before the Kentucky State Bar Association, on July 8, 1908, at Louisville, to which I refer as setting forth fully my views on it. It took considerable time to prepare this paper, and this accounts somewhat for my delay in disposing of this case. The subject was in so much confusion that I could not handle a case successfully involving the question of maintainability of suits against the executive officers of a state without a thorough investigation on my own part covering the whole ground.

The demurrers to the bill are overruled.

If parties agree, the cause can be submitted on bill, answer, and affidavits, as was done in the case of Allegheny Oil Co. v. Snyder, 106 Fed. 764, 45 C. C. A. 604. If so, a decree will be entered dismissing plaintiff's bill at his costs. Of course, the temporary restraining order granted herein ceases as of this date to be of any force.

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In re COHN.

(District Court, D. North Dakota, S. E. D. July 28, 1909.)

1. BANKRUPTCY (§ 458\*)—ORDER OF REFEREE—REVIEW—EXCEPTIONS.

Where a bankrupt filed no exceptions to a referee's order determining his right to exemptions, the bankrupt could not object to any of its provisions on certificate for review.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 918; Dec. Dig. § 458.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. PUBLIC LANDS (§ 140\*)—EXEMPTIONS.**

Under Rev. St. § 2296 (U. S. Comp. St. 1901, p. 1398), declaring that a homestead acquired in public land should not become liable to the satisfaction of any debt contracted prior to the issuing of a patent therefor, the issuance of the patent, and not the issuance of a final receipt, to the homesteader entitling him to a patent, fixes the time from which the property may become liable for subsequent debts of the homesteader.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 379; Dec. Dig. § 140.\*]

**3. BANKRUPTCY (§ 396\*)—EXEMPTIONS—STATUTES—REPEAL.**

Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), providing that the act shall not affect the allowance to bankrupts of exemptions prescribed by state laws, deals solely with laws of the states, and does not repeal or affect Rev. St. § 2296 (U. S. Comp. St. 1901, p. 1398), providing that a federal homestead shall not be liable for debts of the homesteader before the issuance of a patent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 668; Dec. Dig. § 396.\*]

**4. BANKRUPTCY (§ 396\*)—RIGHTS OF TRUSTEE—FEDERAL HOMESTEAD.**

Since, under Rev. St. §§ 2288, 2291 (U. S. Comp. St. 1901, pp. 1385, 1390), a homestead entryman could not transfer his homestead, and by section 2296 (page 1398) creditors prior to patent could not subject the homestead to their claims, a homestead to which no patent had issued, though a final receipt had been granted, did not pass to the entryman's trustee in bankruptcy under Act July 1, 1898, c. 541, § 70(5), 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), declaring that the trustee is vested with the title of the bankrupt to all property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied on and sold under judicial process.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 668; Dec. Dig. § 396.\*]

**5. BANKRUPTCY (§ 4\*)—NATURE AND PURPOSES.**

The purpose of the bankruptcy act is to give creditors only such rights which would have been theirs if bankruptcy had not supervened, and to save to the bankrupt and his family every right and exemption which would have been theirs as against creditors enforcing their claims by ordinary judicial process.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 4.\*]

J. K. Murray and Stambaugh & Fowler, for bankrupt.

J. P. Williams and Engerud, Holt & Frame, for creditors and trustee.

**AMIDON**, District Judge. The above bankrupt filed his voluntary petition in bankruptcy on the 5th day of December, 1908. About the 1st of July, 1908, he made final proof upon a government homestead, and received his final receipt entitling him to a patent therefor. All debts scheduled by the bankrupt were incurred prior to the date of his making such final proof. In his schedules he claimed the homestead as exempt both under the laws of North Dakota and under section 2296 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1398). The trustee set the land off to him as his homestead, under the state laws. One of his creditors filed exceptions before the referee to this action of the trustee, and asked that an order be entered denying the bankrupt's right to the land as a homestead, and directing the trus-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tee to take possession of the same and apply it to the satisfaction of the bankrupt's debts. This question was fully presented before the referee, by counsel for the respective parties, upon voluminous testimony. As the result of such hearing, the referee found that the bankrupt prior to the time of the filing of his petition in bankruptcy had removed from the state of North Dakota, in which the homestead is situated, and taken up his residence in the city of Minneapolis, in the state of Minnesota, and that he had thereby abandoned his homestead as an exemption under the laws of the state of North Dakota, and lost all right to claim the same as exempt under those laws; but the referee further held that the homestead was exempt from the claims of all creditors whose indebtedness was incurred prior to the date of the making of final proof, and entered an order so declaring, and directing that the homestead be applied only to the payment of those debts, properly proven, which had arisen since the bankrupt made final proof for his homestead. A creditor whose claim accrued prior to the making of such final proof excepted to this order of the referee, and at his request the order has been certified to the court for review.

The bankrupt has filed no exceptions to the order of the referee, and cannot therefore be heard to object to any of its provisions. If this were not the case, it is quite likely that he would have just cause to complain of the order because it limits his exemption from debts to those which accrued prior to the making of his final proof; whereas, section 2296 of the Revised Statutes declares that the homestead shall not "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." There is no evidence presented here showing that any patent has ever been issued. It is the issuance of the patent which fixes the time when the property shall become liable to subsequent debts of the homesteader. *Barnard v. Boller*, 105 Cal. 214, 38 Pac. 728; *Wallowa National Bank v. Riley*, 29 Or. 289, 45 Pac. 766, 54 Am. St. Rep. 794.

Counsel for the objecting creditor contends that section 2296 of the Revised Statutes is repealed by sections 6 and 70, subd. 5, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 548, 565 [U. S. Comp. St. 1901, pp. 3424, 3451]). Section 6 simply provides that the bankruptcy act shall not affect the allowance to bankrupts of the exemptions which are prescribed by state laws. Plainly this section deals solely with state laws. It is declaratory in its character. Its purpose is to save exemptions allowed by state laws, not to abolish those allowed by federal law. Its language is affirmative, and ought not to be given a negative effect, in the absence of a clear manifestation of such a legislative purpose. *Potter's Dwaris*, 69. Section 70 declares that the trustee shall be vested with the title of the bankrupt (except property which is exempt), to all "(5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." The land in question does not come within the provisions of either branch of this section. Down to the time of final proof, the entryman could not transfer his homestead. Sections 2288 and 2291, Rev. St. (U. S. Comp. St. 1901, pp. 1385, 1390). Nor could any of the creditors whose claims have been proven have levied upon or sold the home-

stead for the collection of their debts. Such action is clearly forbidden by section 2296 of the Revised Statutes. *Seymour v. Sanders*, Fed. Cas. No. 12,690; *Baldwin v. Boyd*, 18 Neb. 444, 25 N. W. 580; *Shoemaker v. Stimson*, 16 Wash. 1, 47 Pac. 218; *Jean v. Dee*, 5 Wash. 580, 32 Pac. 460; *Brown v. Kennedy*, 12 Colo. 235, 20 Pac. 696. There is certainly no such inconsistency between the bankruptcy act and section 2296 of the Revised Statutes as would sustain a repeal of section 2296 by implication. *Great Northern Railway Co. v. United States*, 155 Fed. 945, 961, 84 C. C. A. 93, and cases there cited.

In some of the cases there are general remarks to the effect that the state law establishes the rule of exemption under the bankruptcy act, and that only such exemptions in value and kind as those laws permit can be claimed by the bankrupt. *Steele v. Buel*, 104 Fed. 968, 44 C. C. A. 287; *In re Manning* (D. C.) 112 Fed. 948; *In re Wunder* (D. C.) 133 Fed. 821. The question before the court in these cases, however, was whether a specific piece of property came rightfully within the terms of the state law granting exemptions. In none of them was the question raised whether a bankrupt was entitled to the protection of the few federal laws granting to him special rights as against his creditors. The question here presented therefore must be determined, not upon such general observations as are found in these cases, but upon the provisions of the statutes themselves. For example, Rev. St. U. S. § 1628 (U. S. Comp. St. 1901, p. 1122), declares that military uniforms, arms, and equipments shall be exempt from all judicial process. These articles are not exempt under many of the state laws. Could it be reasonably contended that such articles pass to the trustee in bankruptcy because they are not covered by state exemption laws? I think not. The cardinal principle of the bankruptcy act is to grant to creditors only those rights which would have been theirs if bankruptcy had not supervened, and to save to the bankrupt and his family every right and exemption which would have been theirs as against creditors enforcing their claims by ordinary judicial process. *Thomas v. Woods*, 170 Fed. —. This principle should not be departed from except in obedience to a command of the statute which is altogether clear. Such feeble inconsistencies as are here brought to the notice of the court would afford no justification for such action.

The decision of the referee must be affirmed, and it is so ordered.

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#### THE DOWNER.

(District Court, S. D. New York. June 4, 1909.)

#### SHIPPING (§ 166\*)—WHO ARE "PASSENGERS"—INJURY TO LICENSEE.

Personal injury to a ship carpenter employed on the steamer *Georgic* through falling into a hatch in the after deck of the tug, by the cover giving way, while being taken by her to New York after the completion of his work on the steamer. *Held* that the libellant could not be deemed a

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

passenger and he could not recover without showing negligence on the tug's part, which he failed to do.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 166.\*

For other definitions, see Words and Phrases, vol. 6, pp. 5218-5227; vol. 8, p. 7748.]

(Syllabus by the Judge.)

Warner & Williams, for libellant.

Alexander & Ash, for The Downer.

ADAMS, District Judge. This action was brought by Thomas Carroll, to recover for personal injuries alleged to have been received through the giving way of a manhole cover of a hatch in the after deck of the tug, upon which he stepped, as he was preparing to disembark after being taken, in company with a number of others, as a passenger, on a voyage to Pier 49, Hudson River, from a steamer down the bay. The libel alleges that Carroll was a ship carpenter in the employ of the White Star Line, and in the performance of his duties, on the 4th day of March, 1908, he was engaged in putting up cattle pens on the steamship Georgic; that the work was not finished when the sailing time of the steamer arrived and those engaged therein continued it until the steamer reached a point near the Narrows; that the White Star Line engaged the tug to follow the steamer down the bay and bring back to said pier the libellant and those working with him. The libel further alleges that when the tug reached her destination, in order to get ashore it became necessary for Carroll to cross the after deck of the tug and in doing so to step upon the manhole cover, which was in an unsafe and insecure condition, so that when Carroll stepped upon it, it tilted and he fell into the hatchway, with his right leg in the opening and his left leg on the other side of the cover. The accident caused him severe pains, loss of wages and permanent injuries, for which he claims \$10,000.

After some denials, the claimant alleges:

"Third: On or about the 4th day of March, 1908, the steamtug 'Downer' was engaged by the White Star Line to meet its steamship 'Georgic' in the Upper Bay and take off some men who were on board of her and bring them back to Pier 49, North River. The 'Downer' is a wooden harbor tug, constructed and fitted in the usual and customary manner and was in every respect well and sufficiently manned and equipped for the service upon which she was engaged. On her after end, and just forward of her hawser rack, there is a small hatch or opening in her deck, which leads to a locker in her hold. Between this hatch and the after end of the house, there is a large space of clear unobstructed deck, affording an absolutely safe passage for all persons across the vessel from one side to the other. Between the forward end of her house and her bow there is also a large clear unobstructed deck, affording a safe means of passing across the vessel from one side to the other. There was no occasion for any person on board of the tug, except the crew in the management of their hawser to go near, to the hatch aforesaid.

Fourth: Upon information and belief, in conformity with the employment aforesaid, the steamtug 'Downer' met the steamship 'Georgic' off Robbins Reef, took a number of men on board from her, brought them back and safely landed them at Pier 49, North River. During the performance of these services, as was necessary and proper, a portion of her towing hawser was on the hawser rack, and ran thence through the hatchway aforesaid into her locker,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



where the balance of it was coiled, and the cover was off the hatch lying on deck. The weather was clear; it was about mid day; the condition of the hatch and hawser was perfectly visible; and, if libellant was on board the tug, and sustained the injuries complained of in the libel, the same were caused through his own gross negligence and carelessness.

Fifth: Upon information and belief, when said men from the 'Georgic' came aboard the 'Downer', they were observed and counted by the master of the tug, and as they went ashore they were also observed and counted by him. No suggestion or claim was made by the libellant at that time, that he had sustained injuries in any manner while on board of the tug and all of them passed from the tug to the dock in apparently the same physical condition as they were when they came on board."

The testimony shows that a gang of carpenters and stevedores were at work on the steamer Georgic, fitting up some cattle pens, when her sailing time came, and in order to complete the work, they remained on the steamer until she was some distance down the bay. The tug Downer was employed by the White Star Line, to which the steamer belonged, to accompany the steamer and take the men off when they were through with the piece of work upon which they were engaged. This occurred when the steamer was in the vicinity of Robbins Reef and the men then went on the tug to be taken back to Pier 49. The libellant and all of the others remained on the deck of the tug, the libellant seating himself on the after towing bitts, facing towards the stern of the boat. He remained there until the tug reached the pier, when in attempting to go ashore, he crossed a hatch, which was partly concealed by its cover. He placed his foot and rested his weight upon the cover, which tilted up, permitting his leg to go into the hole and causing the cover to strike his groin, with the result that he received painful and serious injuries.

The theory on the part of the libellant is that being a passenger, he was entitled to all the care that a passenger is ordinarily entitled to. The difficulty with that contention is that the relation of passenger and carrier has not been established. If the libellant has remained on the Georgic and received injuries there, it would scarcely be urged that he had a passenger's right. He was an employé of the White Star Line, which furnished him with an ordinarily safe place to work and when he was transferred to the Downer, he was still such an employé and was being transported from his work back to New York, also in an ordinarily safe place.

It is said in 5 Cyc. 486 that:

"A passenger, in the legal sense of the term, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to payment of fare, or that which is accepted as an equivalent therefor."

There was no suggestion here of a contract of any description to pay a fare of any kind to the tug for the transportation. The tug's general business was that of towage, or work of that character. She was hired by the hour to perform such service of the kind as the White Star Company might require and in the course of this employment, she was directed to transport the libellant and his fellow workmen from the Georgic to the pier. There was no contractual relation between the libellant and the tug. The only contract in which the tug entered was the one mentioned, under which she was directed

by her employer to transfer the men to the pier. It seems quite evident that the libellant was not entitled to the care which should be given to passengers.

It remains to be determined whether there was any negligence on the tug's part which would entitle the libellant to recover damages for the results of his accident.

It appears that the libellant selected his own location on the boat. If he had desired to go within the cabin or any part of the house structure, no doubt, permission could have been obtained upon application to the master, but the libellant did not consider it worth while to make the request and seated himself as has been described. The hatch into which he subsequently fell was within a couple of feet of the bitts. It was partly concealed by the cover which had been placed on it, leaving room, however, for the hawser which ran into the hatch and kept the lid up from  $1\frac{1}{2}$  to 2 inches. The members of the crew have testified that they did not put the cover on the hatch and it has been suggested that it must have been done by some of the libellant's co-servants but I do not consider this aspect of the case is of much importance. There was sufficient in the appearance of the hatch as covered to excite the notice and apprehension of an ordinarily observant person. It was evidently the duty of the libellant to look about him and see where he was stepping. Ropes were lying on the after deck and its whole condition showed that it was not a place to be moving around without careful observation. I am unable to see that there was any such failure of duty on the part of those in charge of the tug as would constitute negligence imputable to her. They were pursuing the usual course in the navigation of the tug and the arrangement of the deck, and the libellant was or should have been familiar with it, at least sufficiently so as to cause him to be vigilant, in which event, there would have been no accident. The accident was primarily due to the libellant's own negligence.

The libel is dismissed.

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#### THE KRONPRINZESSIN CECILIE.

(District Court, S. D. New York. June 10, 1909.)

##### SHIPPING (§ 81\*)—SWELL DAMAGE—EVIDENCE.

The steamship was obliged to stop at Quarantine and lost her headway, so that it was necessary to put her engines at half speed to regain steerage way. In doing so, she created a swell which caused damage to a tug and tow entering the channel to Greenville. *Held* that the steamship was in fault.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 345; Dec. Dig. § 81.\*]

Liability of vessel for injuries caused by creation of swell, see note to The Asbury Park, 78 C. C. A. 3.]

(Syllabus by the Judge.)

Robinson, Biddle & Benedict, for libellant.

Choate & Larocque, for claimant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ADAMS, District Judge. The libellant, the Long Island Railroad Company, the charterer of the tug Patchogue and Car Float No. 14, brings this action against the steamship Kronprinzessin Cecilie, a North German Lloyd steamer, to recover the damages caused to the former vessels by swells from the latter on the 14th of January, 1908. It is alleged that the tow was proceeding from Long Island City to Greenville, New Jersey, and when in the entrance of the channel to the latter place and heading to the westward, the steamship passed, going up the bay, with such great speed and so near that swells were caused by which the tug and float were injured to the extent of \$4,000.

The answer of the steamer, after some admissions and denials, states:

"Seventh: It alleges that on the day in question the steamship 'Kronprinzessin Cecilie' passed up the main ship channel from Quarantine to her pier at Hoboken, New Jersey, proceeding at all times at an exceedingly reasonable rate of speed; that in fact she barely maintained steerage way; that said steamship at all times observed the rules of the road and proceeded with due regard to other shipping and that if on the day in question the steamtug 'Patchogue' or carfloat No. 14 sustained any damage, the same was not attributable in any way to any negligence, carelessness or improper conduct on behalf of those in charge of said steamship 'Kronprinzessin Cecilie' but that the same was caused or contributed to by the negligence and incompetence of the master, officers and crew of said steamtug and carfloat, as upon the trial will more fully appear."

It appears that the float was 267 feet long and 36 feet wide. The tug was 101 feet long and 25 feet wide. There was a wind of about 12 miles an hour from N. W. by N. The tug was on the starboard side of the float, her stem being about amidships and her stern extending to within about 15 feet of the stern of the float. She was made fast by lines running from the tug's nigger head to a point forward on the float, and by a towing strap running from the side bitts of the tug to the side post of the float, and another set of lines running from aft on the tug to another post on the float. When all the lines were made fast, they were tightened by a winch on the tug in the customary manner. The tow came around through the East River and turned into the Greenville Channel, going under a slow bell. Just before the accident she stopped her engine.

The steamship, a vessel of about 20,000 tons, 707 feet long, drawing 26 feet, was passing up to her pier in Hoboken on one of her regular west bound trips. She took a pilot at Sandy Hook and proceeded slowly to the Quarantine Station, arriving there at 10:40 a. m. She left at 11:03, with the mail boat alongside, engaged in the transference of the mails. This, and some other boats which were alongside, were cast off shortly after leaving the station. It was then found that the ship had lost steerage way and in order to regain it, half speed was deemed necessary by her navigators and at 11:41 both her engines were put at half speed ahead and remained so until 11:53. When her engines were put at half speed, the steamer was about opposite Robbins Reef. At 11:53 she slowed again, and went to her dock. At 11:56, she passed Liberty Island. Going at half speed, with 6 of her 19 boilers out of commission, and the steam allowed to run down, as was usual in entering port, she covered 2 nautical miles,

or more, the distance between a point opposite Robbins Reef and a point opposite Liberty Island, in 15 minutes, a speed at the rate of something slightly over 8 nautical miles an hour, and it is shown that when she started at half speed she was so nearly stopped that her steerage way was practically lost and for 3 minutes just before reaching a point off Liberty Island, her engines were at slow again. The master stated that the maximum speed under a half speed order did not exceed 8 knots through the water, which allowing for a 2 knot ebb tidal current would be 6 knots over the ground, but what the speed over the ground was is not of great importance as it is evident that the speed through the water is the force that creates a displacement wave.

Having covered the distance in the time mentioned, the inquiry is whether such speed was sufficient to create an injurious swell. She started under half speed from a position in which she was practically stopped. The engineer said it would take about 2 minutes for the engines to obtain the half speed number of revolutions, and during the last 3 minutes of her run up to Liberty Island, she was under a slow bell. It is evident, therefore, that in passing the point where the swell was encountered, she was going considerably faster than the average of a little over the 8 knots mentioned, fast enough in fact to create a swell which proved injurious to the tug and tow in the manner described, because there can be no question that the steamer did cause such a swell.

It is not very material, however, what the speed of the steamer was. In discussing the speed of *The Majestic*, 48 Fed. 730, 1 C. C. A. 78, Judge Lacombe said, speaking for the appellate court in this district:

"Be that as it may, however, it is plain, upon the proof, that a wave was thrown up by the steamer, which made navigation unsafe for the canal-boat, although she was, so far as appears, a proper craft to navigate the waters of the upper bay, and was attached to her tug in a proper way for towing with the natural conditions of wind and waves, such as they were that day. If, when moving at seven knots an hour, and the distance of half a mile, the *Majestic* produces such results, then there is something in her size or build which makes it necessary for her officers to be watchful of craft they pass at that distance, as well as of those in the immediate vicinity, and to regulate her motions accordingly. It will not do to say that the swell that she throws is no higher than such as are produced by a high wind in these waters. A high wind had not, on this particular day, rendered the bay unsafe for river craft. They were entitled to navigate there, and the proposition cannot be maintained that harbor waters may be put at all times and at all seasons in a perilous condition for smaller craft, by the rapid movements of large ocean steamers, as they are occasionally by the prevalence of a gale of wind. Such waters are not to be appropriated to the exclusive use of any one class of vessels. We do not mean to hold that ocean steamers are to accommodate their movements to craft unfit to navigate the bay, either from inherent weakness, or overloading, or improper handling, or which are carelessly navigated. But of none of these is there any proof here, and, in the absence of such proof, we do hold that craft such as the libellant's have the right to navigate there without anticipation of any abnormal dangerous condition, produced solely by the wish of the owners of exceptionally large craft to run them at such a rate of speed as will insure the quickest passage. To hold otherwise would be virtually to exclude smaller vessels, engaged in a legitimate commerce, from navigating the same waters."

This language is very appropriate for the case under consideration. There is no doubt that the steamer caused a wave which proved injurious to these boats. Probably the steamer ordinarily in passing up the bay does so at such a moderate speed that no injurious waves are caused but in this instance, doubtless owing to the detention at Quarantine and the necessity for obtaining control of the steamer again, she was put at a rate of speed necessary for that purpose, but such necessity is no excuse for the damage caused to the tug and tow. I see no fault on the part of the tug. She slowed and stopped her engines when she saw the wave coming. There was not sufficient time or apparent necessity for casting off her tow.

Decree for the libellant, with an order of reference.

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NEW YORK MILLINERY & SUPPLY CO. v. HAMBURG-AMERIKANISCHE  
PACKETFAHRT-ACTIEN-GESELLSCHAFT.

(District Court, S. D. New York. June 10, 1909.)

CARRIERS (§ 59\*)—DAMAGE TO CARGO—BILL OF LADING.

Where a carrier receives goods for transportation knowing, or having reason to know, that some of them are not in good condition and issues a bill of lading reciting that they are "in good order and condition" and the bill of lading passes into the hands of an innocent purchaser for value, the carrier is not permitted to assert the contrary of the bill of lading statement.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 179; Dec. Dig. § 59.\*]

(Syllabus by the Judge.)

Kneeland & Harison, for libellant.

Wheeler, Cortis & Haight, for respondent.

ADAMS, District Judge. This action was brought by the New York Millinery & Supply Company against Hamburg-Amerikanische Packetfahrt-Actien-Gesellschaft to recover the damages it sustained, said to amount to \$3,341.32, by reason of the contents of 92 cases of straw hats being found damaged upon delivery in New York the 18th of November, 1907. The shipment was made on the 28th of October, 1907, at Genoa, Italy, by the respondent's steamer Batavia. The libellant in addition to the ordinary averments of the purchase of the goods near Florence, Italy, and the issuance and delivery of a bill of lading by the respondent, acknowledging the receipt of the merchandise in good order and condition, alleged as follows:

"VII. That the respondent has informed the libellant that said goods were received on board the respondent's said steamer at Genoa during rain and some of them were wet and damaged by water when so received, that the statement in said bill of lading that said goods were shipped in good order and condition was false and untrue, and at the time of making it was known to be false and untrue to the respondent or its agents signing said bill of lading, who then received from said F. Henry Humbert a written request for a clean bill of lading, by which request said Humbert agreed to take upon himself the responsibility for any claim that might be presented to the respondent by the consignee of said goods on account of their being wet and damaged and not

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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in good order or condition at the time of shipment. That the libellant accepted said goods in reliance upon said bill of lading and paid for them in reliance thereon without any deduction for damage, and that the libellant does not know whether the information so received by it from the respondent as to the time, place and manner of the occurrence of said damage is or is not true and correct, nor does the libellant know when, where or how said damage occurred, except as is hereinbefore alleged by it."

The answer admits the shipment of the goods, the delivery of the bill of lading, and that at the time of the delivery it received from Humbert a written request for a clean bill of lading and that he executed the indemnity mentioned in the seventh article of the libel. It alleges that it has no information sufficient to form a belief as to several articles of the libel and therefore denies them.

It appears from the testimony that the goods had been purchased by the libellant from Augusto Filippinni of Brozzi, near Florence, Italy, and had been shipped at Genoa by the vendor's forwarding agent, F. Henry Humbert. The respondent issued to the latter its bill of lading, dated October 28, 1907, acknowledging the receipt of the merchandise "in good order and condition" and agreeing to deliver it to the libellant in New York. When they were delivered, it was found that 92 out of the 147 cases receipted for were damaged by water, while the cases remained dry on the outside, showing no signs of damage to the contents. The hats were damp and warped and in many cases heavily mildewed and in some instances water actually ran out of the bundles after the cases were opened.

It is not clear where the damage occurred but in any event an explanation was due from the carrier. No such explanation is given other than what appears in some correspondence introduced in evidence. A letter produced by the respondent and introduced in evidence by the libellant, was as follows:

"Translation.

Hamburg-American Line,  
Freight Department.  
Mr. F. Henry Humbert.  
B/L 85

Genoa, October 29th, 1907.

Please hand over to me the B/L for 151 cases straw goods, shipped by me per s/s 'Batavia' without putting any observation on same, taking upon me the responsibility for any claim that might be presented to you by the consignee on account of the following observations of the officer on board.

The Shipper

[Signed] F. Lanza

(Genoa Manager of the firm F. H. Humbert)

Divers cases wet.  
Cases fragile.  
No 574 & 584 less in dispute."

This letter was forwarded to the New York agents of the respondent with a request that it should not be shown to the representatives of the libellant. There was no testimony to show that any damage had been received by the goods while in the possession of the respondent, and doubtless the true explanation is that they were damaged when shipped and known to be so by the respondent, or, at least, it was put upon inquiry. The bill of lading therefore was incorrect in stating that the hats were in good order and condition. The libellant

had no knowledge of the falsity of the bill of lading and relied upon it in making its payment for the hats.

The case of *Compania Naviera Vascongada v. Churchill & Sim*, 10 Mar. Law Cas. 177, is quite closely in point. There the consignees of a quantity of timber shipped not "in good order and condition" though so receipted for in the bill of lading, were sued by the carrier for freight and counterclaimed for damage to the timber. It appeared that the damage had been sustained prior to the shipment and had actually been noticed at that time; that the consignees had in good faith accepted the bill of lading as evidence of the condition of the timber and paid the vendors the full contract price on the faith of it. It is therefore very similar to this case. Channell, J., in deciding in favor of the estoppel said:

"It seems to me, however, that the case does come within the recognized rules as to estoppel. The statement, as I have pointed out, is one of fact. If not exactly intended to be acted on, it must be known that it would probably be acted on. Bills of lading are transferable, and the object of the shipper in asking for the insertion of the statement that the goods are in good condition at the time of shipment is clearly rather to have evidence to offer to his transferee than for his own direct benefit. The advantage of what is known as a clean bill of lading is obvious, and I think it would be idle for a master of a ship to say that he did not contemplate a purchaser of the goods acting on the statement that the goods were shipped in good condition."

A respondent cannot ordinarily be expected to know about the condition of the contents of the packages but here it did know and took the chances of delivering packages as good and sound when it was advised that, in all probability, there would be a claim by reason of some of the cases being wet, etc. I think that the libellant's claim is well established.

Decree for the libellant, with an order of reference.

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PENNSYLVANIA SUGAR REFINING CO. v. AMERICAN SUGAR REFINING CO. et al.

(Circuit Court, S. D. New York. May 20, 1909.)

DEPOSITIONS (§ 84\*)—RETURN—CROSS-EXAMINATION.

Where the failure of defendant's counsel to appear at the taking of a deposition arose from a misunderstanding caused by unwarranted reliance on statements in a letter of the witness' attorney, and it did not appear that plaintiff would be prejudiced by the return of the deposition for cross-examination, except to the extent of the expense thereof, defendant's motion for return would be granted on condition of defendant's paying the charges of the notary and stenographer and a fee of \$50 to plaintiff for counsel on such examination.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 84.\*]

Irregularities in taking or return of depositions as ground for exclusion as evidence, see note to *Columbus Ry. Co. v. Patterson*, 73 C. C. A. 608.]

On Motion for an Order Directing the Return of Depositions to Permit Cross-Examination.

See, also, 160 Fed. 144.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Battle & Marshall, for plaintiff.  
Parson, Closson & McIlvaine, for defendants.

NOYES, Circuit Judge. It is apparent from the affidavits that the failure upon the part of the counsel for the defendants to appear at the taking of the deposition arose from a misunderstanding. They undoubtedly relied upon the statements in the letter of the witness' attorney, however unwarranted they may have been. Counsel for the plaintiff acted entirely properly and within their rights in proceeding with the deposition, and were I satisfied that the plaintiff would be prejudiced in any other way than that of expense by a cross-examination at the present time, rather than at the time of the direct examination, I should be disinclined to grant this motion. But after an examination of the deposition I cannot see that the plaintiff will be so prejudiced. The plaintiff, however, should not be put to any expense by this delay.

The motion is granted, and the deposition may be returned for the purpose of permitting the cross-examination and redirect examination of the witness, provided the defendants pay the charges of the notary and stenographer in taking the same, and also pay \$50 to the plaintiff for its counsel fees upon such examination. The time for the further examination authorized by this order is fixed for May 27, 1909, at 11 o'clock a. m., at the place named in the original order. The parties are at liberty, however, to agree upon another time. If such further examination be not had, the deposition may be returned in its present form.

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VIGNERON et al. v. AUTO TIME SAVER REPAIR KIT CO.

(Circuit Court, D. Massachusetts. June 23, 1909.)

No. 486.

EQUITY (§ 296\*)—PLEADING—SUPPLEMENTAL PLEADINGS.

An original bill, in the nature of a supplemental bill, filed by a complainant to bring in new facts, where a supplemental bill would have been proper, may be allowed to stand, where it is stipulated that proofs previously taken may be used, so that the defendant is not prejudiced.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 586; Dec. Dig. § 296.\*]

In Equity. On demurrer.

Emery & Booth and Lawrence A. Janney, for complainants.

Roberts, Roberts & Cushman and Charles D. Woodberry, for defendant.

LOWELL, Circuit Judge. The bill of complaint as originally filed alleged that Vigneron was the patentee and the Auto Goods Company exclusive licensee under the patent. After the bringing of the bill, Vigneron alleged his assignment of the patent to the Auto Goods Company, and upon his petition, with the consent of the defendant, he was dismissed from the suit. After taking proofs,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



and at the final hearing, the defendant objected that the suit was not maintainable by the Auto Goods Company, as no license to it had been proved. Without a determination of this objection, the Auto Goods Company thereupon applied for leave to file either a supplemental bill or an original bill in the nature of a supplemental bill, in order to set forth the conveyance of the patent from Vigneron to the Auto Goods Company. This was allowed upon terms; but the complainant was required to elect which form of bill it would file, and it elected the latter. To this bill the defendant has demurred, on the ground that a supplemental bill should have been employed, and that the form of bill selected by the complainant is inadmissible. The demurrer is addressed to the pleadings without regard to the evidence taken.

The original bill in effect alleged a division of the title to the patent between the complainants. The substantial right resided in the Auto Goods Company; the legal title, in Vigneron. It was said at the argument that the proofs taken show no evidence of the license, and so no evidence of the complainant's right to sue, as alleged in the original bill; but, as has been said, the court cannot now look at the evidence. The evidence has not crystallized into a finding by the court. It follows that the second bill alleges a conveyance of a part of the patent rights, which part was originally held by one complainant, to the other complainant, which originally held the rest of the title. Under these circumstances, the authorities seem to hold that a supplemental bill is admissible. This is an easier proceeding for the complainant than an original bill in the nature of a supplemental bill. He is not required under the former to take proofs anew, as he must do under the latter. The complainant has here made the more difficult choice. His amended bill before the court contains all the substantial allegations required both of an original bill in the nature of a supplemental bill, and of a supplemental bill proper, although it is entitled as the former exclusively. If the complainant will execute a stipulation (as his counsel offered in open court) to admit under the new bill the proofs taken under the old one, I do not see in what respect the defendant will suffer by the overruling of its demurrer, whatever the amended bill should technically be entitled. *Ross v. Ft. Wayne* (C. C.) 58 Fed. 404, 406. That a complainant should get the benefit of an original bill by filing a supplemental bill is a serious matter. That he should not lose the benefit of a supplemental bill, merely by styling it an original bill, seems reasonable, and as above guarded, cannot hurt anybody.

In his argument, counsel for the complainant suggested that his election to file an original bill in the nature of a supplemental bill was caused by an intimation from the court. In this suggestion he is altogether in error. No such intimation was given. The election was his own, and the court is in no way responsible for it.

## NEW YORK BREWERIES CO., Limited, v. JOHNSON.

(Circuit Court, S. D. New York. May 13, 1909.)

## CORPORATIONS (§ 657\*)—FOREIGN CORPORATIONS—STATE LAWS—REGULATION.

General Corporation Law (Laws N. Y. 1904, p. 1250, c. 490), § 15, providing that no foreign stock corporation other than a money corporation shall do business in the state without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in the state, and that no such corporation shall maintain any action in the state on any contract made therein unless prior to making the contract it shall have procured such certificate, does not make void the contracts of foreign corporations not having complied with the act within the state, but merely excludes them from the state courts, leaving open to them the federal tribunals.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 657.\*]

On Demurrer to Separate Defense.

Guggenheimer, Untermeyer & Marshall (Abraham Benedict, of counsel), for plaintiff.

Appell & Taylor, for defendant.

NOYES, Circuit Judge. As indicated upon the argument, I think that the statute set up in the separate defense (section 15 of the general corporation law of New York [Laws 1904, p. 1250, c. 490]) does not make void the contracts of foreign corporations not complying with its provisions, but merely excludes such corporations from state courts and leaves open to them the federal tribunals. *Groton Bridge, etc., Co. v. American Bridge Co.* (C. C.) 151 Fed. 871, is approved and followed.

The demurrer is sustained, with costs.

## BEYER v. HAMBURG-AMERICAN S. S. CO.

(Circuit Court, S. D. New York. May 13, 1909.)

## 1. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—SAFE PLACE—PLEADING.

Since the law governing the relation of master and servant imposes the obligation on the master to furnish a safe place for a servant to work, a complaint for injuries, alleging that the master failed to furnish a safe place, was not objectionable for failure to charge that he contracted to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 825-832; Dec. Dig. § 258.\*]

## 2. NEGLIGENCE (§ 1\*)—WHAT CONSTITUTES.

Failure to do a duty is negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. MASTER AND SERVANT (§ 86\*)—INJURIES TO SERVANT—WHAT LAW GOVERNS.**

An action for injuries to a servant by the master's failure to furnish a safe place to work, being founded on tort, is governed by the law of the place where the accident occurred.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137; Dec. Dig. § 86.\*]

What law governs master's liability for injuries to servant, see note to Mexican Cent. Ry. Co. v. Jones, 48 C. C. A. 232.]

**4. MASTER AND SERVANT (§ 86\*)—INJURIES TO SEAMEN—FOREIGN LAW.**

Where a seaman was injured on a German vessel, carrying the German flag, on the high seas, his right to recover for his master's failure to furnish a safe place to work was governed by the German statute, substituting fixed and certain liabilities for injuries in place of responsibility for negligence, so that compliance therewith constituted a defense to the action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137; Dec. Dig. § 86.\*]

At Law. On demurrer to separate defense.

August P. Wagener, for plaintiff.

Percy S. Dudley, for defendant.

NOYES, Circuit Judge. This is an action by a servant against his master to recover damages arising from the alleged failure of the latter to use reasonable care to furnish the former a safe place in which to work. It is not alleged that the master contracted to furnish a safe place. Such a contract would be most extraordinary. It is alleged that the defendant failed in the performance of its duty as master to furnish a safe place. When the contract of employment was entered into, the law governing the relation of master and servant imposed that obligation. The duty arose out of the relation created by the contract, but it was a duty imposed by law. Failure to fulfill that obligation was a failure in the performance of a duty, and not a violation of contract. Failure to do a duty is negligence; and an action for damages for failure to perform a duty is an action of negligence—an action founded in tort, and not in contract.

The action being founded in tort, the liability of the defendant must be determined by the law of the place where the accident causing the damage sued for took place. This accident occurred upon the high seas, upon a German vessel, carrying the German flag. The law of Germany, therefore, governs the case. Consequently the German statute, substituting fixed and certain liability for injuries in place of responsibility for negligence, and compliance therewith, constitute a good defense to this action.

The demurrer to the defendant's separate defense is overruled, with costs.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## HOWARD et al. v. LUCE et al.

(Circuit Court, W. D. New York. June 3, 1909.)

No. 247.

## 1. MINES AND MINERALS (§ 97\*)—PARTNERSHIPS—PLEADING.

A complaint, after alleging conveyances by which plaintiffs and defendants became tenants in common in certain land containing a gold mine, alleged that after a specified date plaintiffs and defendants were and continued copartners and owners of the property, and under a specified firm name possessed, and continued as partners to develop and manage and mine, the property. *Held* to sufficiently charge the existence of a partnership to work the mine.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 222; Dec. Dig. § 97.\*]

Mining partnerships, see note to G. V. B. Mining Co. v. First Nat. Bank, 35 C. C. A. 515.]

## 2. MINES AND MINERALS (§ 97\*)—PARTNERSHIPS.

Tenants in common of a mine may form a partnership to work it, in which the mine itself may or may not become a firm asset, or they may work the mine in common without a partnership.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 222; Dec. Dig. § 97.\*]

## 3. MINES AND MINERALS (§ 99\*)—PARTNERSHIPS—ACCOUNTING.

Tenants in common having formed a partnership to operate a mine constituting the common property, one partner was entitled to sue his copartners in equity for an accounting.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 223; Dec. Dig. § 99.\*]

## 4. EQUITY (§ 148\*)—BILL—MULTIFARIOUSNESS.

A bill of certain members of a partnership between tenants in common of a mine for the operation thereof alleged a cause of action for an accounting, and also charged that it was claimed by the purchasers of two-tenths of the property that complainants were guilty of fraud in the sale thereof, and asked for an adjudication of such questions in the suit for accounting. *Held* that, such sales having transpired prior to the alleged formation of the firm, the alleged fraud could not be litigated in the suit for accounting, and that the bill was therefore demurrable for multifariousness.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 355; Dec. Dig. § 148.\*]

## 5. INJUNCTION (§ 26\*)—RIGHT TO RELIEF—SUIT AT LAW.

Where a bill by certain members of a firm organized to exploit a mine constituting the common property was demurrable in so far as it sought an adjudication of complainant's alleged fraud in the sale of certain undivided interests in a mine, complainants were not entitled to an injunction restraining the purchasers of such interests from instituting or prosecuting suits at law against complainants to determine such question.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 24; Dec. Dig. § 26.\*]

Bartlett & Chamberlain, for complainants.

Moot, Sprague, Brownell & Marcy, for defendants.

HOLT, District Judge. The object of this action is to obtain an accounting between the parties. The complaint, after alleging va-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rious conveyances by which the complainants and the defendants became tenants in common, in certain proportions, of certain lands in Virginia containing a gold mine, alleges that:

"From and after the 14th day of February, 1907 [the date of the last conveyance of an undivided interest to the defendant Armbrecht], these plaintiffs and the defendants were, and continued, and now are, copartners and owners as such of such property."

And later in the complaint it is alleged that:

"From and after the said 14th day of February, 1907, the plaintiffs and the defendants, under the firm name of Howard Bros., Luce & Co., possessed, and continued as such copartners to develop, operate, and manage, said property, and to engage in mining for gold and in the mining business thereon, until on or about the 1st day of July, 1908."

These allegations, although they are somewhat liable to criticism as stating inferences and conclusions, instead of direct allegations, I think sufficiently allege that a partnership existed between the parties to this suit for the purpose of working the mine. Tenants in common of a mine may form a partnership to work the mine, in which case the mine itself may or may not be put in as a firm asset, or tenants in common of a mine may work it without forming any partnership. *Lindley on Partnership* (7th Ed.) p. 29; *Lindley on Mines*, vol. 2, § 796 et seq; *Costigan on Mining Law*, § 135 et seq. I think the meaning of the allegations in the complaint is that the parties to this action were partners in operating the mine. If they were partners, any one of them is entitled to an accounting. Even if they were not partners, but as tenants in common worked the mine under some joint arrangement, they are probably entitled to an accounting; the question depending upon what the arrangement was. I think, therefore, that the ground of the demurrer that the bill is without equity is not tenable.

The claim that the bill is multifarious is based on the facts that the bill alleges that the undivided tenth interest in the land sold by the complainants to Armbrecht was paid for by the delivery by said Armbrecht of 103 shares of the common stock of the Meridian Light & Railway Company, to be held by the defendant Luce as trustee for the complainants during a period of three years; that the conveyance of the undivided tenth interest to Dunton was paid for by a conveyance of certain land in Holland, Mich.; that Armbrecht and Dunton claim that the complainants were guilty of fraud in the sale of said undivided tenths; and that Armbrecht denies that Luce holds the 103 shares of stock in trust for the complainants. The complaint asks that those questions be litigated and adjudicated in this suit. I do not see that they can be litigated in this action if the defendants object, however desirable it might seem to be to have all the controversies between these parties settled in this suit. The sales of the undivided tenths by the complainants to Armbrecht and Dunton, respectively, appear, from the allegations in the complaint, to have been transactions prior to the formation of the alleged partnership. If Armbrecht and Dunton claim that such purchases were induced by complainants' fraudulent representations, and that

they have a right to rescind the sale and reclaim the land or stock transferred in consideration for such purchases, I do not see that such claims can be properly litigated and determined in this action, the only proper object of which is to settle the partnership accounts. I think, therefore, that the bill is multifarious, and the demurrers upon that ground are sustained, with leave to the complainants to amend the bill within 20 days upon payment of costs.

I think that the complainants' motion for an injunction restraining the defendant Armbricht from prosecuting the suit instituted by him in Mississippi, and restraining the defendant Dunton from bringing any suit of a similar nature, should be denied, for the reasons above stated for holding the bill multifarious. If the questions in controversy between the complainants and the defendants Armbricht and Dunton in respect to the validity of the conveyances made by the complainants to said defendants of their respective one-tenth interests in the mine cannot be properly litigated in this action, there is no reason for preventing any of the parties from litigating those questions in other actions.

The complainants' motion for an injunction is therefore denied.

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UNITED STATES v. PERE MARQUETTE R. CO.

(Circuit Court, W. D. New York. June 17, 1909.)

1. CARRIERS (§ 211\*)—TRANSPORTATION OF CATTLE—FOOD AND REST ACT—CONSTRUCTION—"CONTINGENCIES HEREINBEFORE STATED."

Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), forbids railroads from confining cattle longer than 28 consecutive hours without unloading for rest, water, and feeding, unless prevented by storm or other accidental or other unavoidable unanticipated causes, provided that on the written request of the owner or custodian of that particular shipment, separate from any printed bill of lading or any other railroad form, the time may be extended to 36 hours; it being the intent of the act to prohibit continuous confinement for more than 28 hours except "upon the contingencies hereinbefore stated." *Held*, that "the contingencies hereinbefore stated" included both the case where the carrier was prevented from unloading by storm or other accidental or unavoidable causes and the contingency of the owner having filed a written request extending the time of confinement to 36 hours.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 211.\*]

2. CARRIERS (§ 211\*)—TRANSPORTATION OF LIVE STOCK—FOOD AND REST ACT.

Under Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), prohibiting the transportation of cattle for more than 28 hours without unloading, unless the owner or custodian requests in writing, apart from any printed bill of lading or railroad form, that the time be extended to 36 hours, the shipper of cattle, to justify their confinement longer than 28 hours, must file a written request for each shipment, and may not file a single general request applicable to all future shipments of his cattle.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 211.\*]

John Lord O'Brien, U. S. Atty.

Moot, Sprague, Brownell & Marcy, for defendant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HOLT, District Judge. This action is brought to recover a penalty under Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), entitled "An act to prevent cruelty to animals while in transit," commonly called the "28-Hour Act." The act provides, in substance, that no railroad transporting cattle between the states shall confine them in cars—

"for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated."

The essential facts in this case are that on October 5, 1907, at 12:30 p. m., cattle were loaded on the cars of the defendant company at Deckerville, Mich., consigned to the stockyards at Buffalo, N. Y. The defendant transported these cars out of Michigan, across Canada, and delivered them at Niagara Falls, N. Y., into the hands of the New York Central & Hudson River Railroad Company on October 6, 1907, at 6:50 p. m. The cattle were thus in transit, in the custody of the defendant, without being unloaded for rest, water, and feeding, for a period of 30 hours and 20 minutes. No written request for the extension of the time of this particular shipment was ever made; but some time previous, in the year 1906, the owner of these cattle had filed with the agent of the defendant at Deckerville, Mich., a written request, in general terms, asking that the time of confinement of all future shipments of cattle made by him be extended from 28 hours to 36 hours without rest, food, or water. George L. Jones, the owner of the cattle, went on the same train, taking care of them, and at the time of the shipment of these particular cattle said Jones made a verbal request, by telephone, of the agent of the defendant at Deckerville, that the 36-hour clause, so far as rest, food, and water were concerned, should apply to said shipment. The cattle arrived at Niagara Falls in good condition.

The government claims that a general written request by an owner of cattle that in all future shipments the time of confinement may be extended to 36 hours is not permitted by this act, and that a special written request must be made for such extension, if desired, in the case of each particular shipment, and this case is understood to be a test case to have that question determined. The language of this statute is not very clear. It appears to give an absolute right to any owner of cattle, by filing a written request with the railroad company, to have the time of confinement of his cattle extended from 28 to 36 hours. If an owner has such a right, it does not seem to be very important whether it is exercised once for all by

a single request, applicable to all future shipments, or by filing a separate request in respect to each particular shipment. It is argued that the term "contingencies hereinbefore stated," contained in the final portion of the act above quoted, refers to the contingencies previously referred to of "storm or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." These grounds of excuse for the carrier for not discharging the cattle within 28 hours seem to be occurrences arising after the shipment has begun, which, in most cases, at least, could not be foreseen before the shipment; and I think that the term "contingencies hereinbefore stated" includes both the case where the carrier is prevented from unloading by storm or other accidental or unavoidable causes, which could not be anticipated or avoided by the exercise of due diligence and foresight, and the contingency of the owner having filed a written request extending the time of confinement from 28 to 36 hours.

I think, however, that the provision that the written request must be made by "the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form," tends to show that it was the intention of Congress that, if the time was to be extended to 36 hours, there should be a written request in the case of each particular shipment. The provision that the request should be separate and apart from any printed bill of lading or other railroad form suggests that Congress had in mind the possibility of a railroad carrier inserting a general request of that kind in papers to be signed by shippers, with a view of generally extending the time of confinement of all shipments of cattle from 28 to 36 hours, and I think that Congress therefore intended that the owner or shipper of cattle should exercise his judgment as to the necessity of additional time in a distinct instrument, executed by himself, in respect to each shipment; and this conclusion is strengthened by the concluding statement in the act that it is "the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated." The act is a humane act, intended to prevent cruelty to animals; and the act also has in view the protection of the interests of the owners of the animals and of the public, in preventing their health and condition being injured in transit.

As it is the declared policy of Congress that 28 hours shall be the general term of confinement, and 36 hours only permitted in certain contingencies, I think that no construction of the statute should be allowed which would make it possible for an owner of cattle, either acting in his own interest or at the dictation of a railroad company, by filing a general request applicable to all future shipments, to nullify the general declared intent of Congress by making the term of confinement in all cases 36 hours, instead of 28 hours.

My conclusion is that there should be judgment for the plaintiff for \$100 and costs.



## IMPERIAL COLLIERY CO. v. CHESAPEAKE &amp; O. RY. CO.

## POWHATAN COAL &amp; COKE CO. v. NORFOLK &amp; W. RY. CO.

(Circuit Court, S. D. West Virginia. May 27, 1909.)

Nos. 157, 158.

## COURTS (§ 274\*)—FEDERAL COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT.

A suit in a federal court to enjoin a railroad company from filing and enforcing an interstate rate alleged to be unreasonable, jurisdiction being invoked on the ground that a federal question is involved, can only be brought in the state in which the defendant is incorporated and the district of which it is an inhabitant, unless such objection is waived.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.\*]

In Equity. On motions to dissolve restraining orders.

Z. T. Vinson, E. W. Knight, and Arthur B. Hayes, for plaintiffs.

J. H. Holt, Herbert Fitzpatrick, and Jos. I. Doran, for defendants.

KELLER, District Judge. These cases are before me upon motions, made under a special appearance by defendants, for the dissolution of the temporary restraining orders heretofore granted, because, "as it appears from the face of the bill, the foundation of the jurisdiction is a federal question, and not diversity of citizenship alone," and hence that "jurisdiction cannot be entertained \* \* \* except in the district of which the defendant is an inhabitant, and the bill further discloses that the defendant is not an inhabitant of the district where the suit is brought, but a citizen of the state of Virginia, and an inhabitant of one of the districts thereof." I cannot see how, under any theory of jurisdiction advanced by plaintiffs, the court could acquire jurisdiction over the persons of the defendants, unless that question were waived by the general appearance of the defendants, and no such waiver has here been made. In *re* Keasbey & Mattison Company, 160 U. S. 222, 16 Sup. Ct. 273, 40 L. Ed. 402.

If it be contended that a suit such as the present is maintainable under the saving clause in section 22 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 387 [U. S. Comp. St. 1901, p. 3170]), then clearly the place of suit, not being fixed by any special law, is determined by reference to the general jurisdictional statute of March 3, 1875 (18 Stat. 470, c. 137), as amended and corrected by Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 507), and the case is entirely on all fours with the *Keasbey & Mattison Company* Case just cited, in which Mr. Justice Gray, speaking for the court, after referring to *McCormick Harvesting Mach. Co. v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. Ed. 833, *Ex parte Shaw* (*Shaw v. Quincy Min. Co.*) 145 U. S. 444, 12 Sup. St. 935, 36 L. Ed. 768, and *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942, as establishing the doctrine that "a corporation cannot be considered a citizen, an inhabitant, or a resident of a state in which it has not been incorporated," goes on to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

say (page 229 of 160 U. S., and page 275 of 16 Sup. Ct. [40 L. Ed. 492]):

"Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of different states. But the reasoning on which they proceeded is equally applicable to the other class, mentioned in the same section, of suits arising under the Constitution, laws, or treaties of the United States; and the only difference is that, by the very terms of the statute, a suit of this class is to be brought in the district of which the defendant is an inhabitant, and cannot, without the consent of the defendant, be brought in any other district, even in one of which the plaintiff is an inhabitant."

From all of the authoritative cases upon this subject that I have been able to find I have deduced the following three propositions in regard to the subject of jurisdiction as affected by the act of March 3, 1875, as amended in 1887 and 1888:

(1) That section 1, Act March 3, 1875, as amended in 1887 and corrected in 1888, has no application in its restrictive clauses, either as to place of bringing suit or as to jurisdictional value, to causes of which the Circuit Courts of the United States had, by statutes in force at the time of the passage of the amendatory acts of 1887 and 1888, original jurisdiction "exclusive of the courts of the several states," but is necessarily limited to the terms in which it is worded. *In re Horst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211.

(2) That all civil suits at law or in equity, fairly comprehended in the descriptive terms of that section, except such as were provided for in special and exclusive jurisdictional acts in force prior to the passage of said act as amended and corrected, and such as have been provided for in subsequent acts conferring special (though not necessarily exclusive) jurisdiction upon the Circuit Courts of the United States, are governed by the provisions of section 1, Act March 3, 1875, as amended by Act March 3, 1887, and corrected by Act Aug. 13, 1888, in respect to place of suit and amount in controversy.

(3) That the conferring of jurisdiction upon Circuit Courts of the United States by statutes which do not in terms or by necessary implication describe such jurisdiction as "exclusive" does not have the effect of ousting the jurisdiction of the courts of the several states as described in Act March 3, 1875, as amended in 1887 and corrected in 1888, inasmuch as said act was a general jurisdictional statute, and prospective as well as present as to the subjects to be embraced by it; and hence that, except as specially provided in any such subsequent statute, the place of bringing suit will be governed by the general provisions found in section 1, Act March 3, 1875, as amended by the acts of 1887 and 1888.

In illustration of what I wish to convey I will refer to the interstate commerce act. Under that act section 9 provided for a suit for damages by any person claiming to be damaged by a common carrier subject to the provisions of the act "in any District or Circuit Court of the United States of competent jurisdiction." Here the place of bringing suit is not pointed out, and hence is to be governed by the general law in force determinative of that fact. So, if a suit in equity were brought to restrain the commission of an injury of like character to those for which section 9 provides a legal remedy, the same rule as to place of

suit should, in my judgment, prevail. Again, in section 22 we have the general provision that:

"Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

In this case, also, it is manifest that the rule as to place of bringing suit must be sought either under the general law or such statutory remedies as are sought to be invoked. On the other hand, we have in section 16 of the act a provision of a special kind, providing its own rule as to place of bringing suit. This provision, giving remedy for the carrier's violation or refusal or neglect to obey or perform any lawful order or requirement of the Commission created by the act, provides that such Commission, or any company or person interested in such order or requirement, may apply in a summary way by petition to the Circuit Court of the United States sitting in equity, "in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen." Here a special provision as to place of bringing suit has been enacted, and will, of course, govern; but the illustration only serves to emphasize the proposition that, where no such definite provision has been made, the rule as to place of bringing suit must be sought in the general statutes governing the matter.

I conclude that in these cases, the court not having jurisdiction *ratione personæ*, that objection, seasonably made, must prevail, and that the preliminary restraining order heretofore awarded must be dissolved as improvidently awarded, and that the bills must be dismissed, without prejudice, for lack of jurisdiction over the persons of the defendants.

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In re LEECH.

(District Court, W. D. Kentucky. December 12, 1908.)

**BANKRUPTCY (§ 163\*)—VOIDABLE PREFERENCE—TRANSFER OF EXEMPT PROPERTY—"WEARING APPAREL."**

A ring, of whatever material or value, is within Ky. St. § 1697 (Russell's St. § 4656), which exempts to a housekeeper with a family all "wearing apparel"; and, being so exempt, its transfer to a creditor by a bankrupt, who is such a housekeeper, does not constitute a voidable preference.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 163.\*

For other definitions, see Words and Phrases, vol. 8, pp. 7425, 7426; 7834.]

In Bankruptcy. On review of order of referee.

Order affirmed by Circuit Court of Appeals, 171 Fed. 622.

J. D. Mocquot, for trustee.

J. C. Flournoy, for claimant.

EVANS, District Judge. On August 22, 1908, H. V. Sherrill, the trustee of this bankrupt, filed before the referee a petition for a rule against the bankrupt to turn over to the trustee two diamond

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rings, which, having been several years before presented to him by his wife, Mrs. Agnes Leech, had, some weeks before the adjudication, been transferred to her in part payment of a debt of several years' standing which the bankrupt owed to his wife, and which was evidenced by a promissory note given in 1902. The referee, upon the evidence, concluded that the transaction constituted a preference to the creditor, Mrs. Leech, and ordered the surrender of the rings to the trustee. Both the bankrupt and his wife have filed petitions to have the order of the referee reviewed by the court.

In determining these petitions it may be matter of fair doubt whether the order of the referee should not be reversed upon the ground that the testimony does not show a preference in favor of the wife in the transfer of the rings under the rule laid down by this court in the Case of Pfaffinger, 154 Fed. 523, and which, while not referred to by the Circuit Court of Appeals in its opinion in *First Nat. Bank v. Holt*, 155 Fed. 103, 84 C. C. A. 16, appears to be the same as that established for this circuit in the latter case. As to the contention that this transfer should be controlled by section 2128 of the Kentucky Statutes (Russell's St. § 4631), it may be sufficient to say that we must, in respect thereto, be governed by the ruling of the Circuit Court of Appeals in *Re Doran*, 154 Fed. 467, 83 C. C. A. 265.

But, whatever weight these two propositions may inherently have, probably they should be disregarded, as the decision of the matter may be made to turn upon section 1697 of the Kentucky Statutes (Russell's St. § 4656), which, *inter alia*, exempts from liability for the debts of any housekeeper with a family (as this bankrupt is) "all wearing apparel." In *Anthony, etc., v. Wade*, 1 Bush, 110, and in *Morton v. Ragan*, 5 Bush, 334, the Court of Appeals of Kentucky, following the general rule, in substance held that, as creditors had no interest in exempt property, they could not be heard to assail any disposition of it which the owner chose to make. That court, however, has never, so far as we can ascertain, construed the words "all wearing apparel," used in the statute last referred to, and we must for ourselves and as best we can ascertain their meaning. If the phrase were "all necessary wearing apparel," we should be permitted to inquire into the question of necessity for personal ornaments of any kind. If the statute limited the value of exempt apparel, we could easily ascertain its limitations. But the statute does neither of those things. We are all familiar with the famous Texas statute, which exempted a debtor's home and probably three horses, and the highest court of that state held that even if the home were a most palatial and most expensive one, or if the horses were the finest and most valuable or costly racers, stallions, or brood mares, it was immaterial, as there were no words to limit or qualify the broad and general language of the statute. In Kentucky the homestead exemption is limited to \$1,000 in value, and the horses which are exempt are limited to a value of \$150 each. So that, while the Legislature clearly manifests that it knew how to make limitations in respect to the value of exemptions, it chose not to do so as to wearing apparel, but exempted all of it,

of every character, making no limitations, either as to its necessity, its extent, or its value.

The Legislature did not appear to contemplate the possibility (suggested by the trustee's counsel at the argument) of a fraudulent investment in apparel, especially ornamental apparel, with a view to bankruptcy. We do not think the courts would be impotent to deal with a case where, in contemplation of bankruptcy, there had been a fraudulent investment in any kind of wearing apparel or ornament. Manifestly there was nothing of that character in this instance. That rings (whether diamond rings or not) are in the present day apparel, and that they are worn by a very large percentage of the people, male and female, is a fact no one can fail to observe in the ordinary walks of life, and the Kentucky Legislature had knowledge of this general fact in the current affairs of men. If one, by wearing rings, apparels himself in them, those facts fill every element of the phrase "all wearing apparel"; and, as the Legislature did not limit the character or value of such or any wearing apparel, the courts have not the power to change the enactment. In earlier times, possibly, the phrase "wearing apparel" would not at once have been regarded as including rings, especially diamond rings, and particularly for men; but times have changed, manners and habits have become different, and our legislation has adjusted itself thereto, and so must the courts in their interpretation of legislative acts, especially as the rule is general that exemption statutes must be construed with broad liberality. We should have to shut our eyes to an everyday and general custom if we should deny that finger rings are part of the apparel usually worn in certain walks of life, and we should not be misled from the logical result of this fact by the detail that the ring worn in a given instance is diamond, instead of horn or gold or silver. The material out of which the ring is made cannot be important, if the ring is apparel at all; and it is a matter for the Legislature to remedy, should it see fit to do so, by specifying the value of the wearing apparel intended to be exempt, or by making it clear that rings, especially those exceeding a certain value, were not to be regarded as wearing apparel at all within the statute. The courts must get as best they can at the meaning of the statute, and cannot alter or amend its provisions, nor readjust them upon the idea that the Legislature had been guilty of an omission or of a mistake in framing it. While in the earlier cases there was some tendency in a different direction, we are content to follow the lead of Judge Bradford in the case of *In re H. L. Evans & Co.* (D. C.) 158 Fed. 153, where, after much research, that learned judge reached the conclusion that the language of the Delaware statute, which was precisely the same as that of the Kentucky statute, included rings and other articles of jewelry used for personal adornment or apparel. And, if the rings are exempt in this instance under the Kentucky statute, then the ruling of the Supreme Court in the familiar and often cited case of *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, clearly applies, and must defeat the assertion of right by the trustee to the rings in question.

It results that we must reverse the order of the referee in the premises, and direct that the petition of Sherrill, the trustee, be dismissed.

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EISFELDT v. CAMPBELL

(Circuit Court, W. D. New York. April 27, 1909.)

No. 351.

COPYRIGHTS (§ 85\*)—SUIT FOR INFRINGEMENT—INJUNCTION.

Two theatrical plays, although having different names, *held* so similar in characters, plot, action, and dialogue as to render the production of one by defendant a violation of a preliminary injunction restraining her from producing the other.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 85.\*]

In Equity. On preliminary injunction.

Love & Keating, for complainant.

John J. McInerney, for defendant.

HAZEL, District Judge. The record does not disclose any material dissimilarity between the play "Mrs. Peckham's Carouse," the playing of which by the defendant was heretofore restrained, and "Mrs. Mix Mixes," the play which she subsequently produced. The plot or theme of the latter is not different from that of the former. It is true that subjects of intemperance and their portrayal in plays and on the stage, with the peculiarities of persons under the influence of liquor, are not new or novel; but the play "Mrs. Peckham's Carouse" illustrates and embodies such peculiarities in its central character, accompanied by farce dialogue and stage situations in a manner hitherto uncommon, and its theme, plot, action, characters, situations, and scenes are found in "Mrs. Mix Mixes." Such being my opinion regarding the two plays, the only question of importance arises as to the ownership of the original production. The defendant disputes complainant's title, and claims that she is the absolute owner of the original copyrighted play; it having been presented to her by complainant's predecessor. This claim of ownership, however, is denied, and, whatever merits it may have, I think the defendant is amply protected by the bond required of the complainant on the original application herein from any loss which she may sustain by reason of the temporary injunction.

The injunction will be continued *pendente lite*, and the question of contempt reserved to the final hearing.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## In re PULLIAN.

(District Court, E. D. Tennessee. February 18, 1909.)

No. 889.

**BANKRUPTCY (§ 404\*)—DISCHARGE—EFFECT OF FAILURE TO ASK DISCHARGE—SECOND PROCEEDINGS.**

Where a bankrupt fails to apply for a discharge within the time limited by the act, the effect is the same as a judgment denying his discharge from the debts therein involved, and he is not entitled to a discharge for such debts in a subsequent proceeding. A second proceeding by voluntary petition, in which no new assets nor debts are scheduled, will be dismissed; but, if new debts are scheduled, the bankrupt will be enjoined from applying therein for a discharge from the old debts.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 404.\*]

In Bankruptcy. On petition of Froneberger Mills & Co. and others to dismiss the proceedings.

Anderson & Hall, for bankrupt.

Norman B. Morrell, for petitioning creditors.

SANFORD, District Judge. The material facts are these: The bankrupt in April, 1907, filed a voluntary petition in bankruptcy, and was adjudged a bankrupt on the same day, but did not apply for or obtain a discharge in such proceeding. In January of this year the bankrupt filed the present voluntary petition in bankruptcy, listing with the petition 24 creditors with claims amounting to a little over \$500. In this list are 21 creditors, including Froneberger Mills & Co. and the three other present petitioners, who were listed for the same claims in the former case; there being listed in the present case only three new creditors, with claims aggregating \$32. No assets whatever were surrendered by the bankrupt for distribution in the present case; the schedule showing that outside of the property claimed by him as exempt he had no other property, except an account which he had previously assigned to the clerk of the court and to his attorneys in the present case. Upon this state of facts, the petitioners pray that the entire proceedings be dismissed, or that, in the alternative, the bankrupt be perpetually restrained from making any application in this case for a discharge from their claims.

It is now well settled in the later federal decisions, overruling in some respects the case of *In re Claff* (D. C.) 111 Fed. 506, and the cases therein cited, that where, in a bankruptcy proceeding, the bankrupt fails to apply for a discharge within the time limited by the bankruptcy act, this has the same effect as a judgment denying his discharge from the debts therein involved, and that in a subsequent bankruptcy proceeding, in which no new assets are being administered, either an actual judgment denying his discharge in the former case, or a constructive judgment by default for failure to make application, will operate as *res adjudicata* against him and prevent his discharge from the same debts in the new proceeding. 2 *Remington on Bankruptcy*, § 2436, p. 1471; *Loveland on Bankruptcy* (3d Ed.) § 280c,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

p. 813; *In re Fiegenbaum*, 121 Fed. 69, 57 C. C. A. 409; *Kuntz v. Young*, 131 Fed. 719, 65 C. C. A. 477; *In re Weintraub* (D. C.) 133 Fed. 1000; *In re Kuffler* (D. C.) 144 Fed. 445; *In re Kuffler*, 151 Fed. 12, 80 C. C. A. 508; *In re Bramlett* (D. C.) 161 Fed. 588. Further, that where the second proceeding is under a voluntary petition filed by the bankrupt, in which he brings into court no material assets for administration, and the sole purpose is to obtain a discharge from the debts involved in the former proceeding, no ground of relief is presented, and the proceedings should be dismissed as futile. 2 *Remington on Bankruptcy*, § 2437, p. 1471; *Loveland* (3d Ed.) § 280c, p. 813; *Kuntz v. Young*, *supra*. Or, at least, that further proceedings in the case should be stayed (*In re Weintraub*, *supra*), or the bankrupt restrained and enjoined from filing a petition for discharge in the second case (*In re Fiegenbaum*, *supra*).

Where, however, as in the present case, new creditors are listed in the second proceeding, a different question arises. In 2 *Remington on Bankruptcy*, § 2438, p. 1475, the view is expressed that the court should in such case in its order of discharge in the second bankruptcy expressly except all debts provable in the first bankruptcy; but in the case of *In re Kuffler*, 151 Fed. 12, 80 C. C. A. 508, it was said by the Circuit Court of Appeals for the Second Circuit that the proper proceeding in such case is to restrain the bankrupt from making any application in the second bankruptcy for a discharge from the debts of the creditors whose claims had been involved in the original case.

Under the foregoing authorities I am of the opinion that, while the prayer of the petition must be denied in so far as it seeks a dismissal of the entire proceedings, in view of the fact that new creditors are involved, yet it should be granted in so far as it prays that the bankrupt be restrained and enjoined from making any application in this case for a discharge from the claims of the four petitioners, *Froneberger Mills & Co.* and others.

It is unnecessary to determine in this case whether under the authority of *In re Drisko*, 2 *Lowell*, 430, Fed. Cas. No. 4,090, if any new assets had been brought into court in the present case, the former creditors might have declined to share therein and thereupon objected to a discharge, or what, if any, would have been the effect of the former proceeding as *res adjudicata* if application had been made in the former case, within 18 months after the adjudication, for leave to file a petition for discharge, and the same had been denied without prejudice to the commencement of new proceedings, as was done in the cases of *In re Brooke* (D. C.) 100 Fed. 432; *In re Fahy* (D. C.) 116 Fed. 239; *In re Wagner* (D. C.) 138 Fed. 87.

An order will be entered in accordance with this opinion.



## JACKSON v. HOOPER et al.

(Circuit Court, S. D. New York. June 12, 1909.)

**1. PROCESS (§ 72\*)—NONRESIDENT—SUBSTITUTED SERVICE.**

In a suit against several defendants in personam, not affecting property within the district, jurisdiction could not be obtained over such of the defendants as were nonresidents of the district, over their objection, by substituted service.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 72.\*]

**2. EQUITY (§ 363\*)—BILL—AFFIDAVITS.**

On motion to set aside service on nonresident defendants and dismiss the bill, allegations in the affidavits used on the motion and statements of counsel in the argument could not be considered as supplying an omitted allegation in the bill, from which it could be found that the suit affected property within the district.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 363.\*]

**3. EQUITY (§ 362\*)—BILL—DISMISSAL.**

A bill in equity may be dismissed, when it appears that the relief prayed for cannot be granted without injuriously affecting persons not parties to the suit.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 362.\*]

**4. EQUITY (§ 362\*)—BILL—DISMISSAL.**

Where it did not clearly appear that complainant might not be entitled, on his allegations, to some measure of injunctive relief against defendant, who was a resident of the district and properly served, independent of other nonresident defendants, as to whom the bill was dismissed, the resident defendant was not entitled to a dismissal of the bill on motion, filed in the place of a demurrer, because of the absence of the other defendants.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 362.\*]

In Equity. On motions to set aside service and dismiss the bill.

Evarts, Choate & Sherman, for complainant.

Samuel Untermyer and Abraham Benedict, for defendants.

NOYES, Circuit Judge. An examination of the briefs confirms the impression formed upon the argument that most of the interesting questions discussed cannot properly be determined upon these preliminary motions. The defendants Franklin H. Hooper and Charles C. Whinery move to set aside the service upon the ground that they are not residents of the Southern district of New York. This fact seems clearly established with respect to each of them, and necessarily calls for the relief which they ask, provided this suit be regarded as a personal action. If, on the other hand, the case as it stands can be regarded as a suit affecting property within the district, and within the provisions of section 8 of the judiciary act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513]), so that these defendants could forthwith be brought in by substituted service, there would be no propriety in letting them out to be cited in again.

In my opinion the bill of complaint is framed upon the theory of stating a personal action. It contains no allegations whatever of the presence of any specific real or personal property in this district. In-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

deed, it is only by way of inference that it can be said to state that any of the partnership assets are located here. It is true that the affidavit of Walter M. Jackson, used upon the hearing, refers to specific property in New York. But the affidavit is no part of the bill, and cannot serve to supply its deficiencies. So it was stated upon the argument that partnership assets of large value are located here; but these statements cannot be considered as amplifying the bill. The case presented by the pleadings cannot be regarded as a suit to enforce a lien upon or claim against property within the district, and the motions of the said defendants to set aside the service, upon the theory that it is a personal action, must be granted.

The service against said defendants is, however, set aside without prejudice to the right of the complainant upon regular motion calendar to apply for leave to amend his complaint by stating the facts relating to the presence of property within this district and his claim against it which he thinks make out a case within section 8 of the judiciary act, and without prejudice, in case such amendment should be allowed, to his right to apply to bring said defendants in again by substituted service. In such proceedings the questions discussed in the briefs and arguments concerning the character of the property and the nature of the lien or claim against it, which must be shown in order to make said section 8 applicable, could be considered and determined. But I think that the court should at present confine itself to the bill as it stands, and not rule upon questions not raised by the pleadings, and which the complainant may deem it inexpedient to attempt to raise.

The defendant Harris B. Burrows is a resident of this district and a citizen of the state. So far as the jurisdiction is concerned, the suit is properly brought against him. With the service upon the other defendants set aside and the defendant Horace E. Hooper not appearing, he will be left as the sole defendant. He, however, says in effect that no cause of action is stated against him alone, and that the relief prayed for cannot be granted in the absence of the other persons named as defendants. Consequently he moves that the bill be dismissed on account of the absence of indispensable parties. It is undoubtedly the proper practice in equity to dismiss a bill when it appears that the relief prayed for cannot be granted without injuriously affecting persons not parties to the suit. But the allegations of the present bill are comprehensive, and the prayers for relief broad. I am not satisfied that the complainant may not be entitled, upon his allegations, to some measure of injunctive relief against the defendant Burrows, independently of any other persons. Moreover, in a case like the present, I think a motion to dismiss should not take the place of a demurrer to the bill. Therefore, while the motion is denied, it is without prejudice to the right of the defendant Burrows to demur.

The motion of the defendant Burrows is denied. Those of the defendants Whinery and Franklin H. Hooper are granted.

## In re ADAMS.

(District Court, N. D. New York. July 15, 1909.)

**1. BANKRUPTCY (§ 413\*)—DISCHARGE—OBJECTIONS—CONCEALMENT OF ASSETS.**

Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (U. S. Comp. 1901, p. 3427), provides that a bankrupt shall be granted a discharge unless he has committed an offense punishable by imprisonment, as provided, and section 29 provides that a person may be punished by imprisonment on conviction of having knowingly and fraudulently concealed, while a bankrupt or after his discharge, "from his trustee" any of the property belonging to his estate in bankruptcy. *Held* that, in order that such offense might be committed, there must be a trustee; and hence a specification, where no trustee had been appointed, that the bankrupt had concealed property "from his estate in bankruptcy," was fatally defective.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 413.\*]

**2. BANKRUPTCY (§ 413\*)—CLAIMS—CONCEALMENT.**

An allegation that a bankrupt turned over a plumbing business to his wife under an agreement that he was to manage the business thereafter and take therefrom at such times as he saw fit whatever amount he might wish, and that he had drawn therefrom only from \$2 to \$4 a week, while his services were reasonably worth from \$10 to \$20, did not allege the existence of any indebtedness on the part of the bankrupt's wife to him, which could be the subject of a fraudulent concealment or of a false oath on the part of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 413.\*]

In Bankruptcy. On demurrer to specifications of objection on application for a discharge.

Charles R. Stewart, for bankrupt.

T. B. & L. M. Merchant, for creditors.

RAY, District Judge. The first specification of objection states that the bankrupt has knowingly and fraudulently concealed, while a bankrupt, from "his estate in bankruptcy," certain property belonging to his estate in bankruptcy, consisting of a claim of \$500 and upwards, which is due and owing to the said bankrupt from his wife, Evelyn C. Roe Adams, for personal services rendered to her subsequent to April 13, 1906, in the management of a plumbing business turned over to her at that time by said Stephen B. Adams, and of which he had full management and control, and has only drawn from \$2 to \$4 out of the business per week since April 13, 1906, although he had the right to and did take from the business, at such times as he saw fit, whatever amount he might wish, and that his services in running such business were reasonably worth \$10 to \$20 per week, and that the wife of said bankrupt is indebted to him in open account in an amount estimated to be between \$500 and \$1,500.

There are two objections to the sufficiency of this specification: First, there is no allegation that the bankrupt concealed, while a bankrupt, "from his trustee" any property belonging to his estate in bankruptcy, or this debt or claim, assuming it to be a valid debt or claim; and, second, the facts stated negative the idea that there was an enforceable debt or claim against his wife.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The statement that the bankrupt had concealed property "from his estate in bankruptcy," instead of "from his trustee," was not a mistake or error of the pleader, as on the argument it was conceded that no trustee has been appointed. Under subdivision "b" of section 14 and section 29 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550, 554 [U. S. Comp. St. 1901, pp. 3427, 3433]), a person cannot be convicted of an offense and imprisoned for fraudulently concealing, while a bankrupt, property "from his estate in bankruptcy." The court cannot legislate, and subdivision "b" of section 29 is explicit in its language, and says that a person may be punished by imprisonment "upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy." Before this offense can be committed there must be a trustee, and nowhere is it made an offense, or a ground of refusing a discharge, not to disclose in the schedules, or even on oath, the existence of property or of a debt owing to the bankrupt. If in the schedules, or in making oath thereto, or on an examination, the bankrupt commits perjury, then he has "made a false oath" in or in relation to a proceeding in bankruptcy, and the making of such false oath is made a ground of refusing a discharge. Such false oath may consist in giving evidence which in effect amounts to a concealment, etc.

The second and third specifications of objection charge the bankrupt with having knowingly and fraudulently made a false oath in relation to a material fact, viz., in stating under oath that he had included all his property in his schedules, when in truth and fact he had knowingly omitted therefrom the claim against his wife. As the specifications fail to set out the existence of a valid claim against the wife, I do not see that it is charged that the bankrupt has made a false oath. If the bankrupt worked for his wife under an agreement that, as compensation for his services, he might take from time to time from the business such sums as he might wish, and he did so, he is satisfied, whether the sums taken be large or small. There is no allegation that he was to be paid what his services were reasonably worth. The specifications do not allege an indebtedness in a specific amount for work, labor, and services, and stop there, but state the facts out of which it is claimed the indebtedness arose; and as, on these facts, it appears there was no indebtedness, the first, second, and third specifications of objection are clearly insufficient, and the demurrer thereto is sustained.

The fourth and fifth specifications are sufficient, and the demurrer to the fifth is overruled. The fourth is not demurred to.

There will be an order accordingly.

## In re MARTINOVSKY.

(District Court, W. D. Pennsylvania. July 13, 1909.)

No. 2,163.

**ALIENS (§ 68\*)—NATURALIZATION—STATUTES.**

Naturalization Act (Act Cong. June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 421]) § 4, par. 2, requires that the petition for naturalization shall be signed by the applicant in his own handwriting, provided that, if he has filed his declaration before the passage of the act, he shall not be required to so sign his application. Section 31 declares that the act shall take effect 90 days after its passage, except that certain sections, not including section 4, shall take effect immediately. *Held* that, the act having been passed on June 29, 1906, an alien, who declared his intention to become a citizen on September 8th following, was required to sign his petition in his own handwriting as a condition to naturalization.

[Ed. Note.—For other cases, see *Aliens*, Dec. Dig. § 68.\*]

## Application by Andras Martinovsky for Naturalization.

ORR, District Judge. It appears in this case that the applicant declared his intention to become a citizen of the United States on September 8, 1906, and at that time he could not sign his name in his own handwriting. It further appears that he cannot sign his name in his own handwriting to-day. The question arises whether or not he should now be naturalized because of the provisions of paragraph 2, § 4, of the act of Congress approved June 29, 1906 (34 Stat. 596, c. 3592 [U. S. Comp. St. Supp. 1907, p. 421]), commonly called the "Naturalization Act."

That paragraph requires that the petition for naturalization shall be signed by the applicant in his own handwriting, but contains a proviso that if he has filed his declaration before the passage of said act he shall not be required to sign the petition in his own handwriting. Inasmuch as the act was passed on June 29, 1906, and the applicant's declaration of intention was made September 8, 1906, he should be refused naturalization.

It is true the thirty-first section of the act provides that the act shall take effect and be in force from and after 90 days from the date of its passage, with the proviso that certain sections, not including section 4, should go into effect immediately upon the passage of the act; and it is true that the declaration of the applicant's intention was made within the 90 days from the date of the passage of the act. But the act clearly means what it says, and that the declaration of intention was made before the act should take effect, but subsequent to its passage, is no reason why the provisions of the act should be ignored.

Let an order be drawn accordingly.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## NORTHERN UNION GAS CO. v. MAYER et al.

(Circuit Court, S. D. New York. July 29, 1909.)

**DEPOSITS IN COURT (§ 10\*)—DISPOSITION.**

Where a gas company, ordered to refund to consumers an excess charge, paid the money into court, and a portion thereof remained unclaimed in the hands of a special master, due to consumers whose whereabouts could not be ascertained, the master would be directed to return the balance of the principal, on the gas company giving bond to make payments to persons entitled thereto on their subsequent appearance; the suit being kept alive in the meantime to enable the court to enforce any necessary orders.

[Ed. Note.—For other cases, see Deposits in Court, Cent. Dig. § 11; Dec. Dig. § 10.\*]

In Equity. Application of special master for instructions, upon notice to all parties.

Cortlandt Belts, for complainant.

George S. Coleman, Robert C. Taylor, and Francis K. Pendleton, Corp. Counsel, for defendants.

LACOMBE, Circuit Judge. The special master who was appointed to receive, and was subsequently ordered to refund to consumers, the money deposited by the Northern Union Gas Company, being excess charges over 80 cents per 1,000 feet for gas consumed and paid for, has applied for instructions as to what disposition to make of an unclaimed balance in his hands. It appears that by July 3, 1909, all moneys due to consumers had been repaid, except \$24,983.51. Of this sum \$910.65 was covered by assignments as to which it had not yet been determined whether assignor or assignee should receive it, and by affidavits of claimants which were not drawn in the proper form, or the validity of which had not been determined. These amounts were by July 23d reduced to \$20,924.51 and \$571.04, respectively.

Neither the special master nor the gas company has been able, either through the use of the mails or by inquiry, to ascertain the present addresses of those consumers who cannot be found at the places where their payments of overcharges were made. As to prepayment consumers where slot meters were used, all who have made claim have been paid, except where there is some controversy as to assignment or identity, or sufficiency of papers. There is, therefore, in the hands of the master an unclaimed balance of overcharges originally received from this company of \$20,924.15. It is to be expected that from time to time belated applications will be made by owners of many of these claims; but no one can tell how long they will delay making their applications. It seems desirable, therefore, to safeguard their rights to these moneys, and at the same time relieve the special master of the further burden and expense of administration of the funds under supervision of the court, which might go on for years in the disbursement of trifling sums. In order to secure prompt payment the special master opened a separate disbursing bureau for refunds to consumers of this company, and so long as it remains

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

open it will be necessary to maintain its equipment of assistant auditors and clerks to prepare vouchers and checks. This expense should be terminated as soon as conveniently may be. It has been suggested that nothing be done with this unclaimed balance until the money due to consumers of the Consolidated Company shall have been repaid; but there is no reason apparent why this fund which came from consumers of the Northern Union Company should await the disposition of another fund which came from consumers of a different company. All the companies will probably not reach the same situation as that of the Northern Union for several weeks yet. The unclaimed balance should not be hung up unadministered. If the court gives up the administration, it should be taken up elsewhere; for at any time some one may appear to ask for his share, and there should be persons ready to examine, adjust, and pay it promptly. The unpaid balance of the rebates of the Northern Union Gas Company will therefore be turned over to that company upon the following terms:

(a) The court retains the suit still alive, so as to be able to make and enforce such orders as may from time to time be required to secure the proper and equitable disposition of the fund created under the order of June 29, 1906.

(b) The gas company shall execute a bond, with sufficient surety (to be approved by the court), conditioned that to every consumer, or his lawful executors, administrators, or assigns, who may hereafter present to it a claim for repayment of overcharges represented in this fund, within the proper period fixed by the statutes of the state, prompt payment thereof shall be made; provided, that, should the company be satisfied that the claimant is for any reason not entitled to the sum claimed, it shall submit its controversy with him to this court, to be summarily disposed of, without cost to such claimant, if successful. And, in the event of the court's thus summarily deciding that the money is rightfully due to said claimant, the company will promptly pay the same to him.

(c) That it will in like manner pay the various claims, now in controversy before the special master, or in which the necessary papers are being perfected, promptly upon receipt of directions from the court as to whom payment should be made to.

The unclaimed balance thus ordered to be transferred is principal only. It was stated in the memorandum filed February 18th that the expenses of administration might well prove to be so great as practically to exhaust the accumulations of interest. Besides the large number of assignments which have had to be investigated and the many attempts to defraud which have been detected and punished, the work of auditing the claims of individual consumers and drawing the checks to pay them has been most extensive. The several gas companies, as required by the terms of the original order, prepared and delivered to the special master month by month the papers for refund, showing the names and addresses, with amounts and dates of payments of excess. In the aggregate they disclosed over 1,300,000 separate accounts. The work of classifying, auditing, and checking out has progressed more expeditious-

ly than was expected when repayment began; but the cost of administering the fund has been great.

When all who can be found shall have been repaid (it is hoped this will be early in the fall), the special master will file his accounts, and, if there be any balance of interest left over, its disposition can then be considered.

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STANDARD GASLIGHT CO. OF CITY OF NEW YORK v. MAYER et al.

(Circuit Court, S. D. New York. July 29, 1909.)

In Equity. Application by a special master for instructions as to the disposition of a fund.

Edward W. Burdick, for complainant.

Robert C. Taylor, George S. Coleman, and Francis K. Pendleton, Corp. Counsel, for defendants.

LACOMBE, Circuit Judge. Except for a difference in the figures, the situation in the case of this company is the same as that of the Northern Union Company, which is disposed of by memorandum filed to-day. 171 Fed. 602.

A similar disposition will be made of the unclaimed balance in this case.

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In re INTERSTATE PAVING CO.

(District Court, N. D. New York. July 9, 1909.)

BANKRUPTCY (§ 72\*)—INVOLUNTARY PROCEEDINGS—CORPORATIONS.

Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1025]), in making corporations "engaged principally in manufacturing," etc., subject to the act, refers to the time when the petition was filed and a reasonable time prior thereto, and that a corporation had previously been principally engaged in a different business is immaterial.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.\*]

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank of Mattoon, 42 C. C. A. 4.]

In Bankruptcy.

Motion to open and set aside adjudication and allow certain judgment creditors with an execution outstanding and levy made to interpose an answer and set up that the bankrupt is not subject to adjudication. Also, motion by other creditors to intervene and amend first petition filed by alleging acts of bankruptcy not set forth therein.

Graves & Miles, for first motion.

Fuller & Miller and Grant & Wager, opposed.

Martin & Jones, for second motion.

Graves & Miles, opposed.

RAY, District Judge. On the moving papers and on the affidavits received in opposition to the motion to vacate the adjudication, and the evidence of the president of the company taken in open court in

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



such motion, I am satisfied that the Interstate Paving Company is subject to adjudication and was properly adjudicated, and that the motion should be denied. It is true, probably, that prior to January, 1907, or July, 1907, the corporation was engaged principally in making its own material for paving streets and taking contracts for and paving streets with a certain kind of paving material. After that date it completed some of its old contracts, but took no new ones, and embarked in the business, fully authorized by its articles of incorporation, of manufacturing and selling paving blocks and other material, including curbing. It purchased large amounts of different materials, sold some of them, and used most of same in manufacturing these blocks for sale. For the two years last past its principal business has been that of manufacturing and selling its products. To quite an extent it has been engaged in mercantile pursuits. I do not think the question is to be determined by what it did in 1904, 1905, and 1906, but by its business in 1907, as concededly in 1908, on account of its financial troubles, it did but very little business. What it did during that time has been manufacturing and selling its product. On a prior petition, still pending, this matter was fully gone into but not decided, as the special master found the single act of bankruptcy alleged had not been committed. Nothing has been done with that report.

The law says, "engaged principally in manufacturing," etc. (Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1025]), and I think refers to the time when the petition was filed and a reasonable time prior thereto, and not to some prior time in the history of the corporation. This corporation had the right to change its principal business, even if it had, prior to 1907, engaged principally in contracting and construction work. The evidence shows that it did make such change prior to July, 1907, that the corporation is insolvent and was when the petitions were filed is not denied, and it is not denied that it had committed acts of bankruptcy. In my judgment it would be a waste of time and money and an unjustifiable delay to open the adjudication. Justice does not demand that it be done. The first petition is still pending. It has not been dismissed, and it is desired to amend and set up other acts of bankruptcy committed prior to the filing of that petition. No one objects to this being done in case it is held that the corporation is subject to adjudication.

Having so held, the motion to intervene and amend should be granted. The motion to vacate the adjudication should be denied, and the injunction granted by the order to show cause vacated.

So ordered.

THE ST. PAUL.  
THE NONPAREIL.

(District Court, S. D. New York. May 28, 1909.)

SHIPPING (§ 81\*)—TOWAGE (§ 11\*)—NEGLIGENT NAVIGATION—INJURY TO TOW—  
NEGLIGENCE OF TUG.

Swell damage to scow in tow of a tug on a hawser near the West Bank Light, lower New York Bay, *held* to have been caused by the navigation of the St. Paul and other steamers in that vicinity, but that the St. Paul was not liable; the injury sustained by the scow being the result of an improper make up of the tow by her tug, in that the boats were fastened within four or five feet of each other.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 345; Dec. Dig. § 81; \* Towage, Cent. Dig. § 15; Dec. Dig. § 11.\*]

(Syllabus by the Judge.)

In Admiralty.

Carpenter, Park & Symmers, for libellant.

Robinson, Biddle & Benedict, for the St. Paul.

Wing, Putnam & Burlingham, for the Nonpareil.

ADAMS, District Judge. This action was brought by P. Sanford Ross, Incorporated, the owner of the scow S. 2, to recover for the damages she suffered by reason of swells of the steamship St. Paul, encountered on a voyage to sea on the 29th of August, 1908. There were two scows of the same character in the tow fastened close together, 4 or 5 feet apart, in tow of the tug Nonpareil on a hawser of about 75 fathoms, the S. 2 following the S. 1. The tow was proceeding through the lower bay, on the way to the dumping ground outside. The tide was ebb, the weather clear, with little wind. The St. Paul was bound from sea to New York, and when the tow was slightly to the south of Craven Shoal Buoy, the steamer was seen coming up by West Bank. She passed the tow 300 or 400 feet to the port just above that light. It is alleged that in passing, the St. Paul created a heavy displacement wave and swell which threw the other scow upon the S. 2, doing damage to the latter, claimed to amount to \$1,600. The tug was also alleged to be in fault for making up the tow of the scows by fastening them so close together.

The steamer and tug answered, each denying any fault upon its own part and alleging that the other was solely to blame.

The steamer's testimony shows that she was rounding the South West Spit at 12:41 o'clock, and arrived at Quarantine at 1:10 o'clock. If this meant the upper Quarantine, she must have covered a distance of at least 8 nautical miles in 29 minutes, notwithstanding a strong ebb tide, estimated in the testimony at 4 or 5 knots, but was probably much less, and notwithstanding also that she slowed for about 3 minutes in coming up to West Bank. The lower Quarantine, however, was doubtless meant because the steamer's log has a subsequent entry showing the passing of the Narrows at 1:24, 14 minutes later than the time she reached Quarantine according to the 1:10 entry.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The steamer claims that she was not going at a speed in excess of 10 miles an hour when off the West Bank Light, because she had reduced her speed in that vicinity. This seems to be true. There can be no doubt, however, that she did, in conjunction with that of other steamers in the vicinity, create a swell which proved dangerous to this tow and caused another in the neighborhood to break up. There is no detailed information about the make up of the latter but it appears that the boats of this tow were fastened so closely together that they were liable to be injured by almost any swell.

The facts in this case bring it within the ruling in *La Savoie* (D. C.) 157 Fed. 312.

The libel against the *St. Paul* is dismissed. The libellant is entitled to a decree against the *Nonpareil*, with an order of reference.

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### THE HURSTDALE.

(District Court, S. D. New York. May 10, 1909.)

#### ADMIRALTY (§ 124\*)—COSTS.

Disbursements made in giving stipulations for value, even if not to surety companies, are taxable if reasonable.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 124.\*]

(Syllabus by the Judge.)

See, also, 169 Fed. 912.

Wing, Putnam & Burlingham, for libellants.

Convers & Kirlin, for claimant and respondent.

ADAMS, District Judge. On the taxation of costs in this action, a question is presented whether the successful party is entitled to recover the disbursements necessarily made in giving a stipulation for value. The claimant in giving such a stipulation incurred an expense of \$50.19, paid to bankers in England, and it was objected to, and the objection sustained by the clerk, probably because there is no direct authority for the taxation. It has, however, become the settled practice to allow disbursements made to surety companies for the same purpose. I am unable to see any distinction in this matter in principle. The fee seems to have been reasonable and if it is proper to allow such disbursements to surety companies, it should also be allowed in a case of this kind. The exception is therefore sustained.

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### CLEMENT v. DOWLING.

(Circuit Court, S. D. New York. May 13, 1909.)

#### PLEADING (§ 59\*)—SUFFICIENCY OF ALLEGATIONS —PERFORMANCE OF CONDITIONS PRECEDENT.

Under Code Civ. Proc. N. Y. § 533, a general allegation of performance of conditions precedent is sufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 124, 125; Dec. Dig. § 59.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On Demurrer to Amended Counterclaim.

Townsend, Avery & Button, for plaintiff.

Bowers & Sands, for defendant.

NOYES, Circuit Judge. The demurrer to the original counterclaim was apparently sustained upon the ground that it admitted that the defendant was bound to do certain things to bring about the execution of the contract between the two corporations and failed to allege performance. This result was reached by treating the allegations of the complaint not denied in the counterclaim as admitted, although denied in the answer prior thereto. After the sustaining of the demurrer the defendant filed an amended counterclaim, adding the following averment of performance:

"That this defendant has duly performed all and every the conditions and things on his part in that behalf to be performed."

The plaintiff now demurs to the amended counterclaim upon the ground that it, too, fails to state a cause of action. In presenting the case upon this demurrer the questions necessarily determined upon the first demurrer are reargued by the parties. The orderly administration of justice, however, requires that, when one judge has passed upon the sufficiency of the pleadings in a case, his ruling should, except under extraordinary circumstances, be followed by other judges hearing other phases of the case; and resolving, as I should, every doubt in favor of the previous ruling in this case, I am unwilling to take action inconsistent therewith. If an error has been committed it can be corrected by the appellate court.

It will be accepted, therefore, as established that the counterclaim without the paragraph added by amendment fails to state a cause of action, because it fails to allege performance of those things which the defendant, by failing to deny the allegations of the complaint, admitted that he was bound to perform. The question, then, is whether the new paragraph sufficiently avers performance. In my opinion it does. It uses the broadest possible language, and should, I think, be construed as alleging performance of all the conditions precedent required to be performed by the defendant, both by the express allegations of the counterclaim and by any averments brought into it by reference, admission, or otherwise. Section 533 of the New York Code of Civil Procedure permits the general allegation of the performance of conditions precedent; and it would be rather hard to read conditions precedent into a counterclaim by the failure to deny them, and then construe broad allegations of performance as not applying to them.

In case this demurrer should be sustained, and the defendant be permitted to again amend, he could meet the objection now under consideration by specifically alleging performance of the conditions precedent in question; and, as the demurrer will be overruled upon the distinct ground that the present averments are to that effect, the situation of the parties upon the trial would not be changed by such action.

The demurrer is overruled, with costs; but the plaintiff, upon payment of such costs, may plead over within 20 days.

REYBURN v. QUEEN CITY SAVINGS BANK & TRUST CO.

(Circuit Court of Appeals, Third Circuit. May 17, 1909.)

No. 17.

1. EVIDENCE (§ 354\*)—BOOKS OF ACCOUNT—RECORDS OF BANK.

Entries in the books of a bank, showing discounts or debits and credits from day to day, are admissible in evidence in favor of the bank to establish the time of a transaction there recorded, where it is shown that the books are books of original entry, or as nearly so as possible, and such as the business of the bank requires, and upon the faith of which such business is transacted, and when the entries are duly proved by the persons who made them as having been made by them on the dates shown in the regular and usual course of their employment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.\*]

2. BILLS AND NOTES (§ 371\*)—ACCOMMODATION PAPER—REQUISITES.

Promissory notes made and indorsed and discounted by the payee, under an agreement between them that the maker and indorser shall each receive one-half the proceeds and pay one-half the notes, are not accommodation paper, and do not give the maker the character or rights of an accommodation maker, to affect the status of a bona fide purchaser for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 964; Dec. Dig. § 371.\*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 163 Fed. 597.

John C. Bell, for plaintiff in error.

Julius C. Levi, for defendant in error.

Argued before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. In the court below, suit was brought by the defendant in error (hereinafter called the plaintiff) against the plaintiff in error (hereinafter called the defendant), on certain promissory notes made by the defendant, of which plaintiff claimed to have been the indorsee and bona fide holder for value. The case having been pleaded to issue, the same, under an agreement and stipulation in writing between the parties, came on to be tried before the court without a jury. At the conclusion of the trial, the learned judge of the court below made certain findings of fact and law, upon which he directed judgment to be entered in favor of the plaintiff. These findings, which, by exceptions duly made and sealed, are included in the record, are as follows:

J. B. McPherson, District Judge. This is an action brought by the plaintiff as indorsee, against the defendant as maker, of two promissory notes for \$5,000 each, due at four months from Oct. 20 and 25, 1906, respectively. The case having been submitted to the court without a jury, I find the facts to be as follows:

1. In the fall of 1906, the defendant was in need of money to carry on a business enterprise in which he had an interest, and in order to raise the needed funds he agreed with the Union Potteries Company, an Ohio corporation, through the agency of a broker in New York City, to make five prom-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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issory notes of \$5,000 each. These notes were to be indorsed by the Potteries Company and negotiated wherever the money could be obtained, and the proceeds were to be divided equally between the Potteries Company and the defendant, by whom also the liability upon the notes was to be equally borne. The notes were duly executed toward the end of October and were placed in the broker's hands to be negotiated. Certain circumstances, which it is not necessary to detail, aroused the defendant's suspicions concerning the fairness and good faith of the transaction to which he had thus committed himself, and he took steps which resulted in the return to him of three of the notes. This action relates to the remaining two.

2. The notes in suit were offered to the plaintiff for discount by the Potteries Company about October 30th, and on that date the plaintiff addressed the following letter to the defendant:

"Mr. John E. Reyburn, Philadelphia, Pa.—Dear Sir: We have this day been offered some 4 mos. paper of yours by the Union Potteries Co. for discount, they claiming that this paper was given by you in payment for stock sold to you in their company. Would you be kind enough to telegraph us at our expense whether this is the situation? And confirm same by letter.

"Hoping that you will give us the desired information, we remain,

"Resp. yours,

The Queen City Savings Bank & Trust Co.,

"Ernst Von Bargen, Sec'y."

The defendant replied under date of November 2d:

"Dear Sir: I have your favor of the 30th ult. and in reply beg to say that there must be some misunderstanding about the transaction in Union Potteries Co., as I have no understanding about taking shares of stock in that company. I did not wire because I thought it was better to communicate in writing with you.

Yours very truly,

John E. Reyburn."

Thereupon the plaintiff, on November 5th, addressed a second letter to the defendant:

"Dear Sir: We are in receipt of your favor of the 2nd inst. and in reply will say that we do not understand your letter.

"We were offered two notes—one of October 20, 1906, and the other of October 25, 1906, for four months each at five thousand (\$5,000) dollars each, signed by you, by Mr. Hart, vice president of the Union Potteries Co., who claims that these notes were given in payment of stock in either the Union Potteries Co., Pittsburg, or the Huntington China Co., Huntington, W. Va., or both.

"In your letter you say you have no understanding about taking stock in the company. We wish you would let us know if you gave these notes for some other reason and whether they are your bona fide notes, and will be paid at maturity.

"We are sorry that we are putting you to all this inconvenience, but we would like to be on the safe side before we discount these notes for the Union Potteries Co.

"Thanking you in advance, we remain,

"Yours very truly,

Ernst Von Bargen, Secretary."

This communication the defendant answered as follows on November 8th:

"Dear Sirs: I beg leave to acknowledge receipt of your letter of the 5th inst. regarding my two notes dated October 20th and October 25th, for \$5,000 each. I desire to state in reply thereto that since writing you in answer to your letter of October 3d, the difference between the Union Potteries Company and myself regarding stock has been satisfactorily adjusted.

"The notes in question will be paid at maturity.

"Very truly yours,

John E. Reyburn."

In reliance upon this correspondence the plaintiff discounted the two notes on November 12th and placed the proceeds, namely, \$4,885, on each note, to the credit of the Potteries Company.

3. In consequence of the defendant's suspicions, to which reference has been made in paragraph 1, he determined to stop the negotiation of the remaining two notes of the series, if possible, and on the evening of November 14th, he sent the following night telegram to the plaintiff:

"Have discovered fraud since writing. Do not discount notes bearing my signature."

This telegram was received by the plaintiff before banking hours on November 15th and was replied to as follows:

"Notes already discounted on strength of your letter November 8th."

This reply was confirmed by a letter of the same date.

4. On November 12th, the balance to the credit of the Potteries Company on deposit with the plaintiff was \$1,778.14. This balance was increased by the discount of the notes to \$11,548.14. On November 12th, the Potteries Company drew a check for \$2,500 upon this balance; on November 13th, a check for \$1,000; and on November 14th, two checks for \$1,250 and \$4,000 respectively. These checks were duly honored by the plaintiff.

5. There is no evidence of fraud or bad faith on the part of the plaintiff, or of any knowledge on its part of fraud or bad faith on the part of the New York broker or of the Potteries Company. The defendant received no consideration for the notes, either at the time of their execution or afterwards, and received no part of the proceeds of the discount; but there is no evidence, if the fact were important, that the plaintiff knew of the want of consideration or of the agreement that the defendant was to have one-half the proceeds of the discount.

6. Before suit was brought, the defendant refused to pay the notes either in whole or in part.

Upon these facts it seems to me that the law is settled, and that the following propositions govern the case:

1. The notes in suit are accommodation paper, and the defendant is the accommodation maker thereof.

2. The plaintiff is the bona fide holder thereof for value and before maturity.

3. Being accommodation paper, however, the mere discount of the notes, and the credit of the proceeds to the account of the Potteries Company, were not equivalent to parting with value.

4. The defendant was entitled to cancel his obligation by proper notice given to the plaintiff before it actually parted with value by honoring the checks of the Potteries Company.

5. As a result, the plaintiff is entitled to recover \$6,971.86, with interest from, say, February 22, 1907.

In finding these facts, I have taken into consideration the depositions of the plaintiff's employes, and the loose leaf of the ledger that was produced at the trial, believing the depositions and the loose leaf to be competent evidence. The numerous decisions in favor of its competency seem to me to be founded on excellent reason. The business of a bank is dealing in money, and the same reasons that have been found sufficient to warrant the admission of a merchant's books in evidence to prove a sale and delivery of goods apply in the case of a banker's books to prove his transactions in money with a customer. Moreover, the necessity of the situation furnishes another reason for admitting such entries as competent, but of course, not conclusive, evidence of the dealings to which they relate. In the multiplicity of transactions in a banking institution, it is practically impossible to have better evidence; and the admissibility of the entries may therefore stand also upon the ground that they are ordinarily the best evidence of which the case admits. To the admission of the depositions and the entries referred to, the defendant is granted an exception.

One word more may be said concerning the payment by the plaintiff of \$2,500 on November 12th. The Potteries Company and the Huntington China Company were closely allied corporations, being indeed, practically identical. The plaintiff was the holder of certain bonds of the China Company. As partial security for their payment, it was agreed by the Potteries Company, on October 26, 1906, as follows:

"Cincinnati, O., Oct. 26, 1906.

"The Queen City Savings Bank & Trust Co., Cincinnati, Ohio—Gentlemen: For valuable consideration received, we hereby agree and bind ourselves to deposit twenty-five (25%) per cent. of all the commercial business paper discounted by you, for the account of the Union Potteries Company, to a special

fund to be called 'Huntington China Company, Huntington, W. Va., Sinking Fund Account,' and it is hereby agreed the same shall not be subject to check, but shall be held to apply on the forty thousand (\$40,000.00) dollars Huntington China Company, Huntington, W. Va., bonds held by you, it being understood that upon this sinking fund balance, you are to pay us interest at the rate of three (3%) per cent. per annum.

"Yours very truly

Union Potteries Company.

"F. W. Fowler, President.

"Max Hart, Vice President."

To this the China Company agreed:

"Cincinnati, O., Nov. 12, 1906.

"Mr. F. W. Fowler, Pres't. Huntington China Co., Pittsburgh, Pa.—Dear Sir: Enclosed we hand you authority signed by the Union Potteries Company, Max Hart, vice president, authorizing us to charge back any paper discounted for the Union Potteries Company, which, when due, would fail to be paid, either to the account of the Union Potteries Company or the Huntington China Company Sinking Fund.

"We would be pleased to have you sign this authority, as the Huntington China Company, per yourself as president."

To this the China Company replied on the same date:

"The Queen City Savings Bank & Trust Co., Cincinnati, Ohio—Gentlemen: In regard to the sinking fund account which you have credited to the Huntington China Company, would state that, in the matter of discounting our paper, in case any of it is not paid at maturity, and it is necessary to charge same to our account, and should our account not have sufficient balance to justify such charge, that you are authorized to charge such balance to the sinking fund account of the Huntington China Company.

"Yours very truly."

It was suggested upon the argument, although I did not understand the position to be much insisted upon, that the plaintiff was bound by this agreement to apply the \$2,500, at all events—if not the whole \$4,700 which it appears was in the sinking fund account—in relief of the defendant's obligation upon these notes. In my opinion the suggestion does not need an elaborate reply. The defendant was not a party to the agreement, whatever its scope may be, and has no right to avail himself of its terms. In the view most favorable to his interest, the best that can be said about the agreement is, that it furnished the plaintiff with an additional security for the payment of such commercial paper as might be discounted for the Potteries Company, and that the defendant may have a valid claim to subrogation against this sinking fund after he has discharged his obligation to the plaintiff upon the notes in suit. In coming to this conclusion, I have not considered at all the letter of June 3, 1907.

The clerk is directed to enter a finding in favor of the plaintiff in accordance herewith, upon which judgment may be entered in due course.

The above and foregoing testimony and evidence set forth and contained in this the defendant's bill of exceptions, is all the testimony and evidence that was produced, given or heard at the trial of said issue and cause as well as all the testimony and evidence taken by deposition or on commission and taken into consideration by said judge in making his findings in said cause.

And thereupon, the counsel for the said defendant did then and there except to the aforesaid admission of the aforesaid evidence offered by the plaintiff and to the finding and opinion of the said judge that plaintiff paid out the said moneys before the receipt of notice from defendant of cancellation and that there was competent evidence to support such finding of fact, and inasmuch as the said evidence, finding and opinion so excepted to do not appear upon the record.

The said counsel for the said defendant did then and there tender this bill of exceptions to the said portion of the findings and to the opinion of the said judge and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge at the request of the said counsel for the de-



fendant did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 8th day of October, 1908.

John B. McPherson. [Seal.]

The defendant, during the trial, objected to the competency of certain testimony offered by the plaintiff, and duly excepted to the admission of the same. Upon this and certain findings of the court founded thereon, assignments of error have been made, which have raised the questions discussed at the bar. The court below has found, as we have seen, that there was no evidence of fraud or bad faith on the part of the plaintiff, or of any knowledge on its part of fraud or bad faith on the part of any of the intermediate parties to the notes, and that plaintiff was the bona fide holder thereof, for value and before maturity; yet it also found that the notes were accommodation notes, the mere discount of which and the crediting of the proceeds to the account of the Potteries Company, the indorser, were not equivalent to parting with value, for the purposes of this case. The court therefore concludes that the defendant, as an accommodation maker, was entitled to cancel his obligation, by proper notice given to the plaintiff before it actually parted with value, by honoring the checks of the Potteries Company, and as a result, that the plaintiff was entitled to recover, not the full amount of the notes, but, only the aggregate of the amounts paid out to the Potteries Company, on checks drawn upon the proceeds of the notes placed to its credit.

Assuming that the fact of such payments was found by the court upon competent and sufficient testimony, the defendant below could hardly complain of the resulting conclusion reached by the court. In fact the defendant's counsel agrees with the court, in its finding that Reyburn was an accommodation maker, and that he was entitled to revoke his obligation on the paper, by proper notice given the bank, even after the bank had discounted the same and passed the proceeds to the credit of the indorser, and that the bank could recover, as a holder for value, only to the extent of payments made prior to the receipt of such notice. But counsel for the defendant contends that the evidence of such payments by the bank, prior to said notice, as offered by the plaintiff and admitted by the court, was incompetent and should have been rejected, and that therefore the court erred in its findings as to such payments, and that the judgment on that account should be reversed.

We think, however, that the court was justified in the reception of the testimony objected to, and has given satisfactory reasons therefor. Upon examination of this testimony, we find that the discount clerk of the bank testified to his employment as such, and that he kept a record of all paper discounted by the bank, and kept the books in connection therewith; that the discount register is a complete record, giving the names of the drawer and maker, etc., and an exact copy of the note; that if the note is discounted, it is put into the discount ledger, and from that a ticket is made, crediting the account of the customer for whom the paper is discounted, with the amount thereof, less the discount. He also testified that this discount register was in his possession, and he then produced it; that the entries were in his handwriting, made in the usual course of business of the bank, and that the

entries under date of November 12th, relating to the notes in question, were made at the time they purported to have been made; that the book was a book of original entries of the Queen City Savings Bank & Trust Company, of all discount transactions. He then, producing the record, testified to the particular entries made by him, showing the discount on November 12th, of the notes in question, with all necessary names and dates, together with copies of the notes. He also gave the same testimony in regard to the discount tickler and discount ledger, kept by him in the plaintiff bank, and produced the same, with their entries on November 12, 1906. As this testimony was taken upon commission, a copy of the account, certified to by the commissioner, was attached to his return. So also of the same character was the testimony of the clerk who kept the individual ledger. He testified of his own knowledge that the proceeds of the discounts were credited by him to the Potteries Company in the individual ledger, and a copy of the leaves containing these entries was certified by the commissioner and attached to his return. He also testified that all the entries in this account were made by himself, both as to debits and credits, and that the book was regularly and fairly kept in the transaction of the usual business of the bank from day to day.

Plaintiff strongly objects that these payments by the bank out of the proceeds of the notes in question, credited to the Potteries Company, could not be proved by these entries on the bank's books, because, being cash items, they are not within the rule by which shop books and tradesmen's books of account, regularly and fairly kept as books of original entries, supported by the oath of the plaintiff himself, are admitted as prima facie evidence of the pertinent entries therein contained. The rule in regard to the admission of books of original entries, supported by the oath of the party to prove the transactions therein contained, is a very old one in this country, and existed in England as an ancient rule of the common law. It was adopted by courts as a rule of necessity, as in many cases without it the administration of justice would have been at fault. It was recognized as a rule of convenience that facilitated the ordinary transaction of business, and has found a secure place in the jurisprudence of this country, whether as a doctrine of the common law of evidence, or as an enactment of the statute law. The reasons upon which this rule rests, strongly support the admission in evidence of the book entries of those engaged in banking, or whose principal business is in money and cash transactions, whether as individuals or as corporations. The same necessity and the same convenience commend the rule in the one case as in the other.

The entries in the books of the bank thus made and thus proved, were admitted in the court below over the objection of the defendant, as evidence tending to show the discount of the notes in question, the crediting of the proceeds to the account of the Potteries Company, the indorser of the same, and the withdrawals by the Potteries Company of the amounts referred to by the learned judge of the court below, as constituting the payments made by the bank on account of these notes, prior to the 15th day of November, the date of the reception of the notice from the defendant.

Counsel for the defendant, while admitting that such payments would be pertinent to the issue, strongly objects to the competency of this mode of proof, on the ground that the rule of evidence, by which shop books and tradesmen's books are admissible in evidence, does not apply to entries of cash items. It may be admitted that this exception to the rule is as old as the rule itself, which referred originally only to items of purchase and sale, or of work and labor performed, which made up so large a part of the daily business of a community. Items of money loaned or money advanced were exceptional, and ordinarily were easily proved by receipts or other evidence than the book account. In the development of the shop book rule, that has taken place in this country, and later in England, some modification as to the exclusion of such items has been made, to which we need not now refer. It is only necessary to say that the reasons upon which books of original entry, as to sales of merchandise and as to work and labor performed, were admitted, has been long applied to the books kept by banks and those whose business is altogether or chiefly concerned with the care of money, and in dealing with debits and credits for the same. Indeed the reasons of necessity and convenience are stronger in the latter case than in the former, and the fundamental ground of circumstantial trustworthiness attaching to the entries made in regular course by a large banking corporation, is more apparent than in the cases originally embraced within the rule as to shop or tradesmen's books. A large banking institution must of necessity be organized in departments, and the integrity of its transactions must depend on the accuracy and fidelity with which those in charge of the records thereof perform their work. Indeed the whole business of such an institution may be said to rest on properly made entries in proper books, and that such entries are, in a sense, themselves ultimate facts to be received under certain circumstances as probative facts, and both the necessity and convenience of the business world require that under a wise judicial discretion they should constitute legal *prima facie* evidence of the transactions to which they relate. They constitute, in most cases, the best evidence that is attainable, and as a matter of fact, such entries when regularly and fairly kept in the ordinary course of business, regarding debits and credits from day to day, are more reliable than fallible human memory could possibly be, as to any given transaction which they purport to record, especially where a considerable interval of time has elapsed between the giving of the testimony and the transaction referred to.

Of course judicial discretion in every such case is appealed to, to see that such testimony, when offered, has been safeguarded by such an environment of circumstances as will give it the requisite circumstantial trustworthiness. The entries accordingly must have been made in the regular course of business, and must be testified to, if possible, by the entrant, who must be shown to have been the one whose ordinary business it was to make such entries, and that such entries are to all intents and purposes, or as nearly as possible, original entries, and such as the business of the bank requires, and upon the faith of which such business is transacted. Take, for instance, the case before us. We have the entries from the discount register and the discount ledg-

er, the first named being undoubtedly a book of original entries, and we have the oath of the clerk who made the same. We have also the individual ledger account, in which the credits to the Potteries Company were made upon written information from the discount clerk, and the debits against that account upon the same page, entered as sworn to by the testifying clerk in charge of the book. This book, too, was as nearly as possible a book of original entries; at least, there was no other book in which a specific charge was made against the Potteries Company. These debits were necessarily made, either from the checks themselves of the Potteries Company, or memoranda furnished by a paying teller, but they were made in due course of business and regularly made by the entrant who swore to them and whose business it was to make all such. No paying teller could possibly testify as to the date and amount of a particular payment, and the bank itself must depend upon the fidelity and accuracy with which the entries in question were made.

Wigmore, in his excellent work on Evidence, says:

"The practical impossibility, on grounds of mercantile inconvenience of producing all the clerks, salesmen, teamsters, or the like, who have contributed their knowledge in making up the items of voluminous accounts, is by some courts recognized as a sufficient ground for nonproduction. \* \* \* The policy of these rulings, so far as it exempts from the production of all but one verifying person, on the ground of mercantile inconvenience is deserving of common adoption."

A fortiori, should such a policy apply in proving the daily debit and credit transactions of a bank. *Johnson v. Farmers' Bank*, 1 Har. (Del.) 117; *Meighen v. Bank*, 25 Pa. 288; *Town of Concord v. Concord Bank*, 16 N. H. 26.

In addition to the testimony of the entrant clerks, above referred to, the vice president and secretary of the bank was called as a witness, and testified that he was the general supervisor of the business of the bank, and kept in touch with it all as it was transacted. He produced the original sheets from the books of the bank, containing the entries already testified to by the clerks keeping the same, certified copies of which were attached to the return made by the commissioner who took their testimony. He testified to being familiar with these entries, and upon their faith was willing to swear, as he did swear, that the withdrawals by the Potteries Company of certain sums of money out of the proceeds of the discounted notes, between the 12th and 14th of November, were actually made before reception of the telegram received from the defendant on the morning of the 15th. On cross-examination, however, he testified that he relied entirely upon these entries, and had no independent memory of the facts therein stated. But such testimony from the active business manager of the bank only emphasizes the necessity of admitting these book entries as prima facie evidence of the payments to which they refer. It was this necessity which properly appealed to the discretion of the trial judge, and it was, as said by him, the best evidence of which the nature of the case admitted. "When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and success-

fully be one rule for the business world and another for the courtroom." Wigmore on Evidence, § 1530.

*Continental Bank v. First Natl. Bank*, 108 Tenn. 374, 68 S. W. 497, is quoted with approval by the writer to whom we have just referred, as follows:

"We think it not necessary that the bookkeeper who made the entries should be examined as to their correctness. At most he could only testify that the entries made by him are true entries of transactions reported to him by others. In other words, he could only testify that he wrote down what others told him. The court knows, as a matter of common information, that there are many persons in the employ of banks, and each has his different department, and each transaction passes through the hands of several—it may be of many—persons. We take a deposit, for instance, it goes into the hands of the receiving teller, thence into the hands of a journal clerk, thence to the individual bookkeeper, or such other officials as perform the functions of these officers. When it reaches the hands of the bookkeeper, who makes the final entry, which stands as the true statement between the bank and depositor, it has gone through the hands of a dozen parties, perhaps; and the last party only records what comes to him through so many hands, and knows nothing, it may be, of the actual transaction. It would seem that the cashier, whose function it is to overlook all transactions at the counter and over the books, and test each transaction through all its stages, would be the person most competent to produce the books and vouch for their accuracy."

See, also, *Fielder v. Collier*, 13 Ga. 499, and the quotation from the opinion of Lumpkin, J., made by the same writer; also, *Nelson v. Bank*, 16 C. C. A. 425, 69 Fed. 798; 1 *Morse on Banking*, § 295.

But counsel for the defendant further contends that, however this may be, plaintiff's books are inadmissible to prove money paid to a third person. This proposition is not applicable to the present case. The transaction here testified to is not *res inter alios acta*, but a transaction between the plaintiff and defendant in this respect; i. e., the defendant having notified plaintiff not to discount his notes offered by the Potteries Company (or pay the proceeds of the discount to the said company), the plaintiff is showing that it has already paid certain amounts to the Potteries Company. This is the vital issue between the plaintiff and defendant. But again, it is to be noted that the only other evidence open to the plaintiff to prove the withdrawals of this money by the Potteries Company before the reception of said notice, was that of the proper officer of that company, who offered the notes for discount, one Hart. He was not called or produced by the plaintiff, but was subpoenaed and attached for nonappearance by the defendant, and an affidavit of one Miller was introduced by the defendant, in which the affiant swore that he had had a conversation with Hart, in which Hart had said that no money had been drawn out from the plaintiff bank by the Potteries Company until long after the date of the notice in question. In order to avoid a continuance, plaintiff stipulated that Hart would have so testified if he had been produced as a witness. This testimony, defendant relies upon to prove his side of the issue, as to there having been no payments by the bank out of the proceeds of the notes in question until after the date of the notice. Surely no court would tolerate the infliction of such a hardship upon the plaintiff in this case, as to prevent its resort to the best evidence attainable to con-

trovert such testimony on behalf of the defendant. In this conflict of testimony, the court below was required to decide to which it would give credence, and we do not feel called upon to review that decision.

As the writ of error in this case was sued out by the defendant below, it is not necessary to discuss the contention of the plaintiff below and defendant in error, that, as soon as the bank had discounted the defendant's notes and passed their proceeds to the credit of the Potteries Company, it became a bona fide owner and holder of these notes for value; and that no notice thereafter of fraud between the defendant and the payee of the notes, or attempted revocation by him as accommodation indorser, could affect plaintiff's legal right to demand payment of these notes at maturity.

It should be observed, however, that the learned judge of the court below found, as a conclusion of law, from the facts testified to, that the defendant was an accommodation maker of the notes in question, and that as such, he had the right to cancel his obligation thereon at any time before plaintiff had parted with value for the same. A careful examination of the testimony convinces us that this conclusion of law is unwarranted by the evidence disclosed in the record. The defendant himself testified that he was engaged in a business enterprise, in which he needed some money from time to time, and various persons had approached him with offers of accommodation, and among them was the representative of the Union Potteries Company; that after looking up through the various mercantile agencies, he found that the said company had a good rating, and that he decided to conclude the arrangement which was, that he was to receive one-half and the Union Potteries Company one-half of the proceeds of the notes, which he made to their order, when discounted. It is true that he testified that he did not receive the one-half of the proceeds, but this default could not have occurred until after the discount of the paper, and could not affect the status of plaintiff as a bona fide holder of the notes for value. The paper thus issued was very far from being accommodation paper, and could not give to the defendant the character or rights of an accommodation maker. But this is not all. The correspondence by mail and telegraph, which took place between the plaintiff and defendant prior to the discount of the notes, would seem clearly to estop defendant from claiming such rights, or denying his liability on the notes. This correspondence is set forth by the learned judge of the court below in his findings of fact, above quoted.

It is impossible, however, as the case is now presented to us, to do more than affirm the judgment of the court below, and it is so ordered.

## GREENWOOD et al. v. WATSON et al.

(Circuit Court of Appeals, Third Circuit. July 1, 1909.)

## No. 15.

## 1. SALES (§ 150\*)—PERFORMANCE—PLACE—TENDER BY SELLER.

Where a contract for the sale of corporate stocks and bonds provided that the buyer agreed to pay the price on a specified day, and that the place of payment was to be a certain bank in Chicago, where the securities were to be assembled and all clearances made, the seller was bound to have the securities at that place on the day specified and then and there tender the same to the buyer in order to establish the buyer's default, unless a tender was waived.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 150.\*]

## 2. TENDER (§ 11\*)—REQUISITES.

In order to constitute a valid tender, there must be actual ability, accompanied by immediate physical possibility of reaching out and laying hold of the thing to be delivered and the making of a manual proffer thereof, or of placing it in such a position that the person to receive it may lay hold of it if he chooses.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 20; Dec. Dig. § 11.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6910, 6911.]

## 3. SALES (§ 176\*)—DELIVERY—WAIVER OF DEFAULT OR DELAY.

Where a buyer's agent requested further time to accept a delivery of securities purchased, which was denied, and on the date specified for completing the sale the buyer notified the seller that S. was the buyer's agent, but would communicate with the seller, there was no waiver of the seller's obligation to have the securities at the place specified for the completion of the sale in order to make a tender required to put the buyer in default.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 176.\*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 164 Fed. 294.

W. B. Bodine, Jr., and G. W. Pepper, for plaintiff in error Maury. Joseph De F. Junkin, for plaintiff in error Greenwood.

E. J. Pershing and Geo. E. Nicholls, for defendants in error.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

BUFFINGTON, Circuit Judge. In the court below, Messrs. Watson, Preston & Co., herein called "plaintiffs," recovered a verdict against Greenwood & Co., herein called "defendants," for breach of a contract between them. Defendant's motion for judgment non obstante veredicto having been denied and judgment entered for plaintiffs on the verdict, defendants sued out this writ of error. The error now pressed is that binding instructions for defendants should have been given. The contract sued on was as follows:

"This agreement entered into as of this 7th day of July, A. D. 1906, by and between Watson, Preston & Company, of Chicago, Illinois, known hereinafter

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as the party of the first part, and Greenwood and Company, of Philadelphia, Pennsylvania, known hereinafter as the party of the second part:

"Whereas, the party of the second part is desirous of purchasing the gas and electric light property located at Centralia, Illinois, the property being owned by a corporation known as the Centralia Gas & Electric Company; and whereas, the party of the first part owns or controls the capital stock; it is hereby mutually agreed as follows:

"First. The party of the first part agrees to sell and deliver to the party of the second part all of the stock and bonds of the company herein referred to and in accordance with the terms and agreements herein contained, on or before August 1, 1906. The stock and bonds sold are as follows: \$125,000.00 preferred stock; \$125,000.00 common stock; \$165,000.00 5 per cent. first-mortgage, gold bonds. The above stock and bonds mentioned, being all of the stock and bonds outstanding against the company.

"Second. In consideration of the party of the second part making the payments as hereinafter specified, the party of the first part agrees to deliver the securities hereinbefore referred to and turn the property over free and clear from all indebtedness.

"In consideration of the agreement of the party of the first part, the party of the second part agrees as follows:

"First. On or before August 1, A. D. 1906, the party of the second part hereby agrees to pay to the party of the first part the sum of two hundred and thirty-five thousand dollars (\$235,000.00) in cash; the place of payment to be the American Trust & Savings Bank, of Chicago, where all securities are to be assembled and all clearances made, in accordance with the terms of this contract."

This agreement contemplates delivery of the securities at a certain time and place. In such case the duty of a vendor is clear. "Where the thing is to be performed at a certain place, on or before a certain day, to another party to a contract, there the tender must be to the other party, at that place." Benjamin on Sales, § 686.

Recognizing this, the plaintiffs in their statement of claim averred that on August 1, 1906, they were ready to deliver the stocks and bonds in question "at the American Trust & Savings Bank, Chicago, Ill., and then and there tendered the same to the defendants, who declined to receive them or to perform their contract in any way whatsoever." The defendants, by their plea, denied such tender. On the trial it was shown that on August 1, 1906, the securities in question were not presented or tendered in Chicago, but were then in a bank at Bellesville, Ill., 300 miles distant. Now the authorities are clear that the plaintiffs, in order to recover damages against the defendants for noncompliance by the latter with this contract, must show a tender of securities or an express or implied waiver of tender by the defendants. This contract called for the performance of concurrent acts by the parties, and the plaintiffs could no more put the defendants in default by demanding payment for the stocks without having them there and tendering them than the defendants could have put the plaintiffs in default by demanding the stocks without having the money there and tendering it. The law in that respect is stated in Hunt on Tender, § 226:

"Actual ability, accompanied by the immediate physical possibility of reaching out and laying hold of the money or thing to be delivered and making a manual proffer of it, or placing it in a position so that the tendor, if he choose, may lay hold of it; must not only exist as a fact, but it must be made to appear at the time that the party has the money or thing ready for actual delivery."



In the case of *Buchenau v. Horney*, 12 Ill. 336, the court say that:

"A tender is *stricti juris* and must be clearly proved. \* \* \* To constitute a legal tender, it is essential to prove an actual offer of the sum due, unless the actual production and offer of the money be dispensed with by the express declaration of the creditor that he will not accept it, or by some equivalent act."

Where the acts of buyer and seller are mutual and concurrent, it follows that, to put one in the position of legal default and actionable liability, tender or waiver of tender must be shown by the other party, and while, as said in *Benjamin on Sales*, § 713, "the actual production of the money may be dispensed with by the vendee, the courts, however, have been vigorous in requiring proof of a dispensation with the production of the money." Referring to mutual and concurrent duties in a sale, the court say, in *Dunham v. Pettee*, 8 N. Y. 513:

"If the buyer in a case of this sort fails to pay or offer to pay within the time specified for mutual performance, the seller is discharged from liability to answer in damages for not delivering the thing sold; but it does not follow that the seller in such case is entitled from the mere default of the buyer to recover the purchase money. To entitle the seller to recover the price, he must show not only that the purchaser failed to pay, but that he himself was ready and offered to deliver the goods."

So in *Neis v. Yocum* (C. C.) 16 Fed. 170, the court, referring to mutual, concurrent obligations, say:

"But if either party would enforce this contract against the other, he must do more than show the default of such other; he must show a performance, or an offer to perform on his part, or, according to the circumstances of the case, that he was ready and willing to perform at the time and place appointed. *Dunham v. Pettee*, 8 N. Y. 508; *Coonley v. Anderson*, 1 Hill, 519; *Lester v. Jewett*, 11 N. Y. 453; *Goldsborough v. Orr*, 8 Wheat. 224, 5 L. Ed. 600; *Phila., etc., Ry. Co. v. Howard*, 13 How. 338, 14 L. Ed. 157."

The actual production and tender of these securities at the time and place of delivery their contract required being necessary, and this not having been done, it is clear this action cannot be sustained, unless the defendants waived such production and tender. Inasmuch as there was no express waiver by word or writing, one could be implied from acts only. Such acts we do not find. Some time during July, Scholl, an agent of defendants, requested from the plaintiffs a postponement of the date of performance; but his request was not acceded to. Thus Watson, one of the plaintiffs, says:

"He (Scholl) asked me at that time if there could not be some way of putting this off for a few days. I told him at that time I did not know how it could be done, that we had arranged for making the clearance both ways on the 1st day of August."

He was then asked: "Did you, at the interview with Mr. Scholl that you have spoken of, extend the time then?" to which he replied: "No, there was no conclusions come to at all."

It will thus be seen that the plaintiffs on August 1st stood on their contract rights and were not misled by an act or request of defendants from which they could infer that a tender of contract performance by them was waived. Indeed, that they stood on contract performance and not a waiver of a requirement thereof is shown by their telegram of that date to defendants, wherein they say: "We are ready

to deliver as per contract with you dated July 7th." There can be no mistake as to their position. Having granted no extension, they had a right to stand on their contract. This they did in their telegram, in the letter they wrote defendants the same day, and in their statement of claim in this suit. So standing on their contract it became their duty to comply with their obligation to deliver the securities on August 1st at the place of delivery their contract called for. Unfortunately for their legal position they failed to have the securities there. The telegram received by them from defendants during the day, saying: "W. H. Scholl is our representative in matter. He will communicate with you"—was no waiver of the necessity of tender. The plaintiffs did not see Scholl or hear from him until some days later. The telegram neither affected nor misled any one. It in no way debarred the plaintiffs from placing the defendants in the position of actionable default by making a proper tender, and it in no way debarred the defendants from standing on their right to a precedent tender by plaintiffs before defendants were put in actionable default.

There being therefore no tender by plaintiffs and no waiver of tender by defendants, we are clear that binding instructions should have been given for defendants.

The judgment is therefore reversed.

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In re LEECH.

SHERRILL v. LEECH et al.

(Circuit Court of Appeals, Sixth Circuit, July 19, 1909.)

No. 1,915.

1. BANKRUPTCY (§ 159\*)—"UNLAWFUL PREFERENCE"—ELEMENTS.

In order to establish an unlawful preference under Bankr. Act July 1, 1898, c. 541, § 60, cls. "a," "b," 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), voiding the same, it must be alleged and proved that at the time of the transfer the transferor was insolvent, that the property transferred was such as his creditors had a right to subject to their claims, that he intended a preference, and that the transferee had reasonable cause to believe the transferor so intended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247-281; Dec. Dig. § 159.\*]

2. BANKRUPTCY (§ 302\*)—PREFERENCE—TRANSFERS.

A trustee's petition, alleging that the bankrupt had within four months before the filing of the petition for adjudication transferred to his wife, as part payment of an indebtedness, two jeweled rings, intending an unlawful preference, was insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 456; Dec. Dig. § 302.\*]

3. BANKRUPTCY (§ 302\*)—PREFERENCE—FRAUD—PLEADINGS.

Allegation in a petition by a bankrupt's trustee that a preference sought to be set aside was fraudulent, without any facts showing fraud other than that the transfer constituted a preference, was insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 456; Dec. Dig. § 302.\*]

**4. BANKRUPTCY (§ 305\*)—PREFERENCE—VACATION—FINDINGS—JUDGMENT.**

Where, in a suit to set aside an alleged fraudulent preference, the referee found that the property was transferred, not with a fraudulent intent, but to prefer the transferee over the bankrupt's other creditors, but failed to find that the bankrupt was then insolvent, or that the creditor preferred had reasonable cause to believe that it was intended to give a preference, the findings were insufficient to sustain a judgment setting aside the transfer.

[Ed. Note.—For other causes, see Bankruptcy, Dec. Dig. § 305.\*]

**5. BANKRUPTCY (§ 228\*)—REFEREE'S DECISION—REVIEW BY DISTRICT JUDGE.**

On certificate of a referee in a proceeding to set aside an alleged fraudulent preference, the District Judge, if the petition is sufficient, may take new evidence offered, or he may examine the evidence reported by the referee and determine the facts anew.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 228.\*]

**6. BANKRUPTCY (§ 306\*)—APPEAL—REVIEW OF EVIDENCE.**

On appeal from an order overruling the determination of a referee in bankruptcy on a petition to set aside an alleged fraudulent preference, the Circuit Court of Appeals may review the evidence, but not so if the proceeding is brought up on a petition to review, on which the court's jurisdiction is limited to the determination of questions of law.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 306.\*]

**7. EXEMPTIONS (§ 40\*)—"WEARING APPAREL."**

Whether jeweled rings were exempt as "wearing apparel," under Ky. St. 1909, § 1697 (Russell's St. § 4656), depends largely on whether they were acquired and used as ornamental apparel, or as an investment of value as a matter of business.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 45; Dec. Dig. § 40.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7425, 7426, 7834.]

Petition to Review an Order of the District Court of the United States for the Western District of Kentucky.

For opinion below, see 171 Fed. 591.

J. D. Mocquot, for petitioner.

J. C. Flournoy, for respondent.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

SEVERENS, Circuit Judge. The trustee, Sherrill, prays for the revision of an order made by the District Court dismissing a petition which he filed in the bankruptcy proceeding to compel the bankrupt, Leech, to deliver to him, the trustee, two diamond rings, alleged to belong to, and then in possession of, the bankrupt, and claimed by the trustee to be part of the estate. The claim of the trustee was, as stated in his petition, that the bankrupt had, within four months prior to the date of filing the petition on which he was adjudged bankrupt—

"fraudulently transferred to his wife, Agnes Leech, as a credit on a pre-existing indebtedness then owing by him to her, two rings, containing two diamonds and one sapphire gem each, of the value of \$2,000. That the said pretended transfer and conveyance was a fraudulent preference, and was intended by the bankrupt to be a fraudulent preference, in favor of said Agnes Leech."

And the petitioner prayed for a rule requiring the bankrupt to turn over the rings to him, the trustee. To this petition the bankrupt responded—

"denying each of the allegations therein, and averring that the rings in controversy were transferred and delivered to said Agnes Leech for a valuable consideration, that they were delivered to her and retained by her for several weeks, and that she left on a trip to be gone until the 15th day of September, 1908, and at that time requested the bankrupt to keep the rings for her until her return, and that in this way the rings are in his possession, and he is holding them simply as bailee for her; denies the rings are his property, and avers that they were sold and delivered to said Agnes Leech, in good faith and for valuable consideration, long prior to the time that he filed his petition in bankruptcy, and before he had any idea of becoming a bankrupt."

Upon hearing the evidence the referee found as follows:

"That the rings in controversy, which were transferred by Thomas C. Leech to his wife, Agnes Leech, were transferred by him to her, not with a fraudulent intent, but with the intent and for the purpose of preferring her to his other creditors; that the title to said property never passed from said Thomas C. Leech to Mrs. Agnes Leech, and at the time of his bankruptcy were the property of said Thomas Leech, and by his said bankruptcy became and are now the property of said H. V. Sherrill, as trustee of said bankrupt's estate, and they are so adjudged."

And upon this finding, the referee—

"ordered that said Thomas C. Leech do now turn over and deliver to said trustee both of said rings."

Mrs. Leech thereupon filed a petition for revision of the order of the referee by the District Judge. The referee certified the proceedings, stating the proceedings before him, including the substance of the evidence, his finding, and his order. In his report it was also stated that the rings had been appraised by experts agreed upon by counsel at the sum of \$400 and \$250, respectively. The judge reversed the order of the referee and—

"further ordered, adjudged, and decreed that the referee be and he is directed to dismiss the petition of the trustee, H. V. Sherrill, filed herein on August 22, 1908, praying for an order to require the bankrupt to surrender the said two rings."

The question here is whether the court below erred in reversing the order of the referee and directing the dismissal of the trustee's petition. It appears from the opinion of the District Judge that he first canvassed the question whether, without any finding by the referee that Mrs. Leech had reason for believing that her husband intended an unlawful preference, the order could be supported. But, waiving a decision of that question, he proceeded to consider whether, under the statute of Kentucky (Ky. St. 1909, § 1697 [Russell's St. § 4656]), concerning exemptions from execution, these rings were exempt, holding, as he did, that if they were so the husband might do what he would with them. Referring to decisions of other federal courts in states having similar exemption laws, he concluded that the rings were exempt as wearing apparel. His conclusion rested upon two propositions: First, that rings were wearing apparel; and, second, that, whereas the Kentucky statute had fixed limitations of value upon other kinds of property exempted, it affixed none in respect of wearing apparel.

We pass by for the present the consideration of this ground for the order made, because we are clear that upon other grounds his order was right. In order to establish that there was an unlawful preference, it must be alleged and proven that at the time of the transfer the party making it was insolvent, that the property transferred was such as his creditors had a right to have subjected to their claims, that he intended a preference, and that the transferee had reasonable cause to believe that the transferor had such an intention. Act July 1, 1898, c. 541, § 60, cls. "a," "b," 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445). In respect to the matter of pleading in such a case, it may be admitted that the allegations need not be technical or formal; but, inasmuch as the proceeding is aimed at the determination of a substantial right, the essential facts on which a recovery is sought should be alleged. In this case the only one of the essential facts alleged in the trustee's petition was that the bankrupt had, within four months before the filing of the petition for adjudication, transferred to his wife as a part payment on an indebtedness to her the two rings, intending an unlawful preference. It is characterized as a fraudulent preference; but no fact is alleged making it fraudulent, other than it was so because of the giving a preference. It was not alleged that the bankrupt was insolvent at the time of the transfer, nor that the wife had any reason to believe that the payment was intended to give her a preference forbidden by law. As it was necessary to allege these facts, it was necessary to prove them. The burden was on the trustee.

Further, before an order can be made for the surrender of the property transferred, it must be found that not only was the transferor insolvent at the date of the transfer, but that the transferee had reasonable cause to believe that it was intended thereby to give a preference. Neither of these facts were found by the referee. Following the allegation of the petition, he found the one fact only, that the rings "were transferred by him to her, not with a fraudulent intent, but with the intent and for the purpose of preferring her to his other creditors." All the rest of his finding is a deduction from those premises. That the facts omitted are indispensable to a judgment such as the trustee was seeking has been held in previous decisions of this court. *Lansing Boiler Works v. Ryerson*, 128 Fed. 701, 63 C. C. A. 253; *First National Bank v. Holt*, 155 Fed. 100, 84 C. C. A. 16; *In re Pfaffing* (D. C.) 154 Fed. 523; *Acme Food Co. v. Meier*, 153 Fed. 74, 82 C. C. A. 298. And see, also, a recent decision of the Circuit Court of Appeals for the Fifth Circuit in *Tumlin v. Bryan*, 165 Fed. 166; *Loveland on Bankruptcy* (3d Ed.) §§ 194a, 194c.

No new testimony was taken when the matter was brought to the District Judge, and no new fact found. It was inevitable that the judge should have reversed the order of the referee, because of the entire absence of essential facts necessary to support it; and the order of the District Court must be affirmed. If there had been a sufficient petition, the judge might have taken new evidence, if it had been offered, or he might have examined the evidence reported by the referee and determine for himself what the facts were. If this were an appeal, we might ourselves review the evidence; but on a review of the proceedings, we are limited by the terms of the act to the determination

of questions of law arising in the proceedings, and must accept the facts as found by the District Court.

The question whether the conclusion of the court on which it based its order, namely, that the rings were exempt property, was correct or not, would depend largely on facts not found by the judge nor by the referee, and we could not form an intelligent judgment whether the order was justified without knowing, for instance, the financial circumstances and the conditions of the man's life prior to his failure, and what was customary in respect to the wearing of such jewelry among his associates and friends; for we conceive that the turning point upon the provisions of the Kentucky statute would be whether these rings were acquired and used as ornamental apparel, or were acquired and kept as an investment of values, as a matter of business, rather than for the purpose of ornament. And in the present case, if there had been an issue upon the question of the transferror's solvency at the time of the transfer, or of reasonable cause to believe on the part of the transferee that the transfer was made with intent to create an unlawful preference, it would have devolved upon the referee, or the judge, to find the facts, so that the reviewing court might apply the law to the facts found by the court whose findings of fact are final. This case is not peculiar in this respect. We have on several occasions experienced the same difficulties.

Counsel who bring the case here should see that the case is properly made up, to the end that this court should have the basis for decision. The statute contains no provision upon this subject. We think it expedient to formulate a rule for the guidance of counsel and the District Courts in preparing cases for revision by this court, and shall undertake to do so.

Order affirmed, with costs.

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### WESTALL et al. v. AVERY.

(Circuit Court of Appeals, Fourth Circuit. June 9, 1909.)

No. 877.

1. **BANKRUPTCY (§ 22\*)—PROCEDURE—EQUITABLE CHARACTER OF PROCEEDINGS.**

Bankruptcy proceedings are purely equitable in their character, and, within the limits prescribed by the bankruptcy acts and the special rules of practice prescribed by the Supreme Court, are to be administered in accord with the general principles and practices of equity.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 22.\*]

2. **BANKRUPTCY (§ 287\*)—ACTION BY TRUSTEE—FORM OF REMEDY.**

A proceeding by a trustee in bankruptcy to set aside fraudulent conveyances or illegal preferences is not a proceeding in bankruptcy, but, while ancillary to such proceedings and authorized by the bankruptcy act to be instituted in either the federal District Court or in a state court of competent jurisdiction, it must be governed, so far as pleading and practice are concerned, by the laws and rules of the court wherein it is instituted, and, where that is a federal court, such suits are in equity, and

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

governed by the rules of pleading and practice in equity which obtain in such court independently of the state practice.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 287.\*]

3. ARBITRATION AND AWARD (§ 82\*)—REFERENCE—FINDING—REVIEW.

A proceeding by a trustee in bankruptcy to set aside conveyances as fraudulent was instituted in a District Court as an action at law; and, after evidence had been taken before a jury and a verdict directed as to two issues, by agreement in open court an order was entered referring the cause and all other issues arising upon the pleadings to a person designated to take and state the evidence and his conclusions of law and fact thereon to the next term of court for its further action. *Held*, that such order in effect constituted such person an arbitrator, and that his finding could be reviewed by the court only for fraud, misconduct, or other recognized legal reasons authorizing the setting aside of an arbitrator's award.

[Ed. Note.—For other cases, see Arbitration and Award, Dec. Dig. § 82.\*]

Setting aside an award for interest, prejudice, or misconduct of arbitrator, see note to *Nolan v. Colorado Central Consolidated Mining Co.*, 12 C. C. A. 592.]

In Error to and Appeal from the District Court of the United States for the Western District of North Carolina, at Statesville.

Avery, trustee for J. A. Townsend & Co., bankrupts, filed his "complaint" on the law side of the Circuit Court below, seeking to set aside as fraudulent three contracts made by the bankrupt, J. A. Townsend; the one, a deed of trust to Abernathy, trustee, dated January 13, 1903, to secure Westall \$6,250, the second, bearing the same date, to Westall, whereby he (Townsend) was to ship to Westall all lumber manufactured from certain lands set forth in the deed of trust above referred to, "as well as from all other lands upon which the said W. H. Westall \* \* \* contracts \* \* \* to buy timber in Burke county," and the third, executed in August, 1903, whereby Townsend turned over to Westall the possession of the stock of goods, conveyed by the deed of trust to Abernathy, trustee, and to have the title and possession to the properties embraced in said contracts vested in him as such trustee in bankruptcy, as also to have Westall account to him for the value of all such property converted by him. Subsequently, by reason of doubt of the Circuit Court's jurisdiction, counsel agreed with the acquiescence of the District Court, that service should be accepted in the District Court, that pleadings filed in the Circuit Court should be read as pleadings in and the case tried by the District Court.

The joint answer of Westall and Abernathy, trustee, was filed denying the charges of fraud and fraudulent intent charged, and the right of plaintiff to be vested with title to the properties or to have the accounting from Westall claimed by him. On December 16, 1904, a jury was impaneled to try this "action," and some 13 issues were submitted to it. After taking testimony touching these issues, five days later, the court directed the jury to answer the first issue in the negative. This issue was: "Did the defendant, J. A. Townsend, make and deliver the trust deed of January 13, 1903, with intent to hinder, delay, and defraud his creditors?" He also directed the jury to answer in the affirmative the fourth issue, which was: "Did Townsend and Westall enter into an oral agreement on the 13th of January, 1903, and, if so, are the terms of said agreement embraced in the writing bearing that date signed by Townsend and Westall, but admitted to have been executed on the 4th of July, 1903?" Thereupon, "by consent of the parties, expressed in open court," it was ordered that "said case and all other issues arising upon the pleadings" should be referred to A. Burwell, Esq., who should "take and state the evidence and his conclusions of law and fact thereon" to the next term of court

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for its action, this, however, to be without prejudice to the exception taken by the plaintiff to the court's action directing the jury's findings to issues 1 and 4 as above set forth. Burwell on June 11, 1906, filed his report finding the remaining 11 issues undetermined by the court and jury, and some 7 additional ones submitted by plaintiff's counsel, adversely to plaintiff's contentions, and determining "from the facts found by the jury, by the answers to record issues Nos. 1 and 4, and the facts by me stated above in my answer to the other record issues and the issues submitted to me by plaintiff's counsel, \* \* \* that the plaintiff trustee is not entitled to recover of the defendant, W. H. Westall, anything in this action." To this report of Burwell, the plaintiff filed some 19 exceptions, and upon consideration of these exceptions the court below entered a decree in the "action" in which is set forth five additional findings of fact by the court itself, in contradiction and modification of those found by Burwell, by reason of which the plaintiff trustee was held to be entitled to recover from Westall \$3,710.34, "the value of the lumber on the yard at Hildebrand, N. C., not embraced in the deed of trust," \$266.47, "the value of the two Cook notes," and the full costs of the "action," except that the allowance to Burwell and to his stenographer for their services are divided equally. To this decree of the court the defendants filed at the time 13 exceptions and have in this court assigned 14 errors.

Charles A. Moore and W. A. Self (Moore & Rollins, on the briefs), for plaintiffs in error and appellants.

Charles H. Armfield and Wilfred D. Turner, for defendant in error and appellee.

Before GOFF and PRITCHARD, Circuit Judges, and DAYTON, District Judge.

DAYTON, District Judge (after stating the facts as above). In view of the anomalous proceedings had in this cause, whereby an action at law was started in the Circuit Court, by consent, considered and determined in the District Court, first submitted to a jury, then by consent withdrawn, by like consent referred to an arbitrator, and finally adjudicated by a decree in equity, whereby so much doubt has arisen that it has been brought here and docketed under a combined writ of error and appeal, it would seem both pertinent and necessary to state that it is well settled that bankruptcy proceedings themselves are purely equitable in their character, and, within the limits prescribed by the bankruptcy acts and the special rules of practice prescribed by the Supreme Court, are to be administered in accord with the general principles and practices of equity; but, independent of this, it is also well settled that a proceeding instituted by a bankrupt's trustee to set aside fraudulent conveyances or illegal preferences is not a proceeding in bankruptcy, but, while ancillary to such proceeding and authorized by the bankrupt act to be instituted in either the federal District Court or in a state court of competent jurisdiction, it must be governed, so far as pleading and practice is concerned, by the laws and rules of the court wherein it is instituted. *Loveland, Bkcy.* (3d Ed.), 618; *Pond v. N. Y. Nat. Ex. Bank* (D. C.) 124 Fed. 992. And, further, it is to be borne in mind that the equity practice of the federal courts is independent of, and unaffected by, state laws as to procedure in state courts. *Payne v. Hook*, 7 Wall. 430, 19 L. Ed. 261; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358.



In federal courts the rules of the High Court of Chancery in England are recognized as "the common law of chancery" and an authoritative exposition of the principles, rules, and usages belonging to courts of equity, except so far as they may be modified by federal statute and by rules promulgated by the Supreme Court. *Penn'a v. Wheeling*, etc., *Bridge Co.*, 13 How. 563, 14 L. Ed. 249.

Finally, it is to be observed that federal courts, both when exercising general jurisdiction and also when exercising the special one conferred by the bankruptcy act in this particular, require suits to set aside deeds and contracts as fraudulent to be instituted in equity. *Wall v. Cox*, 101 Fed. 403, 41 C. C. A. 408; *Horner-Gaylord Co. v. Miller & Bennett* (D. C.) 147 Fed. 295; *Pond v. N. Y. Ex. Bank* (D. C.) 124 Fed. 992; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Grant v. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Stucky v. Masonic Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640.

It therefore follows that, while this proceeding might have, under the Code practice of North Carolina, been instituted as a law action in its own courts, having been instituted in the federal courts there, it necessarily had to be instituted in equity, and the "complaint" could only be considered and maintained as a bill in equity. The effort therefore to try by jury the matters involved was unwarranted, and this application to this court must be regarded as an appeal, and not a writ of error.

Regarding it as such, the question for us to determine is whether or not the court below was justified in entering the decree complained of, modifying the findings of fact and the conclusion of law ascertained by Burwell, to whom the matter had been referred by consent of parties. We are constrained to hold that such decree was not authorized for two reasons: First, because, under all the circumstances and anomalous proceedings had, it would seem clear that the parties by consent constituted Burwell in practical effect an arbitrator to settle and determine the matters in controversy. It is to be remembered that after at least four days of taking testimony before the jury upon the theory that the proceeding was one at law, and after the court had directed a verdict as to the two essential issues favorable to defendants Westall and Abernathy, the parties in open court agreed that:

"Said case and all other issues arising upon the pleadings be, and the same are now hereby referred to A. Burwell, Esq., who will take and state the evidence and his conclusions of law and fact thereon to the next term of this court for further action of the court."

It will be perceived that this reference was not to Burwell as either a referee or master of the court, nor did the order constitute him a special master *pro hac vice*. The whole case was referred to him as a private individual and gave him power to "conclude" as to both the law and the facts involved. He was to report his conclusion to the court, it is true, "for further action of the court." What further action by the court was contemplated? Was it any other or further than that usual in cases of arbitration where the award is provided to be entered up as the judgment of the court unless it should be prop-

erly assailed and set aside for fraud, misconduct, or other well-settled legal reasons? We think not. On the contrary, it was, at least, fully within the scope of the ruling, in *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764, where, by consent, a special master was constituted to "hear the evidence and decide all issues between the parties and make his report to this court, \* \* \* which report shall be subject to like exceptions as other reports of masters." In that case, notwithstanding the last provision subjecting the special master's report "to exceptions as other reports of masters," it was held: It is not within the general province of a master to pass upon all the issues in an equity case, and the court cannot refer to him the entire decision of a case without the consent of the parties; but when the parties consent to a reference of a case to a master to hear and decide all the issues therein, and such reference is entered as a rule of the court, his findings cannot be disregarded at the mere discretion of the court, but are to be taken as presumptively correct—subject, however, to be reviewed under the reservation contained in the order of the court for manifest error.

But suppose, as in this case, no reservation to review is contained in the order. Does not such unqualified reference, by consent of parties, to a private individual, constitute him an arbiter? We think so. But, second, if there be any doubt as to this, we are satisfied that the independent additional findings of fact by the court below were not warranted by the evidence, and, in view of the finding as to issues "Nos. 1 and 4" practically by the court itself, were wholly immaterial and did not justify the decree against Westall for the two items set forth in the decree. By finding No. 1 the deed of trust was held not to be fraudulent. By finding No. 4, the other material contract assailed by the "complaint" was held to have been made orally on the same day as the deed of trust and to have been subsequently reduced to writing on July 4th following. The deed of trust and the contract were therefore found to have been consummated more than four months before the bankruptcy proceeding. The "lumber on the yard at Hildebrand, N. C., not embraced in the deed of trust," for which the court below found Westall responsible to Townsend's trustee in bankruptcy, was clearly there, in its manufactured state, by reason of this last contract so upheld by the court. By reason of its terms and conditions, the timber from which this lumber was manufactured had been purchased with Westall's money furnished to Townsend for the purpose, and it was always to be in Westall's name, "in whom the title thereto shall always be and remain." This contract simply constituted Townsend a purchasing agent for Westall of timber which Westall permitted him to saw and manufacture into lumber at agreed prices and ship to him (Westall) in this manufactured state. The original timber and the lumber manufactured therefrom was at all times Westall's. By advancements made, Westall had more than provided for Townsend's compensation for sawing and shipping it. Townsend's trustee in bankruptcy under this valid contract not impeachable for fraud, could take no better title or have any better right than the bankrupt had. What, then, were the efforts Westall made to get possession

of his own property, and what misconduct on the part of Townsend could effect his right thereto in the interest of his trustee?

As to the Cook notes, the value of which constitutes the second item charged by the court against Westall, it is clear that property in these notes was acquired by Townsend through the unauthorized application thereto of Westall's money, by reason whereof they were assigned without fraud by Townsend to Westall. In view of these facts, we are fully convinced that the court below erred in modifying the finding or award of Burwell, but that the conclusion of the latter that "the plaintiff trustee is not entitled to recover of the defendant, W. H. Westall, anything in this action," was entirely justified in law and by the evidence. The decree of the court below must therefore be reversed, and the cause remanded, with instructions to dismiss the bill, with decree for all costs incurred in this court and the court below in favor of Westall and Abernathy, trustee, against the plaintiff, A. C. Avery, Jr., trustee of the bankrupts, but payable only out of the assets of said bankrupts in his hands as such trustee to be administered.

Reversed.

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RACINE PAPER GOODS CO. v. DITTGEN.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909. Rehearing Denied May 28, 1909.)

No. 1,527.

1. CORPORATIONS (§ 519\*)—ACTIONS—ISSUES AND PROOF.

In a suit for unfair competition against a corporation which succeeded to the business of a partnership, the members of which were the incorporators, complainant may allege and prove acts of the partnership prior to the incorporation as tending to show a continued course of conduct and intention, although such acts as causes of action may be barred by limitation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2085; Dec. Dig. § 519.\*]

2. TRADE-MARKS AND TRADE-NAMES (§ 97\*)—UNFAIR COMPETITION—THREATENING SUIT FOR INFRINGEMENT OF PATENT—INJUNCTION.

Complainant and defendant were competing manufacturers of individual cigar pouches, made of paper in sheets, and were the only manufacturers of the same in the United States. Both manufactured under patents, and during five years or more defendant by letters and through its salesmen continuously represented to purchasers of such articles that complainant was infringing its patents and threatened suits against users of his product, causing customers to refuse to give him orders and to cancel orders, resulting in serious injury to his trade. He submitted samples of his goods to defendant and requested the bringing of suit to determine their rights; but no such suit was brought, nor did defendant allege or attempt to prove infringement when sued for unfair competition by reason of its acts. *Held*, that its failure to make an attempt to establish the legal right it claimed was conclusive evidence of its bad faith and of unfair competition, and that complainant was entitled to an injunction and an accounting for damages.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 110; Dec. Dig. § 97.\*]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

For opinion below, see 164 Fed. 85.

See, also, 164 Fed. 84.

Appellee, who has been for more than 15 years a manufacturer and dealer in paper cigar pouches, filed his bill in the Circuit Court charging that appellant, a Wisconsin corporation engaged in the same business, for the purpose of suppressing competition, and with intent to break up and destroy appellee's business, was, at the time the bill was filed, and had been theretofore, circulating among appellee's customers and the trade generally, by letters and otherwise, representations that appellee was infringing appellant's letters patent, that they would render themselves liable in damages should they use appellee's device, a so-called multiple cigar pouch made of paper which he had been manufacturing and selling for five years last past under his patent No. 662,226, granted November 20, 1900, that he had been enjoined from such manufacture, that suits would be filed by appellant against appellee's customers if they used his pouches, and thus made it generally understood in the trade that appellant owned or controlled patents covering appellee's manufacture, and that persons using the appellee's pouches would render themselves liable for damages to appellant. The bill further alleges that all of said representations were false and malicious and made in bad faith and for the purpose of unfairly destroying appellee's business. The bill further charges: That appellee showed his device to appellant and requested it to desist or bring suit, offering to accept service in any competent jurisdiction and help speed the cause to an early hearing, all of which appellant has declined to do, but persists in such malicious course, and will so continue unless restrained; that in this way many customers have been kept from buying appellee's device; that many would-be purchasers have been induced to cancel orders; that, as he is informed and believes, appellant's agents follow appellee's agents from customer to customer and by such representations prevent sales and secure cancellation of sales already made, whereby appellee has lost not less than \$40,000; that his business is being thereby ruined and destroyed; and that unless restrained such action will cause irreparable injury to him. Prayer is made for preliminary and permanent injunction and for an accounting.

The answer asserts that appellant owns patents, in protection of which it has given notice to appellee and the trade, denies all charges of unfair competition in trade, and denies that appellee has suffered or will suffer any damages by any unlawful act done by appellant. The cause was brought to final hearing, and such action was had that the court entered a decree on February 4, 1908, finding that appellant had been guilty of unfair competition in trade, in that it had for many years past, without having brought suit to establish its rights, persistently represented to appellee's customers and to the trade that appellee's cigar pouches infringed appellant's letters patent, that purchases from it and users would be subject to injunction and liable in damages for the use and sale of the pouches, that appellee's trade has been diverted and injured thereby, and decreeing an injunction and ordering an accounting as prayed. Hence this appeal.

Two grounds of error are assigned:

(1) That the court enjoined appellant from notifying infringers of its claims as to infringement unless such notice should be followed up by suit or other judicial proceeding.

(2) That the court decreed defendant to be guilty of unfair competition in trade.

The further facts are stated in the opinion.

E. H. Bottum, T. E. Dennett, and E. B. Hand, for appellant.

George B. Parkinson, for appellee.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge, (after stating the facts as above). By amendment to the bill, and evidence introduced, it appears that

appellant corporation succeeded to the business of a copartnership of the same name, whose members became the charter members of the corporation about January 1, 1902. In its amended answer appellant denies the charge that the transaction was merely a merger of the copartnership into the corporation, and denies that it committed the acts complained of in the bill, or that they were malicious or false or made for the purpose of destroying appellee's business, or will do so. The amended answer further alleges that all the acts charged against the copartnership are laid more than six years prior to the amendment, and therefore barred by the statute of Wisconsin. With regard to this latter defense, the acts charged, to the extent that they are material to the remedy by injunction, are merely evidentiary, as tending to show a course of conduct and an intention, and are not relied upon as causes of action, although, considering the nature of them, it may well be contended that, even were the statute involved, the amendment would not, under the circumstances, be construed to be anything more than an amplification of the averments of the bill, and therefore not within the limitation act. *Patillo et al. v. Allen West Commission Co.*, 131 Fed. 680, 65 C. C. A. 508. That in a proper case appellee was entitled to the relief sought is held in *Emack v. Kane* (C. C.) 34 Fed. 46, decided by Judge Blodgett, *Farquhar Co., Limited, v. National Harrow Co.*, 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755, and *Adriance Platt & Co. v. National Harrow Co.*, 121 Fed. 827, 58 C. C. A. 163. These authorities were followed by Seaman, Circuit Judge, in overruling the demurrer filed to the original bill herein.

Undoubtedly, one claiming that his patent is being infringed should take steps to advise the public of his rights as provided by statute, provided, however, that if it is made to appear that under pretense of so doing he is pursuing a course which is calculated to unnecessarily injure another's business, and with the plain intention of so doing, his conduct will be deemed malicious, and he brings himself within the rule of law obtaining in cases of unfair competition in trade, and subject to injunction.

In the cases cited *supra*, the means employed to injure the business of the three complainants was by circulars addressed to the trade, differing from the acts of appellant herein more in volume and method of distribution than in substance. The distinction goes only to the degree of certainty in establishing the malicious motive, not to the question of amount of damage sustained. In other words, it requires no prolonged or extensive series of damaging assaults upon one's business to call into service the restraining hand of the law, provided it satisfactorily appears that the acts are done with the purpose of injuring the business, and have injured, and are calculated to injure it. When this is proven, fraud will be implied.

As above intimated, the acts complained of cover a period from 1899 up to the filing of the bill on March 1, 1905, about six years. During that time, and on January 1, 1902, or thereabout, appellant was incorporated, and it is insisted that the course of conduct pursued by its predecessor copartnership cannot be taken into consideration in this suit. Even though it were conceded that ordinarily ap-

pellant could not be held liable in an action based entirely on the partnership acts, it nevertheless is true that for the purpose of ascertaining the intention of appellant, and construing the conduct of appellant in that respect, since its incorporation, and in view of the fact that the corporation succeeded to the copartnership, assuming all its benefits and obligations, those prior acts become not only competent but important. It must be borne in mind that the parties hereto are admitted in the record to be substantially the only persons in the United States engaged in the manufacture of these paper cigar pouches, so that the business course of each seriously concerns both. The evidence of appellee consists of interviews and letters passing between the parties, depositions of appellee and other witnesses, letters written by customers to appellee, and replies thereto. Some of the matters contained in the letters are deemed proven, others, especially those alleging threats made to customers, and not otherwise proven, and those alleging fear on the part of customers, growing out of rumors in the cigar trade to the effect that appellant would make trouble, are not brought home to appellant, and can only be considered, if at all for the purpose of showing the state of mind of the cigar dealers' trade, so far as they may do so, having been received in the regular course of business, and being likely to result from the course of conduct of appellant disclosed by the acts and representations legally established.

It is affirmatively shown by the record that the parties hereto were often in contention, both by interviews and letters; the appellant insisting that appellee should desist from handling the multiple cigar pouches in controversy and threatening suit for infringement, and appellee denying infringement and calling upon appellant to sue. This correspondence covers a period, as above stated, of almost six years immediately prior to the beginning of this suit, and antedating the grant of appellee's patent aforesaid. Appellee sent to appellant a copy of its patent on April 23, 1902, and by his accompanying letter accused appellant of representing to the trade that its devices were infringements, and asking appellant to bring suit. This course was consistently pursued by appellee. It advised appellant that its failure to sue would be deemed evidence that its claim was a mere bluff, and not made in good faith, but for the purpose of "unfair and unmanly competition." The only response to this was that Parmenter, president of appellant, was out of town and would answer when he returned, which he never did.

In July, 1899, appellee was negotiating with Bundy & Co. of New York for sales, and with a view to secure them as exclusive agents for the multiple pouch, when appellant's representative, Parmenter, threatened them, and succeeded in causing them to decline further negotiations because appellee would not give protection against interference in their trade.

In the early part of 1902 appellant wrote a letter to the American Cigar Company of Westfield, Mass., threatening suit if it dealt with appellee. This company was induced to cease dealing with appellee, as it claims through manipulation of its counsel by appellant's representative. Some time prior to June 23, 1902, the Emerson Parchment

Bag Company were advised by appellant's agent, Haas, that his concern had pending injunction against appellee. Josephson Bros. of New York were warned by one Gratz, representing appellant in 1904. Appellant's representative, Parmenter, notified Otto Fritz, a cigar dealer of Cincinnati, some time in the spring of 1905, that his company was going to sue appellee and warned Fritz by letter shortly thereafter against the use of Dittgen's pouches. Parmenter wrote a letter to Len Spalding of Lebanon, Ky., on February 26, 1900, warning Spalding, who was then negotiating with appellee for a large order, against dealing in appellee's pouches, and threatening suit.

On December 22, 1904, appellant advised Ghio & Rovira of New York that the patent office considered there was sufficient ground for infringement against a party manufacturing in Cincinnati, meaning appellee, to grant an interference. So far as the record shows, there was no such matter pending at that time. Whatever proceeding of that character had been pending had theretofore terminated in appellee's favor. All of the foregoing instances are fully and affirmatively established by the evidence.

In addition to the foregoing there is considerable evidence of a hearsay character going to show beyond a doubt that trade generally was in fear of trouble if it dealt with appellee. New business was halted, and contracts already concluded were abandoned because appellee did not furnish indemnity against acts of appellant. Large amounts in sales were lost by reason of fear of trouble with appellant. It is not unfair to assume that this condition of things grew out of the conduct of appellant above alluded to which was clearly calculated to alarm dealers. The evidence shows large losses resulting to appellee from this apprehension. During all this time appellant took no steps to submit its contention to any tribunal for judicial determination. Nor was appellee in a position to force it to do so. The appellee testifies that he had never seen or heard of a pouch that he considered an infringement of his patent, and so could not bring suit against appellant for infringement. He was compelled for almost six years to fight in the dark. It would be difficult to devise a more effective or tyrannous method of misusing his monopoly to destroy a competitor's business. Even though there had been infringement, the exasperating delay to make its character known would be persuasive evidence of malice. If there was no infringement, the maliciousness would be undoubted. Several of appellant's witnesses deny the misrepresentation alleged, and evidence is introduced to show that towards the last salesmen and agents were directed to avoid any attack on appellee's device, one letter, at least, having been sent after the suit was begun, yet this instruction was not construed to prevent some of them from representing that appellant's patents were being infringed. The trial court held that the failure of appellant to introduce evidence on the hearing below to sustain his exclusive rights in the pouch was persuasive of malicious intent. The defense does not materially weaken the force of appellee's evidence. Under the circumstances, it was incumbent on appellant to conclusively establish its right to the device of appellee which it so persistently and unhandedly attacked, within a reasonable time. The facts bring the

case within the rule of law above cited, and the trial court was right in holding that appellant's failure to submit its claim to judicial determination under the facts of the case was conclusive evidence that it pursued appellee, not for the purpose of protecting its rights under its patents, but for the purpose of destroying appellee's business in order to benefit its own trade and stifle competition.

It is unconscionable that appellant should be permitted to use a grant from the government to work a wrong upon appellee without bringing suit to secure a judicial determination. An injunction granted in a proceeding for that purpose would have afforded clearly defined limits to appellant's claims. The course pursued by it herein, by reason of its very indefiniteness, is more onerous and oppressive than would be the order of a court. It was practically prohibitive. It is one of the well-established powers and duties of a court of equity to remedy wrongs such as are here disclosed.

We find no error in the decree appealed from, and it is affirmed.

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#### TAYLOR v. WEIR.

(Circuit Court of Appeals, Third Circuit. May 17, 1909.)

No. 27.

**1. COURTS (§ 322\*)—JURISDICTION OF FEDERAL COURTS—NECESSITY OF JURISDICTIONAL FACTS APPEARING ON THE RECORD.**

To sustain the jurisdiction of a Circuit Court of the United States on the ground of diversity of citizenship, that fact must be positively and unequivocally averred at the outset in the pleadings of the party invoking the jurisdiction, or it must appear affirmatively and with equal distinctness elsewhere in the record.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876-881, 887; Dec. Dig. § 322.\*]

Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249, and *Mason v. Dullaghan*, 27 C. C. A. 298.]

**2. COURTS (§ 315\*)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—SUIT AGAINST UNINCORPORATED ASSOCIATION.**

Code Civ. Proc. N. Y. § 1919, provides that on a cause of action against a joint-stock association organized under the laws of the state an action may be brought against its president or treasurer, any judgment therein, however, to bind only the property of the association. It is further provided that such an action may be brought against all of the members of the association. *Held*, that such statute cannot affect the jurisdiction of a federal court in another state, and that, in an action therein against the president of such an association on a cause of action against the association, such president is not a real party to the controversy, within the meaning of the Constitution and laws of the United States, but merely a nominal party, and his citizenship is unavailable to confer jurisdiction on the court; the citizenship of the other members of the association not appearing.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 861; Dec. Dig. § 315.\*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 162 Fed. 585.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



S. Morris Wales, for plaintiff in error.

John Lewis Evans, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. The plaintiff in error, who was the plaintiff below, being the owner of certain furs which she valued at more than \$2,000, delivered them in Philadelphia to an agent of the Adams Express Company, to be carried to a certain address in New York. The goods were lost or stolen while in the hands of the carrier, and were never delivered or in any way accounted for. She accordingly commenced suit in the court of common pleas of Philadelphia county, against "Adams Express Company," by serving the writ of summons upon the agent in charge of the business of said company in Philadelphia. After filing the statement of claim and the rule to plead thereon, defendant's counsel entered a restricted appearance for the purpose of moving a rule on plaintiff to show cause why the writ should not be quashed. This motion was accompanied by an affidavit of a member of the board of managers of the Adams Express Company, stating that Adams Express Company was a joint-stock association, consisting of seven or more persons, organized under the laws of the state of New York; that under and by virtue of said laws, "Adams Express Company" may be sued only in the name of its president or treasurer, and that said company is registered in the office of the Auditor General of the commonwealth of Pennsylvania, in compliance with the act of June 7, 1879 (P. L. 112), and its amendments, and is lawfully doing business in said state by virtue of said registration, and that the name of the president of Adams Express Company is Levi C. Weir. This rule was granted by the court, and all proceedings stayed until the return thereof.

Afterwards, on motion of counsel for the plaintiff, and upon rule granted, the name of the defendant on the præcipe, writ, statement, and docket entries in the case was amended, so as to read, "Levi C. Weir, as president of Adams Express Company, a joint-stock association," and appearance was then entered by counsel for Levi C. Weir, as president of Adams Express Company, and thereupon, upon petition of said Weir, as president, etc., alleging that he was a citizen of the state of Ohio, and that the plaintiff was a citizen of the commonwealth of Pennsylvania, and that the amount in controversy was in excess of \$2,000, etc., the record of the said cause was, upon appropriate proceedings had in accordance with the act of Congress in that behalf, ordered to be removed from the said court of common pleas of the commonwealth of Pennsylvania into the Circuit Court of the United States for the Eastern District of Pennsylvania. The cause having been pleaded to issue in said last-mentioned court, a trial by jury was duly proceeded with, and a verdict and judgment thereon for \$159 was duly entered by the court. Motion was made for a new trial by counsel for the plaintiff, and among the reasons filed therefor was one suggesting that the court had no jurisdiction, and praying for a rule on the defendant to show cause why the plaintiff should not have leave to amend the record, by striking out the words "Levi

C. Weir, as president," and why the verdict should not be set aside, the case dismissed, and the record remanded to the said court of common pleas, for want of jurisdiction. The court denied the motion for a new trial, overruling the motion to amend the record, as prayed for; whereupon the plaintiff sued out his writ of error, which brings before us the whole record in the case below. Assignments of error cover exceptions to the charge of the court, upon which questions relating to the merits of the case have been argued at length before us, and the fifth assignment is for error in refusing to grant the motion of plaintiff's attorney at the trial, to remand the case for want of jurisdiction.

In the view taken by this court, it will only be necessary to consider the question of jurisdiction. This question is presented on the face of the record before us. It is a question that can be dealt with at any stage of the cause, by this court as well as by the court below, and with or without suggestion or motion from counsel on either side. Circuit Courts of the United States are courts of limited jurisdiction, and the jurisdictional facts must clearly appear upon the face of the record, the presumption being that a cause is without its jurisdiction, unless the contrary affirmatively appears. In the present case, the only ground of jurisdiction is the diverse citizenship of the parties to the controversy involved in the suit. This jurisdictional fact must appear on the face of the record, and should be positively and unequivocally averred at the outset and in the pleadings of the party who invokes the jurisdiction, or it must appear affirmatively and with equal distinctness in other parts of the record. *Ex parte Smith*, 94 U. S. 455, 24 L. Ed. 165; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Grace v. Am. Cent. Ins. Co.*, 109 U. S. 284, 3 Sup. Ct. 207, 27 L. Ed. 932.

The case before us was removed from the state court into the Circuit Court of the United States, upon the statement, not denied, that the plaintiff was a citizen of the commonwealth of Pennsylvania and resident therein, and that the defendant, Levi C. Weir, is a citizen of the state of Ohio. We have already referred to what the record discloses as to the suit being originally brought in the state court against "Adams Express Company," and the amendment to the writ and proceedings made on the motion of the plaintiff, by which Levi C. Weir, as president of the said company, was made defendant. It appears by the record, and is not denied, that the Adams Express Company, of which the defendant is president, is an unincorporated association, or stock company, and that under the laws of the state of New York (see Code Civ. Proc. § 1919) an action may be maintained against the president or treasurer of such an association—

"to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action \* \* \* against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership or other company of persons which has a president, or treasurer, is deemed an association within the meaning of this section. \* \* \* In such an action, the officer against whom it is brought, cannot be arrested, and judgment against him does not authorize an execution to be issued against his property, or his person, nor does the docketing thereof bind his real property or chattels real. Where such a judgment is for a sum of money, an execution issued thereupon must require the sheriff to satisfy the same out

of any personal property belonging to the association, or owned, jointly or in common, by all the members thereof, omitting any direction respecting real property."

And it is further provided that these proceedings do not prevent an action from being brought against all the members of such an association. It is perfectly clear that the Adams Express Company, not being a corporation, but an unincorporated stock company or partnership, cannot, as such, have citizenship attributed to it as an entity, apart from that of its individual members, nor, apart from special legislation, can they be made party defendants by their partnership or stock company name. The state of New York has sought to meet this difficulty within its own jurisdiction, by the provisions of law above referred to, but these provisions are not sufficient to confer jurisdiction on the United States Circuit Court in the state of Pennsylvania. The president or treasurer of the partnership or stock association, who may be made a defendant in any cause of action upon which the individual members of the partnership or association are liable, is not a real party to the controversy, within the meaning of the Constitution and laws of the United States. Such a party does not stand in the relation to the members of the partnership or association, in which a trustee stands to his cestuis que trust, or an executor or administrator to the estate of his testator or decedent. He is vested with no property rights and incurs no liability in the suit authorized by the act to be instituted against him. He is a merely nominal defendant, through whose appearance in the suit, under the laws of New York, the controversy with, and the liability of, the association and its members may be carried on and asserted. The real controversy is between the plaintiff and the association, or its members, and not in any sense between her and the president of such an association, and his citizenship was unavailing to confer the requisite jurisdiction on the court below.

As said by the Supreme Court, in *McNutt v. Bland*, 2 How. 10, 11 L. Ed. 159, where, by the law of Mississippi, sheriffs were required to execute bonds to the Governor of the state and his successors, and an action was brought in the name of the Governor, for the use of citizens of New York, against the defendants, who were citizens of Mississippi:

"In this case, there is a controversy and suit between citizens of New York and Mississippi; there is neither between the Governor and the defendants. As the instrument of the state law to afford a remedy against the sheriff and his sureties, his name is on the bond and to the suit upon it, but in no just view of the Constitution or law can he be considered as a litigant party; both look to things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law."

So, also, in the case of *Browne v. Strode*, 5 Cranch, 303, 3 L. Ed. 108, the same court states the principle thus:

"That where the real and only controversy is between citizens of different states \* \* \* and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exist."

See, also, in further illustration of this principle, *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Knapp v. Railroad Co.*, 20 Wall. 117, 22 L. Ed. 328.

Of course, it matters not whether such nominal party be plaintiff or defendant, so far as his citizenship is concerned, in determining the jurisdiction of the court. In *Chapman v. Barney*, 129 U. S. 678, 9 Sup. Ct. 426, 32 L. Ed. 800, the Supreme Court says:

"In its original form, this was an action of assumpsit, brought in the court below by the United States Express Company, alleged to have been organized under and by virtue of the laws of the state of New York, and a citizen of that state, against Heman B. Chapman, a citizen of Illinois"

—to recover a certain sum of money alleged to have been entrusted to him for delivery, etc. There was a verdict and judgment thereon, in the usual form, for the sum sought to be recovered. A writ of error was sued out by the defendant, and three assignments of error were urged before the court, none of which touch any question of jurisdiction. The court, after a brief reference to them and to their merits, says:

"But aside from all this, we are confronted with the question of jurisdiction, which, although not raised by either party in the court below or in this court, is presented by the record, and under repeated decisions of this court must be considered. *Sullivan v. Fulton Steamboat Co.*, 6 Wheat. 450, 5 L. Ed. 302; *Jackson v. Ashton*, 8 Pet. 148, 8 L. Ed. 898; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380; *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. Ed. 132, and authorities there cited. The ground upon which the jurisdiction of the federal court is invoked is that of diverse citizenship of the parties. In *Robertson v. Cease*, 97 U. S. 646, 649, 24 L. Ed. 1057, it was said that 'where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intentment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively, and with equal distinctness, in other parts of the record,' citing *Railway Co. v. Ramsey*, 22 Wall. 322, 22 L. Ed. 823; *Bridges v. Sperry*, 95 U. S. 401, 24 L. Ed. 390; and *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885. See, also, *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. 874, 30 L. Ed. 914; *Halsted v. Buster*, 119 U. S. 341, 7 Sup. Ct. 276, 30 L. Ed. 462; *Everhart v. Huntsville College*, 120 U. S. 223, 7 Sup. Ct. 555, 30 L. Ed. 623. On looking into the record, we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is that the United States Express Company is a joint-stock company organized under a law of the state of New York, and is a citizen of that state. But the express company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was organized under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is that the company is not a corporation, but a joint-stock company—that is, a mere partnership. And, although it may be authorized by the laws of the state of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a federal court. The company may have been organized under the laws of the state of New York, and may be doing business in that state, and yet all the members of it may not be citizens of that state. The record does not show the citizenship of Barney or of any of the members of the company. They are not shown to be citizens of some state other than Illinois. *Grace v. American Central Ins. Co.*, supra, and authorities there cited. For these reasons we are of the opinion that the record does not show a case of which the Circuit Court could take jurisdiction. The judgment of that court must therefore be reversed at the costs, in this court, of the defendant in error."

The courts of New York, and possibly those of Pennsylvania, being courts of general jurisdiction, may entertain such a suit, but authority, as well as reason, compels us to the conclusion that this record does not show a case of which the Circuit Court of the United States in Pennsylvania could take jurisdiction, and that the judgment of the court below must therefore be reversed, with directions to that court to remand the case to the state court, whence it was removed. And it is so ordered.

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HUEY et al. v. BROWN.

(Circuit Court of Appeals, Third Circuit. July 1, 1909.)

No. 39.

**DISCOVERY (§ 8\*)—RIGHT TO RELIEF—OWNER OF CORPORATE STOCK—DISCLOSURE—BROKERS.**

Where an assessment had been levied on assessable shares of an insolvent corporation previously purchased by brokers from insolvent holders and permitted to remain of record in the name of such prior owners, the corporation's receiver was entitled to maintain a bill for discovery against the brokers to compel them to disclose the name of their principal for whom they purchased the stock.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 8, 9; Dec. Dig. § 8.\*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 166 Fed. 483.

Samuel W. Pennypacker, for appellants.

Malcolm Lloyd, Jr., Reynolds D. Brown, and Charles H. Burr, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

BUFFINGTON, Circuit Judge. In the court below Arthur K. Brown, receiver of the American Alkali Company, filed a bill of discovery against William G. Huey and George Farquhar. From a final decree ordering discovery respondents took this appeal.

Messrs. Huey & Farquhar were stockbrokers, and as such, and as agents for a principal whose name they are now required by decree of the court below to disclose, they purchased, on August 7, 1899, 300 shares of the preferred stock of the American Alkali Company. At the time of the purchase that stock was, and still is, assessable. It was then registered in the name of George W. Mactague and James Allen, both of whom were then, and are now, insolvent. The new purchaser, instead of having the stock transferred and certificates issued in his name, has, through his agents, the respondents, let the stock stand in the names of Mactague and Allen. Meanwhile the complainant, Brown, was appointed receiver of said company. The latter being insolvent, the Circuit Court, by order

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

duly made, directed that the owners of the preferred stock of said company be assessed the sum of \$2.50 per share. Thereupon the receiver, finding that Mactague and Allen were insolvent and not the owners of this stock, and that the same had been purchased by the respondents, demanded said assessment from them. This they declined to pay, alleging they were not owners, but had purchased as brokers for a principal whose name they declined to disclose. Thereupon this bill was filed, and the court below, citing *Brown v. McDonald*, 133 Fed. 897, 67 C. C. A. 59, 68 L. R. A. 462, and *Kurtz v. Brown*, 152 Fed. 372, 81 C. C. A. 498, overruled a demurrer thereto. The respondents having stood on such demurrer, a final decree was entered thereon.

In the cases cited, the right of this receiver to relief by way of discovery against stockbroker agents of undisclosed owners of stock, who sought to evade assessments, was sustained. Those cases were fully considered by this court, and we see no occasion to recede therefrom. Indeed, in *Kurtz v. Brown*, wherein it was sought to have this court review and reverse *Brown v. McDonald*, we then said, and here repeat:

"Examination has deepened our conviction that the decision in *Brown v. McDonald*, as an application of equitable principles to the facts of the case, was wholly in accord with well-recognized principles of chancery jurisdiction. It exhibits the capacity of the law, while adhering firmly to precedents of far-removed times, to adapt itself to new conditions."

Now we think the facts of this case are such that the principles of *Kurtz v. Brown* are applicable thereto, and therefore controlling. Here, as there, the respondents are stockbrokers, who admit purchasing the assessable stock in question, but disclaim ownership and liability to assessment on their part. In both cases they are the agents and representatives of undisclosed principals, who do own the stock and by virtue of such ownership are liable for assessments thereon. In both cases the respondents are and were not mere witnesses or strangers to the subject-matter of the suit, but active agents of principals using them to conceal their own identity and to evade a conceded liability which already exists and is not created by discovery. The only difference between the cases is that in *Kurtz v. Brown* the broker, after purchasing for his hidden principal, had the stock transferred and the certificates issued in the name of a straw insolvent holder. In the present case the brokers, after buying for a concealed principal, kept the stock standing in the name of a straw insolvent holder. In both cases the hidden principal uses his broker agent for the same purpose, viz.:

"By the act of his agent to vest ownership in himself, and at the same time divest the liability incident to such ownership." *Kurtz v. Brown*, *supra*.

In the present case the broker's act is one of omission; in *Kurtz v. Brown*, one of commission. In both cases, the purpose and result are identical; the difference solely of means to effect such result.

The court below was clearly right in holding the cases cited controlled the present one, and its decree is therefore affirmed.

## RED CROSS PROTECTIVE SOCIETY v. WAYTE.

(Circuit Court of Appeals, Third Circuit. July 1, 1909.)

No. 38.

## 1. INSURANCE (§ 695\*)—GENERAL MANAGER—MUTUAL BENEFIT INSURANCE—AUTHORITY.

Where the constitution and general laws of a fraternal beneficial society provided that the supreme general manager should have charge of the agency force and should hire and appoint the agents and attend to the organization of different lodges, subject to approval of the board of trustees, such manager, without the approval or knowledge of the board of directors, had no authority to employ an attorney to secure control of a New York corporation with power from that state to issue endowment policies to its members.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 695.\*]

## 2. CORPORATIONS (§ 425\*)—CONTRACT FOR SERVICES—RATIFICATION.

Where the general manager of a corporation had no authority to employ plaintiff to perform certain legal services for it, and its board of directors repudiated the employment on acquiring knowledge thereof and refused the results of the services, it was not estopped to deny the authority of its general manager to bind it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701; Dec. Dig. § 425.\*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 166 Fed. 372.

Joseph R. Dickinson and R. Stuart Smith, for plaintiff in error.  
Frank Jacobs, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

BUFFINGTON, Circuit Judge. In the court below, Wayte, herein called plaintiff, recovered a verdict against the Red Cross Protective Society, herein called defendant, for alleged services rendered by him to the latter. A motion of defendant for judgment non obstante veredicto was denied, and judgment on the verdict entered for the plaintiff. Thereupon defendant sued out this writ. The latter is a fraternal beneficial society chartered under the Pennsylvania act of April 6, 1893 (P. L. 10). The plaintiff is a lawyer practicing in the state of New York. At the time the services in question were rendered by plaintiff, one Rothensies was supreme general manager of the defendant, his duties being defined by section 68 of its constitution and general laws as follows:

"The supreme general manager shall have charge of the agency force, shall hire and appoint all agents, and attend to the organization of the different lodges, subject to the approval of the board of trustees."

About January 25, 1897, Rothensies of his own motion and without authorization employed Wayte to secure control of a New York beneficial insurance corporation with power from that state to issue

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

five-year endowment policies to its own members. After considerable work and expense Wayte obtained an option on such a corporation and informed Rothensies, who assented to the arrangement. After this Rothensies reported what he had done to defendant's board of directors. This was the first knowledge thereof by such board, and it declined to acquire the New York company. Thereupon plaintiff brought suit against the defendant for his services and expenditures. The suit was defended on the ground that Rothensies had no authority to employ the plaintiff, and that, inasmuch as defendant had no power to acquire the New York company, it had no power to employ Wayte to so acquire.

Under the assignments of error several questions arise; but in our view of the case it is necessary to consider two questions only, viz.: First, was the employment of the plaintiff by Rothensies, the supreme general manager of the defendant, within the scope of his authority; and, secondly, if not, is the defendant estopped from denying Rothensies' authority?

As to the first question, it is clear beyond question that Rothensies, as supreme general manager, had no authority to employ the plaintiff to secure the New York charter. His general powers were defined and limited by the above-quoted section of the defendant's constitution, and it conferred no such authority. Mr. Wayte's employment was not known to the board, and as soon as it was called to its attention it declined to have anything to do with the matter and take over the New York company. Under those circumstances it is clear that Rothensies' act was not the act of the company, and it is not responsible for Mr. Wayte's unwarranted employment. The court below, however, on the theory that the defendant had enjoyed the fruit of such employment, held it had thereby ratified the unwarranted agency, and in support thereof quoted section 6025 of Thompson on Corporations, which says:

"Where a party has made a contract with a corporation, and has fully performed what he agreed to do on his part, and is suing the corporation for the compensation which it agreed to pay or to render as the consideration of the contract, then the corporation will be estopped from setting up the defense that it had no power to enter into the contract or that it was prohibited by statute from so doing."

But it will be observed we are here not dealing with the ultra vires of a contract which a company had knowledge of and had made, but with the ultra vires of a servant of the company, and with a contract of which the company had no knowledge, and which, as soon as it learned thereof, it declined to adopt or accept its fruits. It is this vital difference that makes the section quoted inapplicable to the present case. This will be seen by an examination of the Pennsylvania authorities quoted in support thereof, viz., *Wright v. Pipe Line*, 101 Pa. 204, 47 Am. Rep. 701, *Oil Creek Co. v. Allegheny*, 83 Pa. 160, and *Wood v. Corry* (C. C.) 44 Fed. 146, 12 L. R. A. 168, which were all cases where contracts were known to the company and were, indeed, actually made by it in its corporate capacity, and where it received and retained the fruits thereof. But in the present case the act of Rothensies, who made the contract, was be-



yond the scope of his authority, and the defendant had neither received the fruits nor done any act which estopped it from denying his authority to bind it thereby.

The judgment must therefore be reversed, and the case remanded, with directions to enter judgment in favor of defendant non obstante verdicto.

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SWEENEY v. SMITH et al.

(Circuit Court of Appeals, Third Circuit. July 1, 1909.)

No. 44.

ACCOUNT (§ 7\*)—RIGHT OF ACTION—WRONGFUL ACTS OR CONDUCT—INTERFERENCE WITH CONTRACT.

The mere fact that a purchaser of bonds from a committee of bondholders authorized to sell the same at the time of the purchase had knowledge that the committee had previously contracted to sell them to another does not impose upon him any liability to account to such other for any profit he may have made in the transaction, in the absence of any allegation or proof of fraud or that he induced a breach of the prior contract by the committee.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 20, 21; Dec. Dig. § 7.\*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 167 Fed. 385.

George Demming and William L. Royall, for appellant.

Henry C. Boyer and William A. Glasgow, Jr., for appellees.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

BUFFINGTON, Circuit Judge. In the court below, Sweeney, herein styled complainant, filed a bill in equity against Smith & Co., herein styled respondents, and Zell and Van Dyke. The bill prayed cancellation by Zell and Van Dyke of a contract which Sweeney had assigned to them, and an accounting by Smith & Co. to Sweeney of the profits realized on the bonds and stock which were the subject-matter of said contracts. On separate demurrers by Messrs. Zell and Van Dyke and Smith & Co., respectively, to said bill, the court overruled the demurrer of Zell and Van Dyke and ordered them to answer. The demurrer of Smith & Co. was sustained in an opinion wherein the facts are stated at length, reported at 167 Fed. 385. From a decree dismissing the bill as against Smith & Co., the complainant appealed to this court.

In view of the elaborate opinion noted above, any expression of opinion by this court could be but a restatement of the grounds and authorities on which the court below justified its action. The vice of the complainant's position is that he assumes a liability on the part of Smith & Co. to account to him. But no such liability ex-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ists. The facts are that Sweeney had a contract with the committee by which he was to purchase these bonds and stocks. For some reason, which reason does not concern the present appeal, further than to say that Smith & Co. had no relation to or part in the committee's action, they refused to carry out their contract with Sweeney. The committee subsequently sold the stock and bonds to Smith & Co., who knew there had been a prior contract between Sweeney and the committee and that the latter refused to be bound by it. No allegation of fraud, bad faith, or any act of Smith & Co. to induce a breach of said contract by the committee, is here involved. Under these facts there is no liability of Smith & Co. to account to Sweeney. Neither privity of contract, accounts, nor a trust relation, express or implied, exists between them. The contention of liability to account as applicable to personal property finds support in no case, and would unduly trammel and preclude that merchantable character of personalty, which gives it its transmissible commercial value.

The appeal is therefore dismissed, and the decree below affirmed.

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DICKINSON v. MATHESON MOTOR CAR CO.

(Circuit Court of Appeals, Third Circuit. July 1, 1909.)

No. 11.

CORPORATIONS (§ 30\*)—PROMOTER'S CONTRACT—RATIFICATION—QUESTION FOR JURY.

G., who was the owner of certain patent rights, agreed that plaintiff should receive 25 per cent. of the actual stock of any company which should be organized to exploit or purchase the patents. Defendant company was thereafter organized, partly through plaintiff's endeavors, and purchased the patent right from G. *Held*, that defendant's acceptance of the benefit of whatever value was contributed by plaintiff's services did not constitute such a ratification of the understanding between plaintiff and G. as would warrant a submission of the question of defendant's liability to plaintiff thereon to the jury.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 30.\*]

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

For opinion below, see 161 Fed. 874.

John J. Lordan, John M. Coleman, and Ralph W. Rymer, for plaintiff in error.

John D. Coons and Willard, Warren & Knapp, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Dickinson, the plaintiff, recovered a verdict against the Matheson Motor Car Company, the defendant, for breach of an alleged contract to convey to him certain shares of its capital stock. The contract was

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said to have been made with the Matheeson Motor Car Company, Limited, a limited partnership of the state of Michigan, the business of which was subsequently taken over by the defendant. It seems to have been assumed and accepted that, if the Michigan company was liable, the defendant should be so held as its successor. On the trial the court below held that under the Michigan statute the contract was ultra vires. Its ruling in that regard is not before us for review. It, however, submitted to the jury the question whether the defendant had enjoyed such fruit from the transaction as to amount to a ratification. The jury, by its verdict for the plaintiff, found such was the case. Subsequently the defendant moved for judgment non obstante veredicto, on the ground that there was no evidence to warrant submission of that question to the jury. In an opinion reported in 161 Fed. 874, the court so held, and to a judgment non obstante veredicto for defendant this writ of error was sued out.

It will thus be seen the case stands on its own particular facts, and, if the court was right in holding there was no evidence showing retention of the fruits of the transaction by the defendant, error is not established. We have examined the testimony, and are of opinion the court below was clearly right. Its analysis of the facts and the grounds of its conclusion are so thorough and satisfactory that a discussion thereof by this court could be but a repetition.

We content ourselves, therefore, with adopting its opinion and affirming the judgment.

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CITY OF OMAHA et al. v. OMAHA WATER CO.

CITY OF OMAHA v. SAME.

(Circuit Court of Appeals, Eighth Circuit. May 11, 1909.)

Nos. 2,970, 2,971.

1. WATERS AND WATER COURSES (§ 203\*)—SUPPLY OF WATER TO CITY—CONTRACT—ACTION FOR BREACH—DEFENSES.

Evidence held not to sustain the defense of a city to an action by a water company to recover hydrant rentals on the ground that the company had failed substantially to perform its contract.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 203.\*]

2. APPEAL AND ERROR (§ 1047\*)—REVIEW—HARMLESS ERROR—ORDER OF INTRODUCING EVIDENCE.

The mere admission in rebuttal of evidence necessary to a plaintiff's case in chief is not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4132; Dec. Dig. § 1047.\*]

In Error to the Circuit Court of the United States for the District of Nebraska.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John Lee Webster and, Carl C. Wright (Harry E. Burnam, on the brief), for plaintiffs in error.

Howard Mansfield and R. S. Hall (Herbert C. Lakin, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

PER CURIAM. When these cases, which were consolidated for trial, were here before, we expressed the principles governing the rights of the parties with respect to the hydrant rentals in controversy. *Omaha Water Co. v. City of Omaha*, 85 C. C. A. 54, 156 Fed. 922. At the second trial the Circuit Court applied those principles, and held there was not sufficient evidence for the consideration of the jury that the water company had, under the facts conceded to exist or clearly proved, failed in substantially performing its obligations under the ordinance contract. Verdicts against the city were therefore directed. Without restating the record as it was when here before, or mentioning in detail the additional evidence that was received, it is sufficient to say we think the Circuit Court was right. The proof was that the water company had substantially performed its contract. There was no substantial evidence to the contrary.

The contention as to the pleadings is disposed of by our former opinion. The order of the introduction of evidence followed the course of the pleadings; but, were this not so, the mere admission in rebuttal of evidence necessary to a plaintiff's case in chief is not error. When a defendant is not surprised, and is afforded an opportunity to meet the evidence so admitted, his substantial rights are not prejudiced. We discover no error in the court's action in the other particulars specified in the assignments.

The judgments are affirmed.

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#### LORAIN STEEL CO. v. PAIGE IRON WORKS et al.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909.)

No. 1,489.

#### PATENTS (§ 328\*)—INVENTION—RAILWAY SWITCHES.

The Kress patent, No. 633,723, and the Krauss patent, No. 555,171, both for improvements in railway switches of the tongue type, used chiefly on street railroads, and each for means to prevent the kicking of the switch, are both void for lack of invention in view of the prior art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Appellant failed in its suit to hold appellees for alleged infringement of patent No. 633,723, September 26, 1899, to Kress, and patent No. 555,171, February 25, 1896, to Krauss.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Kress's statement of invention and his claims in suit read as follows:

"My invention relates to railway-switches of that type in which there is a tongue or point having a depending pintle at its heel end by which the tongue is swiveled to the foundation structure.

"The object of my invention is to improve the durability and reliability of such switches by preventing a large part of the wear at the heel end of the tongue and thereby preventing any danger of 'kicking' of the tongue, which sometimes occurs when the parts at the heel end of the tongue have become loose. This sometimes shifts the tongue after the front wheels have passed onto the right track, so that the front and rear wheels may be switched to different tracks, derailment almost necessarily occurring. I attain the objects which I have just set forth by seating the heel end of the tongue in a recess, one wall of which takes the place of a cut-away portion of the tongue at its heel end; said wall being in alinement with the guard side of the tongue. I prefer also to have the opposite wall of the recess take the place of a cut-away portion of the tread side of the tongue at its heel end, although instead of doing this I sometimes gain the same general object by carrying the wheel across the heel end of the tongue by a flangeway formed in the floor of the fixed portion of the structure. I also prefer to provide a removable plate (which may be made of unusually hard material), which is secured to the switch structure and which has the recess and guard and tread portions herein referred to."

"1. In a railway-switch, the combination of a foundation structure, a plate having a recess and secured to said structure, a tongue having a depending pintle at its heel end and seated at said end in the said recess, and an opening through the floor of said plate for the pintle, substantially as described.

"2. In a railway-switch, the combination of a foundation structure, a plate having a recess and secured to said structure, a tongue having a depending pintle at its heel end and seated at said end in the said recess, an opening through the floor of said plate for the pintle, and a guard for one side of the heel end of the tongue formed by one wall of the recess, substantially as described.

"3. In a railway-switch, the combination of a tongue having a depending pintle at its heel end, a member having a recess in which the heel end of the tongue is seated, and a portion of one wall of said recess taking the place of a portion of the tread-surface of the tongue from the heel end of the tongue to a point in advance of the axial line of the pintle, substantially as described."

"5. The combination, in a railway-switch, of a foundation structure, a plate secured therein and having a recess, a pivoted switch-tongue seated at its heel end in said recess, the walls of said recess taking the place of cut-away portions of the sides of the tongue, substantially as described.

"6. The combination, in a railway-switch, of a foundation structure having a recess, a plate removably secured in said recess, and itself having a recess, and a switch-tongue seated in said last-mentioned recess at its heel end and having a depending pintle passing through the floor of said plate, substantially as described."

The object of Krauss was to provide a means for holding a switch-tongue down in place. The claims here involved are the following:

"1. In a railway-switch, a tongue-fastening comprising a bolt extending vertically downward from the tongue, and a spring in the frame of the switch and adapted to exert a downward force upon the bolt.

"2. In a railway-switch, a tongue-fastening comprising a bolt passing through the tongue and removably secured therein, said bolt passing downward into a pocket in the switchframe, and a spring encircling said bolt, and adapted to exert a downward force thereupon.

"3. In a railway-switch having a vertically pivoted tongue, a pocket in the frame of the switch and beneath the tongue, a spring in said pocket, and a bolt depending from the tongue and engaging the spring."

For opinion below, see 158 Fed. 636.

C. P. Byrnes, for appellant.

George P. Fisher, Jr., for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). The Kress device relates to what is known as the tongue switch, a kind that is particularly adapted for use in street car tracks on paved streets. By means of "a depending pintle at its heel end the tongue is swiveled to the foundation structure." If the tongue is of such a form that the flange of the front wheel of a car in passing from point to heel can strike or press against the side of the heel, back of the pintle, the point will probably be thrown so that the rear wheel will take a different course; but it was not Kress who first conceived the idea of so shaping the tongue that it could not be struck back of the fulcrum. Patent No. 586,892, July 20, 1897, to Angerer, and the manufacturing practice of the appellees, were earlier disclosures of how to shape the tongue and seat it in the foundation structure so as to prevent "kicking." If the whole switch structure were of metal unaffected by wear, the Angerer form would continue indefinitely to be a preventive of kicking or accidental displacements; but the modern heavy street cars, particularly at switches and crossings, hammer and wear the original steel or cast structures out of shape, and a loose and wobbly switch structure is a source of danger. So Kress proposed to cut out a part of the foundation and insert "a removable plate of unusually hard material" which should serve as the floor on which the switch-tongue should rest, and through which the depending pintle should extend, and which should also serve as the side walls about the heel of the tongue. Kress did not invent the hard material, nor the art in street railway construction of cutting away the usual material and inserting removable plates of hard material wherever there was unusual or excessive wear. Hard-metal inserts had been applied quite generally to frogs and crossings, and also to switches. Patents Nos. 536,734 and 536,735, April 2, 1895, to Moxham; patent No. 555,772, March 3, 1896, to Howe & Angerer; patent No. 534,972, February 26, 1895, to Samuel; switch structures manufactured by the New York Switch & Crossing Company in 1898. Removable hard-metal plates had been used as the floor on which the switch-tongue should bear and in which the pintle should be seated; but no one prior to Kress had made the Angerer side walls about the heel of hard-metal. Kress's predecessors, however, had not only taught the art of making and setting particular removable plates, but they also had shown that, wherever an injurious change of shape was likely to occur by reason of wear, there was a place to be treated by the insert process, and that the hard-metal plate or block should be of the form of the metal displaced. In view of the prior art we are of opinion that the Kress patent is void for want of invention.

Turning to the Krauss patent, we find that the bolt and spring are in front of the pintle. In appellees' structure the holding-down spring is upon the pintle. Considering the claims as read upon appellees' structure, we hold them to be void for want of invention, in view of

patent No. 364,267, June 7, 1887, to Lewis, for a pivoted crossing-rail held down by a bolt with a spring-washer, and of the very general use of spring-washers upon bolts to maintain a yielding contact.

The decree is affirmed.

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INTERNATIONAL TELEPHONE MFG. CO. v. KELLOGG SWITCH  
BOARD & SUPPLY CO.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909. Rehearing Denied May 28, 1909.)

No. 1,480.

1. PATENTS (§ 75\*)—PRIOR PUBLIC USE—EXPERIMENTAL USE.

The use of a telephone transmitter by the inventor for the purpose of determining its efficiency only, although known to others, was not a public use which invalidated a later patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 93; Dec. Dig. § 75.\*]

Priority and continuance of public use of invention as affecting patentability, see note to *Eastman v. Mayor, etc., of City of New York*, 69 C. C. A. 646.]

2. PATENTS (§ 83\*)—ABANDONMENT—DELAY IN APPLICATION.

The fact that the inventor of a device did not apply for a patent until six years after it had been perfected, and successfully tested, did not operate as an abandonment or dedication to the public, in the absence of proof of anything indicating such an intention, such as a public use or publication.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 108; Dec. Dig. § 83.\*]

Abandonment of invention, see note to *Hayes-Young Tie Plate Co. v. St. Louis Transit Co.*, 70 C. C. A. 6.]

3. PATENTS (§ 83\*)—DELAY IN APPLICATION—ESTOPPEL.

Mere delay in applying for a patent after an invention has been made does not operate as an equitable estoppel which defeats the right of the inventor to a patent in favor of another, where he was the first true inventor and, notwithstanding the delay, was the first to apply for a patent, and to make public and market his invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 108; Dec. Dig. § 83.\*]

4. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—TELEPHONE TRANSMITTER.

The Dean patent, No. 687,499, for a telephone transmitter, although a combination of old elements, was not anticipated and discloses invention. Also, *held infringed*.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

This appeal is from a decree holding that claims 1, 2, 8, 10, 11, 13, 15, 16, 17, and 18 of patent No. 687,499, November 26, 1901, to Dean, for a telephone-transmitter, are valid and infringed. Dean's general statement of invention and the claims in suit read as follows:

"My invention relates to a telephone-transmitter of the granular type, in which a body of granular carbon or similar material is interposed between two electrodes adapted to partake of relative movement to vary the resistance between the electrodes.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

"It is the object of my invention to provide a telephone of this type which will be simple and compact in structure and which will effectively prevent the 'packing' of the granules, thereby overcoming an objection which is incident to most of the granular telephones as commonly constructed heretofore.

"In accordance with my invention I provide a suitable diaphragm adapted to be vibrated by the vocal organs of the speaker; the diaphragm carrying a suitable recess or chamber for the granules, in which chamber is located one of the electrodes of the telephone. A supplemental diaphragm is associated with the main diaphragm and peripherally attached thereto, the second electrode of the microphone being associated with said supplemental diaphragm in an intraperipheral position; this is, associated with the supplemental diaphragm within the periphery thereof and preferably at the center of the supplemental diaphragm. The supplemental diaphragm co-operates in maintaining the granules within the chamber, and the electrode associated therewith is mounted in any suitable manner, so that as the main diaphragm vibrates the electrode will partake of relative movement to vary the resistance of the microphone. I preferably support the electrode which is associated with the supplemental diaphragm upon a rigid abutment or support, as I find this structure to give the best results, although the employment of a rigid abutment or support is not essential to the operation of the telephone."

"1. In a telephone-transmitter, the combination with a suitable diaphragm, of a chamber for the granules carried thereon, an electrode within said chamber and moving with said diaphragm, a supplemental diaphragm peripherally secured to said main diaphragm, and a second electrode associated with said supplemental diaphragm in an intraperipheral position, substantially as described.

"2. In a telephone-transmitter, the combination with a suitable diaphragm, of a chamber for the granules carried thereon, an electrode within said chamber and partaking of the movement of said diaphragm, a supplemental diaphragm peripherally connected with said diaphragm, a second electrode associated with said supplemental diaphragm in an intraperipheral position, and an abutment for said second electrode mounted in a stationary position, substantially as described."

"8. In a telephone-transmitter, the combination with a suitable sound-receiving diaphragm carrying a laterally-deflected chamber for the granules, of an electrode within said chamber and moving with said diaphragm, a supplemental diaphragm adapted to close said chamber, and a second electrode associated with said supplemental diaphragm in an intraperipheral position, substantially as described."

"10. In a telephone-transmitter, the combination with a diaphragm having a chamber for the granules carried thereon, of a supplemental diaphragm peripherally secured to said main diaphragm, a block fitting against the outer face of said supplemental diaphragm, a plate fitting against the inner face of said diaphragm, and means to clamp said plate and block together upon the diaphragm, substantially as described."

"11. In a telephone-transmitter, the combination with a main diaphragm, a chamber or recess carried thereby, a supplemental diaphragm peripherally secured to said main diaphragm, a block pressing against the outer face of said supplemental diaphragm, a plate similarly located with reference to the inner face of the supplemental diaphragm and having a shank extending through a bore in said block, means to secure the shank so as to clamp the plate and block together upon the said diaphragm, and a support for the block, substantially as described."

"13. The combination with a vibratory member forming a chamber, of an electrode adapted to vibrate therewith, a supplemental member to close said chamber, a second electrode associated with said supplemental member, and adapted to be rigidly mounted and comminuted conducting material, within said chamber, substantially as described."

"15. In a telephone-transmitter, the combination with a diaphragm, a recess or chamber carried thereby, a supplemental diaphragm, a block secured to the supplemental diaphragm, a support for the block, and means to secure



the block in its support in any position, whereby the block may be adjusted in its support by the vibration of the diaphragm and then secured in adjusted position, substantially as described.

"16. In a telephone-transmitter, the combination with a suitable sound-receiving diaphragm, of a chamber for the granules carried thereon, an electrode within said chamber and moving with said diaphragm, a supplemental diaphragm adapted to close said chamber, and a second electrode associated with said supplemental diaphragm in an intraperipheral position, substantially as described.

"17. In a telephone-transmitter, the combination with a suitable diaphragm, of a chamber for the granules carried thereon, an electrode within said chamber and moving with said diaphragm, a supplemental diaphragm having its periphery secured to the edge of the chamber, and a second electrode associated with said supplemental diaphragm in an intraperipheral position, substantially as described.

"18. In a telephone-transmitter, the combination with a diaphragm having a laterally-deflected chamber thereon, of an electrode in said chamber and movable therewith, a supplemental member, a second electrode associated therewith, said supplemental member being adapted to close said chamber and permit the free relative vibration of said electrodes, and comminuted conducting material within said chamber, substantially as described."

The record contains the following patent exhibits:

No. 213,283, March 18, 1879, W. Gillett; No. 218,582, August 12, 1879, S. H. Short; No. 225,790, March 23, 1880, E. Berliner; No. 232,705, September 28, 1880, W. Gillett; No. 240,416, April 19, 1881, S. D. Hout; No. 257,610, May 9, 1882, Prosser & Freeman; No. 285,102, September 18, 1883, E. Berliner; No. 288,017, November 6, 1883, N. Clay; No. 291,866, January 15, 1884, E. Berliner; No. 330,879, November 24, 1885, J. Emmner, Jr.; No. 335,364, February 2, 1886, Keller & Lyon; No. 344,514, June 29, 1886, E. Berliner; No. 350,772, October 12, 1886, G. L. Roberts; No. 354,241, December 14, 1886, A. W. Rose; No. 356,689, January 25, 1887, E. H. Johnson; No. 369,376, September 8, 1887, F. C. Watkins; No. 375,862, January 3, 1888, V. M. Berthold; No. 386,380, July 17, 1888, C. W. Brown; No. 485,311, November 1, 1892, A. C. White; No. 513,305, January 23, 1894, F. R. Colvin; No. 518,263, April 17, 1894, C. Milde; No. 521,220, June 12, 1894, W. L. Richards; No. 521,325, June 12, 1894, J. B. Smith; No. 540,781, June 11, 1895, D. Drawbaugh; No. 545,416, August 27, 1895, G. F. Shaver; No. 557,588, April 7, 1896, W. C. & J. M. Lockwood; No. 558,313, April 14, 1896, A. W. Rose; No. 563,935, July 14, 1896, H. A. Martin; No. 567,077, September 1, 1896, N. L. Burchell; No. 573,356, December 15, 1896, L. W. Pullen; No. 576,551, February 9, 1897, M. E. & E. C. Clark; No. 580,434, April 13, 1897, Stromberg & Carlson; No. 596,834, January 4, 1898, Spencer & Keyes; No. 609,877, August 30, 1898, A. C. Cousens; No. 678,972, July 23, 1898, J. G. Nolen; No. 764,055, July 5, 1904, D. C. Jackson; British patent, No. 22,255, of 1891, A. A. C. Swinton; British patent, No. 1,487, of 1896, P. Charollois; British patent, No. 12,349, of 1898, Siemens Brothers & Co.; British patent, No. 27,335, of 1898, P. M. Justice; and German patent, No. 72,077, of 1893, B. Munsberg.

For opinion below, see 158 Fed. 104.

Josiah McRoberts, for appellant.

Robert S. Taylor, W. Clyde Jones, and Robert Lewis Ames, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Forty odd reference patents were not needed to prove that Dean was not a pioneer in the telephonic art, that he did not originate the granular-carbon type of transmitter, and that he was not the first to provide a means for preventing the packing of the granules. So much he ex-

licitly admitted in his specification; but at the same time he asserted that his "simple, compact and effective" structure was new and useful. Its utility, its high degree of effectiveness, its commercial success, are unquestioned facts. The novelty of none of the claims is gainsaid by any single prior patent or structure; but collectively the references establish that all of the elements, broadly considered, which Dean used in making up his combination, were old and were commonly used in transmitter construction. The question is whether the production of the new and useful combination required the exercise of invention—whether the idea embodied therein was obviously taught by the prior art.

Dean's application confirms his testimony that he was familiar with the White transmitter (patent No. 485,311), and that he considered it the best form then in use, but that the carbon granules therein were too liable to pack. In the White transmitter the electrodes are smooth; the front electrode is attached to the vertical diaphragm against which the sound waves strike; the rear electrode is mounted in the bottom of a substantial chambered block which is rigidly attached to the transmitter case; a supplemental diaphragm of mica or similar material is fastened at its center to the front electrode and at its periphery to the circumferential edge of the heavy chambered block; the space between the faces of the electrodes and between their edges and the wall of the chamber is filled with carbon granules. The variations in the resistance to the current are due wholly to the compression and relaxation of the granules between the vibrating and the stationary electrodes. The carbon chamber is sealed, and so moisture as a cause of packing is eliminated. There is an overflow space around the edges of the electrodes, thus obviating the fusion that might come from heat expansion of granules within confined limits; but the continual tamping of the front electrode upon the granular mass within the rigidly held chamber remained in the White as a known cause of packing. In the Dean structure, with its vertical diaphragm and smooth electrodes, its light-weight chamber carried on the diaphragm, its front electrode attached to the diaphragm within the chamber, its rear electrode upon a rigid post extending within the chamber, its supplemental diaphragm of mica attached at its periphery to the circumferential edge of the chamber and at its center to the rigid post and forming a tight and flexible rear wall of the chamber, its space for granules between the faces of the smooth electrodes and its overflow space around the edges of the electrodes—not only were obtained the variations in current resistance due to the compression and relaxation of the granules between the vibrating and the stationary electrodes, but also the variations due to the inertia of the granules as the chamber played back and forth; and, further, not only were moisture and overheating done away with as causes of packing, but the only remaining cause, namely, the tamping of a stationary mass, was removed by keeping the mass in agitation. Now when Dean had thought out these new results and the way to attain them, it is true that the various elements of the novel and useful combination could be found here and there; but the concept of such a unitary structure was not obviously taught nor foreshadowed by anything in the prior art. Strom-

berg and Carlson (patent No. 580,434) prevented packing by the wedging and separating action of roughened electrodes, aided by elasticity of the plush circumferential wall. Stromberg-Carlson Tel. Mfg. Co. v. American Elec. Tel. Co., 127 Fed. 704, 62 C. C. A. 460. While the result, in the one particular, was of the same general character, the idea of means was totally different. Nothing, of course, was taught respecting the granular carbon type by the earlier transmitters (Short, Berliner, and others) in which the electrodes were in direct contact. The transmitters with horizontal diaphragms we deem inapposite for reasons stated in the Stromberg-Carlson Case. The "pill-box" class (Colvin and others) do not have the tamping action, the effect of which was one of the things in the White transmitter that Dean was aiming to remedy; and the absence of the tamping hardly suggests a cure. In the "piston and cylinder" type (Brown, Charol-lois, and others) in which one electrode is mounted at the bottom of a solid cylindrical granule chamber, and the other electrode is the piston head, having a felt or plush packing or washer, and either the cylinder or the piston is attached to the diaphragm, we trace no suggestion of means for attaining the results produced by Dean. In the Charol-lois structure, which was largely dwelt upon in argument, we find electrodes of the rough-face style and the space between fully and tightly filled with granules—no sealed chamber to exclude moisture, no overflow space to allow for heat expansion, no way suggested to break up tamped granules except by the wedging and separating action of the rough-face electrodes. To our view the White transmitter is the strongest reference. In a broad way it may be said on a comparison of the two transmitters that Dean simply reversed the position of White's sealed chamber with its smooth electrodes and overflow space, and that all the necessary structural alterations and adaptations were within the capacity of the skilled mechanic. But neither the White patent nor anything else exhibited in the prior art would have told the mechanic why the changes ought to be made. The mechanic in Dean had first to be informed by the inventor in Dean.

Infringement is clear. Appellant's mechanical joinder of parts which appellee makes integral does not avoid the identity of the transmitters.

Dean's application was filed in March, 1901, and the patent was granted in the following November. McCormick, inventor for appellant, testified that he made a transmitter embodying the principles of the Dean invention in September, 1900,; but he did nothing about it until some time after Dean had applied for a patent and also had successfully placed his transmitter upon the market. Thereafter McCormick filed an application for a patent, and appellant brought out its copy of the Dean transmitter. Appellee introduced proof tending to show that Dean had made the invention in 1895. Upon this state of things appellant bases several contentions.

Abandoned experiment: The very instrument, unaltered, that Dean constructed in 1895, was successfully used, after this suit was pending, in communication between Chicago and New York.

Public use more than two years prior to the application: Dean did

not sell or lease his completed device; he did not permit others to use it for telephone purposes; he did not so use it himself. He did, to the knowledge of others, couple it to a telephone line to see whether it would do what he hoped. He lost nothing by such a use. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000.

**Abandonment or dedication to the public:** This contention centers on Dean's intent, and the burden was on appellant to prove very clearly that Dean meant to donate his invention to the public. *Ide v. Trorlicht Co.*, 115 Fed. 144, 53 C. C. A. 341, and cases there collated. Within the two years preceding the application there was no public sale or use and no publication under circumstances from which an inference of dedication might be drawn. And the positive evidence leaves no doubt that Dean intended to retain the invention as his own property until he could market it to his profit, as he did in 1901.

**Equitable estoppel:** Dean was the first and true inventor of the device in suit. There being no abandonment, no public use or sale, and no publication, within the terms of section 4886, Rev. St. (U. S. Comp. St. 1901, p. 3382), his right to the patent is not assailable on statutory grounds. So far as equities are concerned, Dean, in spite of his delay, was the first to put the device into commercial use and the first to apply for a patent. If, during Dean's suspension of activities, McCormick had either patented the device or brought it into public use without a patent, the public would have been indebted to McCormick for benefits conferred, and Dean might well be held estopped by his delay from claiming the public grant; but in our judgment neither reason nor authority sanctions an estoppel against the first and true inventor unless the later comer has cut in between and made the public his debtor by being the first to get to the patent office or the market. *Kendall v. Winsor*, 21 How. 328, 16 L. Ed. 165; *Consolidated Fruit Jar Co. v. Wright*, 94 U. S. 92, 24 L. Ed. 68; *Savary v. Lauth*, Fed. Cas. No. 12,389; *White v. Allen*, Fed. Cas. No. 17,535. The decision in *Universal Adding Mach. Co. v. Comptograph Co.*, 146 Fed. 984, 77 C. C. A. 227, is to the same effect, when the general expressions are read, as they should be, in the light of the particular facts.

The decree is affirmed.

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DUNCAN et al. v. CINCINNATI BUTCHERS' SUPPLY CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 29, 1909.)

No. 1,906.

1. PATENTS (§ 328\*)—INFRINGEMENT—OVERHEAD TRAMWAY.

The Werner patent, No. 491,151, for a switching device for an overhead tramway, conceding its validity, discloses novelty only in the form of the switch board and the mode of operation, the principles being old, and must be limited to substantially the identical structure described. Claim 1, so construed, held not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

**2. PATENTS (§ 160\*)—CONSTRUCTION OF CLAIMS—COMBINATIONS.**

An element not mentioned in a claim of a patent for a combination cannot be read into it, although it may appear in the specification; but, if a claim includes an element in general terms and refers to the specification to identify it, such element may be read into the claim.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 235; Dec. Dig. § 160.\*]

**3. PATENTS (§ 157\*)—CONSTRUCTION OF CLAIMS—COMBINATIONS.**

Where an applicant for a patent in one claim makes no mention of an element, and in another includes it, the presumption is that he omitted it from the first on purpose.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 157.\*]

**4. PATENTS (§ 243\*)—INFRINGEMENT—COMBINATIONS.**

A claim of a patent for a combination is not infringed by a device which omits some elements of the combination, and contains others not included therein.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 382, 387, 388; Dec. Dig. § 243.\*]

**5. PATENTS (§ 328\*)—INFRINGEMENT—OVERHEAD TRAMWAY.**

The Werner patent, No. 571,607, for a switching device for an overhead tramway, claims 2 and 5 are valid as limited by reference to the specification, but, as so limited, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Nathan Heard, for appellants.

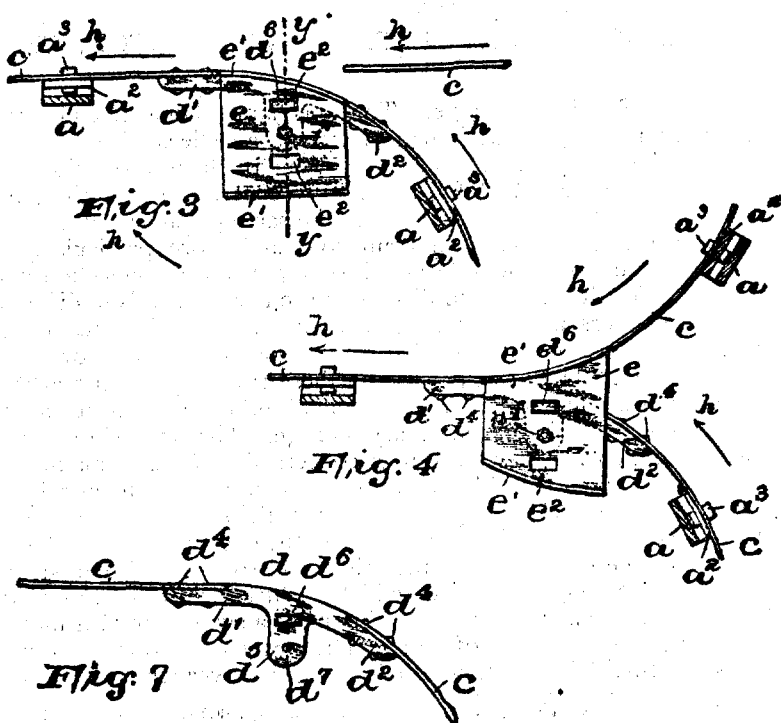
C. E. Mehlhope, for appellees.

Before LURTON, SEVERENS. and WARRINGTON, Circuit Judges.

SEVERENS, Circuit Judge. The appellants, Duncan and Judd, complain of an alleged infringement by the appellees of two letters patent, of which they claim to be owners, one of them being No. 491,151, granted February 7, 1893, to P. F. Werner, and the other, No. 571,607, granted November 17, 1896, to the same patentee. Both were for improvements in overhead tramways, and more particularly to switchboards and appliances designed to be put into a connection with a main track for the purpose of distributing on several rails to different places the carriers and their loads coming on a single track to the switch. The rails are hung on hangers suspended from an overhead beam or ceiling. The principal use of these tramways is in transferring the carcasses of animals from the slaughterhouse to various apartments for cooling off and temporary storage. The first of these patents consisted, so far as we are now concerned with it, in making an opening for a switch board between the end of the single main rail and the ends of the several rails proceeding from the switch, bolting a connecting piece to the end of the main rail on the one hand, and to the opposite end of the switch rail on the other, and so attached that the upper edge of the connecting piece will be a little below the top of the rails thus connected. On the connecting piece a switch board is mounted carrying short sections of rails. The purpose of this connecting piece is to stiffen the joint, which is somewhat weakened by making

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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the opening, and also to supply a rest for the switch board, for which latter purpose an arm is carried out from the connecting piece and is cast, or made rigid, with it. This arm has a flat upper surface, has a hole near its outer end, and a rectangular, short post near the main part of the connecting piece. The switch board is a flat plate, resting upon the connecting piece as well as upon the arm of the connecting piece. A rod descends from the switch board through the hole in the arm and extending below forms a handle, by which the switch board is operated. This forms a pivot on which the switch board is turned horizontally. Through the switch board several rectangular holes are made, each of which is adapted to receive the post on the arm of the connecting piece. At the edges of the switch board and at proper distances from its pivot flanges are turned up in the form of rails, one straight for carrying the main line directly through; others curved to take the carrier to one or the other side. The switch board is operated by the handle below. If it is set with the straight edge or piece of track in line with the main track and it is desired to set the switch so as to connect the main with a side track, the operator will lift the switch board by its handle above the top of the post on the supporting arm, and then turning it around horizontally until the desired edge or piece of rail is presented in the opening, and then dropping the switch board to its place for maintaining that position. Figures 3, 4, and 7 sufficiently indicate the form and mode of operation of the device:



In figure 7 is shown the connecting piece, d, bolted to the rails, c, c, and having a hole, d<sup>7</sup>, in the arm for the pivot, and a post, d<sup>6</sup>, which rises through the rectangular opening in the switch board. In figures 3 and 4 is shown the switch board, e, having a pivot at e' and an opening for the post at d<sup>6</sup>, and at e<sup>1</sup> and c<sup>1</sup> are flanges which serve for rails on the edges of the switch board, one straight, the others curved. The lifting up and turning around of this switch board and letting it fall to place gives a continuous track in any desired direction.

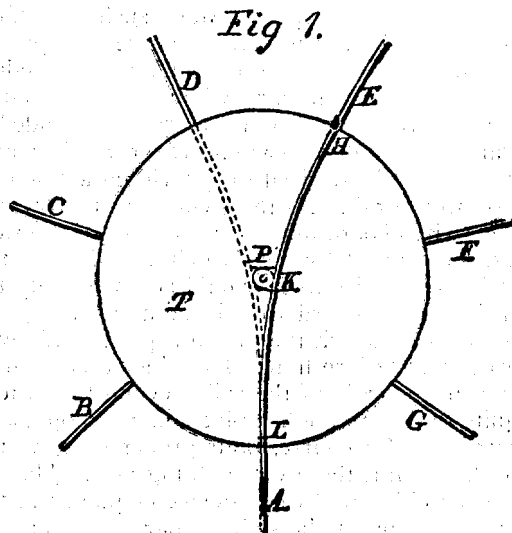
The first claim only of this patent is alleged to be infringed, and is as follows:

"1. In an overhead tramway, the combination of rail sections, a connecting piece, and a pivoted switch board or turntable on said connecting piece, provided with two or more rail sections, substantially as and for the purposes set forth."

The validity of this claim is denied upon the grounds that it had been anticipated, and that it did not disclose invention. And it is further contended that, if it be valid, it can only be so for a structure so nearly identical with the description as not to include the defendants' device. Referring to the wording of the claim, it is seen that the novel features are "rail sections"; the "connecting piece" and a pivoted "switch board" having two or more rail sections thereon. These elements are in combination. The "overhead tramway" is mentioned to show in what kind of structures the devices could be usefully employed. So we are not concerned with the hangers on which the track is suspended, nor with the handle by which the switch board is operated.

Werner was far from being the first to devise a switch board intended to serve the same general purpose. Many such were already in use, most of them supported by a foundation, but several patented devices were already in use for the purpose of switching suspended rails. Of the former kind were the familiar switches in railroad tracks. In transferring a switch from the ground to rails suspended on hangers the same general features of the switch proper would naturally be indicated; but means must be devised for providing a rest for the switch in proper relation to the rail. As the switch must carry rails to effect the diversion, the switch board must be in the line of the rails and movable therein, and the support for the switch must have a rigid connection with the rails; otherwise there would be no security that the portions of rail on the switch board would maintain their proper relation with the lines of rails of which they form a part. This was the problem which Werner had before him. To hold the ends of the one rail in proper relation to the ends of the rails beyond the switch board, he used a device quite similar to the fish plates in common use on railroads for the same purpose. Of course, their proper place would be below the top of the rail. So far, there was nothing new. The use of a connecting piece was an old and obvious device employed in the same art. Then, how should he support the switch board carrying the switching rails? Obviously it could not ride on the narrow foundation of the connecting piece, and be manipulated thereon. He, therefore, extended a horizontal arm from the connecting piece for a broader foundation and formed a pivot thereon whereby the switch board with its rail portions could be turned horizontally to suit the various requirements.

All these suggestions followed each other in natural sequence, or, it is better to say, that the sequences were so far obvious as to raise serious doubt whether the perception of them was beyond the skill of one well trained in the art and familiar with the subject. Many things which seemed indicative of invention in earlier times have lapsed into the domain of the skill and prevision of the artisan, and the test of invention in the mechanical arts has risen to a higher plane as the eye, the hand, and the intelligence of the workman have been educated to higher issues. The fruits of the progress thus made belong to the general public, and the danger is that too many of the utilities of life may be covered by the ever-increasing flood of patents, too many of which may have little or no right to a monopoly. Connecting pieces attached to rails at their ends for the purpose of holding them rigidly in place were, as we have said, common in the art. We have referred to fish plates bolted to the sides of rails. Switch plates or turntables carrying sections of rails and turning on a pivot whereby cars were switched from one rail to one of several others were also in use and some of them patented before Werner's patent was applied for. Some of these patents shown in this record disclosed such a switch resting on the ground, as Wharton's turntable, of date 1873; Harrington's turntable, 1883; Middleton and Cary, 1873; Williams, 1889; Allen, 1890. The last three were switches turning and resting on substructures. A patent granted in this country to Bocande, October 16, 1888, numbered 391,294, for "a turntable switch for single line elevated railways," showed the same device. Figure 1 of the drawing is here inserted.



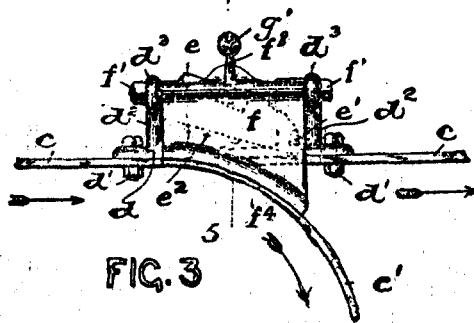
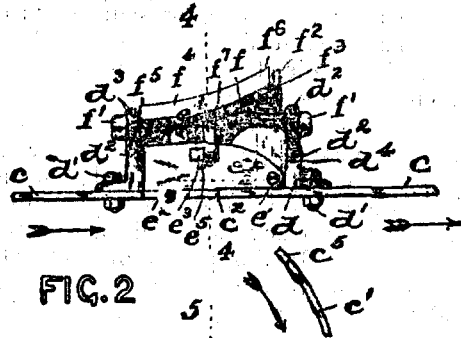
T is the turntable switch carrying sections of the rail A and of D and E. P is the pivot supported from below. It is readily seen that a carrier coming in from A can be switched to any of the radiating lines,



B, C, D, E, F, G, by turning the switch board in its horizontal plane. It is also seen that it fills an opening in the rails. In other patents for switches the switch rails rested on a platform, which was carried from side to side to fill an opening between the ends of rails and adapted to co-operate with them and take the carrier by different connections to different points, as in that to Donkersley, 1880. A number of patents in the earlier art are also shown for switches in overhead tramways suspended on hangers, such as Potter and McDougall, 1887; Hoershelman, 1888; McCredie, 1894; and, we think, Hibbard, 1896. The McCredie patent was not granted in this country until 1894, but it had been issued and recorded in a foreign country as early as 1887. It was numbered in this country 512,515. We notice it the more particularly because it disclosed a track along the edge of the switch board, a feature which is said to differentiate Werner's invention from former switch boards, in which the tracks were laid across the more central parts of the switch board. In this patent of McCredie's the switch board (or block as we call it) there was a lateral extension of the board, near the outer end of which was a groove in which the flange of the carrier wheel should run. The edge of the extended switch board and the groove were straight on one edge and curved on another. This construction formed a rail, which was not merely the equivalent of Werner's section of rail, but was almost identical with it. Thus different sections of rails were provided to go into the opening, and at the same time permit the unobstructed passage of the carrier. What Werner did was to take his pivot outside and locate his rail sections on the margin of his switch board. This was what McCredie did, and was necessary in order to make way for the passage of the carrier. The form and mode of operation were new, but the essential principles, as we have seen, were not. There was also some novelty in the form of his switch board. And these characteristics of his switch board are all there is of novelty in his device which savors of invention. All the rest could be gathered by an observing man from previous structures in the same art. There were so many patented devices in the field for the same purpose, though by slightly different means, that we are compelled to limit his invention, if it can be held valid, to substantially the identical structure devised by him. His invention is so limited as to restrict the range of equivalents to almost none at all. In view of the length of time it has been acquiesced in and the presumption from the grant, we are disposed to concede its validity. His claim 1 is for a combination of the connecting piece and the switch board. There can be no infringement unless both these elements are used in the same form or an unimportant variation of the same form. We think that neither the switch board nor the connecting piece of the defendant are so far similar as to come within the scope of the complainant's patent. They accomplish a similar result, but the mode of operation is not the same. We postpone this particular description of the defendants' structure until we have examined the second of the Werner patents.

The patent No. 571,607 is also for a switching device in overhead tramways. It is more complicated, but more conveniently operated,

than his original device. In this he used, instead of one, two switch boards, one of which is operated by pulling a rope connected with a handle on one of the switch boards and the second operates automatically with the movement of the first. Figures 2 and 3 will serve to explain.



$d^2$   $d^3$  are the arms of the switch bracket,  $d$ . These arms are provided with bearings,  $d^4$   $d^5$ . A rail section,  $f$ , having a portion of rail,  $f^4$ , is pivotally arranged on the bracket. Another rail section,  $f$ , is journaled on the arm of the bracket,  $d^2$ , at  $e^1$ , and swings on it. It also has a rail portion,  $e^2$ . On the bottom of the first-mentioned rail section is a spur,  $e^5$ , which in operation descends into the opening,  $e^3$ , in the second rail section, and, engaging it, turns the second rail section back out of the way, while the first rail section is turned down and takes the place of the second. Reversing this operation the first rail section is thrown up and back, and the spur brings the second rail section forward to its place. We do not see that this arrangement permits of more than one switch rail beside the one provided for a continuous straight line, although the principle of its operation could be

applied to the provision of a switch turning off the main rail to the other side. The claims relied on are 2 and 5. They read as follows:

"2. In an overhead tramway, a switch, comprising therein, a switch-bracket, d, having arms, d<sup>2</sup>, provided with bearings, a rail-section, e, pivotally arranged on said bracket and having a rail portion, e<sup>2</sup>, and a rail-section, f, journaled in the bearing portions of said arms, d<sup>2</sup>, having a rail portion, f<sup>4</sup>, and means for operating said rail-sections, substantially as and for the purposes set forth."

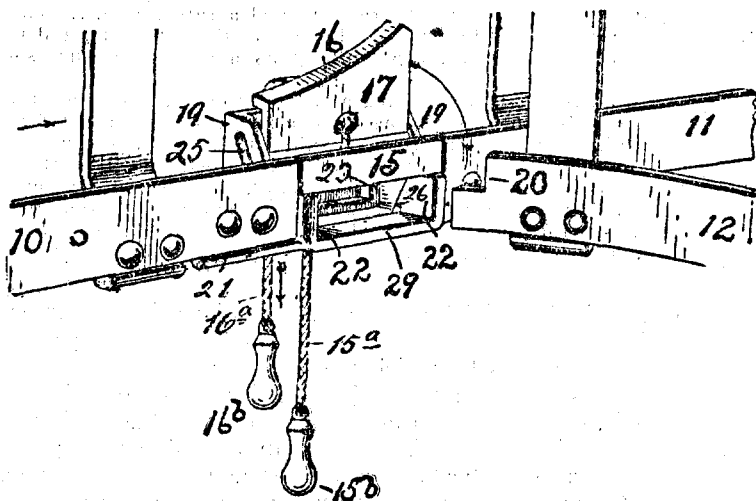
"5. An overhead tramway, comprising a rail or track, c, having a cut-away portion, c<sup>2</sup>, and a disconnected rail, as c<sup>1</sup>, of a switch-bracket secured to one side of said rail, c, directly in front of said cut-away portion, c<sup>2</sup>, a rail-section, e, on said bracket having an upwardly-extending rail portion, e<sup>2</sup>, adapted to be forced into said cut-away portion, c<sup>2</sup>, a second rail-section, f, on said bracket having a rail portion adapted to connect a portion of said cut-away part, c<sup>2</sup>, with said disconnected rail, c<sup>1</sup>, as set forth, and means for operating said rail-sections, e and f, substantially as and for the purposes set forth."

It is to be noticed that claim 2 omits all mention of the spur on the bottom of the first rail section and of the opening in the second rail section, or of any means by which the second rail section is affected by the movements of the first. And yet such means would be an essential part of the invention. But claim 5 calls for "means for operating said rail sections, e and f, substantially as and for the purposes set forth." The rules applicable to the construction of these claims in this regard are, first, that we cannot read into a claim for a combination an element not mentioned in it, although it may appear in the specifications; and, secondly, that if the claim includes an element in general terms, and refers to the specification to identify it, we may read that element into the claim—a rule of construction applicable to all written instruments; and, thirdly, that where the applicant for a patent in one claim makes no mention of an element, and in another includes it, the presumption is that he omitted it in the first on purpose. A patentee may include in or omit from his claims so much of the matter of the specifications of his invention as he pleases; but he is bound to state distinctly what part of it he intends to claim as his own.

Now, it would seem to us that the provision of some means for getting the second rail section out of the way for the other, and vice versa, savored quite as much of invention as any other feature of his device, and, if we leave that out of the claim, it would leave the field open to others to use it in any combination they might wish to organize. Whether this claim can be supported is a question not free from doubt. Conceding, however, that the fifth claim exhibits a novel combination and a degree of ingenuity which qualifies it to rank as an invention, the question whether the defendants infringe it remains to be considered.

In view of the many devices which had been conceived and used prior to this invention of Werner's, it is obvious that it cannot be accorded the rank of a primary invention. In some respects it was novel. In those respects we find the measure of the equivalents which no other person may employ. His patent does not shut out all other means for accomplishing the same object, but only those which involve

the same mode or principle of operation. The defendant's switch is made under a patent granted for an invention by Schmidt and Werner in 1903. Figure 1 is selected for explaining it.



At first sight it resembles the second Werner patented switch. But on analysis of its construction it is found to be an essentially different organization. There are two track sections, 16 and 17, having each a rail on its margin, but here the similitude to any new feature of Werner's ends. The rail sections of the defendant are not separate from and movable on each other, as in the Werner patent, but are cast in one piece rigidly on a common pivot around which both the switch plates revolve. Neither of the plates moves horizontally, as does the lower one in Werner's. A chamber is made below the lower plate, into which it drops on being brought backward and downward off the lugs which support it at either end. These lugs are beveled off on their inner faces so as to form an incline from top to bottom, down which the face or edge of the lower section slides. The operation by which the shifting of one rail section for the other is effected is peculiar. Slitted bearings are made in the casing at either end. These slitted bearings extend upward and backward, and in them are journaled the ends of the pivot, on which the rail sections are arranged at about a right angle. When the lower section is pulled backward and upward, the pivot rises in its bearings, the rail section is drawn off the lugs on which it normally rests, its face or edge slides down on the inclined inner face of the lugs into the chamber. At the same time the other rail section is coming forward and down until it rests on the same lugs. Thus the switching to one of the diverging rails is effected. Simply reversing the process, the upper section is thrown over and back to its former place, and the lower section comes up to its place and by the effect giv-

en to the slotted bearings of the pivot, as the pivot descends therein the rail section is thrust forward into place as soon as it reaches the top of the lugs, and then rests thereon.

The mode of operation and the adaptation of the means to secure it in the Schmidt and Werner patent are so far different from that of the switches shown in the two Werner patents that it cannot be held to infringe them. The difference is in the vital part of the mechanism for shifting the rails which is the purpose of a switch. In the second Werner patent, the devices in which are most like those of the defendant's patent, no means for making the shift being contained in the second and fifth claims, if we should bring in by the reference at the end of the claims the devices pointed out in the specifications for that purpose, this would complete the claims. And this would be the basis for comparison with the defendant's. The spur on the under side of the upper rail section and the opening in the lower rail section constitute the individual elements for making a shift of the rails. In other claims they are expressly included as elements of the combinations. The defendant's switch has no such elements. Moreover, the Werner patent has the ordinary simple bearings on which the pivot of the upper section rail revolves. The lower swings on a pivot at the base of one of the arms of the bracket. The defendants lodge both sections on the same principal pivot and provide slotted and curved bearings for the pivot which effect a peculiar mode of operating the rail sections not found in the Werner patent. And, further, the lugs with inclined inner faces which also affect the mode of operation in the defendant's device are not found in the complainant's. All of the claims of the complainant involved in the controversy are for combinations. The elements of those of the respective parties are not only unlike in some of their characteristics, but those of the complainant's are some of those omitted by defendant and some of those of the defendant which contribute to the operation of the switch are not found at all in the complainant's. It would be flying in the face of well-settled principles in the patent law to hold that there is infringement in such circumstances as these. *Prouty v. Ruggles*, 16 Pet. 335, 341, 10 L. Ed. 985; *McClain v. Ortmyer*, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; *Black Diamond Coal Co. v. Excelsior Coal Co.*, 156 U. S. 611, 617, 15 Sup. Ct. 482, 39 L. Ed. 553; *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100.

The case seems to us an excellent illustration of the rule that when each of the two inventors improve upon the former art, each in his own distinct and separate way, they shall each be credited with his own improvement. It does not necessarily follow that, because the separate elements unaffected by their special adaptations might be found in both patents, the combinations are therefore the same. The observation of Mr. Justice Brown in *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, at page 568, is very pertinent. Of course, it would be likely that some of the necessary features of such an apparatus would coexist, but, as we have said, the elements of the combination do not operate in the same way, although they attain the same object. The second and fifth claims of the second Werner patent are very artfully framed, and seem to aim

at including more than the specifications warrant. It is only by restricting them by the reference to the specifications that they can be supported and as so construed the defendant's switch does not infringe either of them.

The decree of the Circuit Court will be affirmed, with costs.

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GENERAL ELECTRIC CO. v. ALLIS-CHALMERS CO. et al.

(Circuit Court, D. New Jersey. May 26, 1909.)

1. PATENTS (§ 328\*)—INFRINGEMENT—ATTACHMENT FOR MOTOR CONTROLLER.

The Potter patent No. 671,232, for an attachment for notched quadrants, the purpose of which is to secure automatically a notch-to-notch movement of the handle of the contact-cylinder on an electric car, construed, and *held* not infringing.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

2. PATENTS (§ 312\*)—INFRINGEMENT—EVIDENCE.

The fact that a device is within the language of a claim of a patent does not necessarily prove infringement.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 312.\*]

In Equity. On final hearing.

L. F. H. Betts and Ramsay Hoguet, for complainant.

Thomas F. Sheridan and Clifton V. Edwards, for defendants.

CROSS, District Judge. There are two defendants in this suit, one only of which, the Allis-Chalmers Company, has been served. The bill of complaint alleges infringement of letters patent No. 671,232, for an "attachment for notched quadrants," issued to Wm. B. Potter, assignor to the General Electric Company, April 2, 1901.

The specifications define the purpose of the invention as follows:

"This invention relates to controllers for electric motors; and it is especially intended for the large controllers used in electric railway equipments. In certain types of such controllers the handle by which the contact-cylinder is rotated is provided with a spring-latch which engages with notches in a quadrant secured upon the top of the controller-casing. The latch normally engages one of the notches, and can only be disengaged to release the handle by pressing down a thumb-piece in the handle. In operating this device it is necessary to keep the thumb-piece depressed until the latch has cleared the edge of the notch, the result being that the latch is sometimes retained so long as to skip the next notch.

"The object of my invention is to positively insure a notch-to-notch movement and simplify the operation necessary to obtain this result. I accomplish this by providing a spring-actuated auxiliary support movable independently of the quadrant, so that when the latch is raised said support instantly operates to hold it in this position above the teeth of the quadrant, irrespective of the pressure on the thumb-piece, so that the handle is positively released and is free to be turned if the motorman gives only a momentary pressure on the thumb-piece."

A controller is used on street cars to regulate the speed of the motors, and consequently of the cars. As this patent has nothing to do directly with the internal mechanism of the controller, it seems unnecessary to give a detailed description of its method of operation.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

farther than to say that it is essential that the motorman turn the controller drum to such a point that the proper switch connections will be made. For, as the counsel for the complainant in substance says, if it should be turned too far the contact fingers and segments within the drum might be separated far enough to break their actual contact, but not far enough to prevent the formation of an arc between the contact fingers and segments which would result in seriously burning them while at the same time the current might not be efficiently carried to the motors. Hence, in order that the motorman may stop the controller handle at the proper places to make the desired switch connections, the correct positions are marked on a dial plate under the controller handle, by the use of which dial the motorman may gradually move the controller notch by notch to the indicated positions. The object of the inventor of the patent in suit was to provide a handle for the controller "that would operate automatically to insure a notch-to-notch movement." It was intended to provide a gradual movement of the controller handle, and prevent the operator from overrunning the notches and turning the power on too abruptly and suddenly or at improper places. The first claim of the patent, and the only one in issue, is as follows:

(1) "In a controller, the combination with the handle of the contact-cylinder, of a latch pivoted thereon, a notched rack coacting with said latch, and means for automatically supporting said latch when raised out of a notch, until the handle is turned to bring the latch over the next notch."

It will be seen that the claim embodies four elements in combination: The handle of the contact-cylinder, a latch pivoted thereon, a notched rack coacting with said latch, and means for automatically supporting said latch when raised out of a notch until the handle is turned to bring the latch over the next notch. The Priest patent No. 556,862, of the prior art, shows substantially the arrangement of the patent in suit, save for what it called the supplementary rack or auxiliary quadrant. Indeed, the complainant's expert practically admits this when he says:

"I do not believe that there is any material or substantial difference between the device of the Priest patent and the device of the patent in suit, aside from auxiliary quadrant and the means for operating it."

Whatever of invention exists, therefore, in the patent in suit, must be found in the "means" referred to in the fourth element in combination with the other elements. The main contest at the argument was upon the question of infringement. The validity of the complainant's patent was not seriously controverted. With the exception of the Priest patent, the patents cited as anticipations all belong to a more or less remote art and are incapable of adjustment to a controller, and no one of them, not even that of Priest, contains the last element of claim 1, and hence does not show the combination of that claim. But the same thing is true of the defendant's device, which likewise does not contain that element, or any equivalent thereof. The claim calls for means for automatically supporting the latch when lifted out of the notch; means which, upon pressure being exerted upon a button on the controller handle by the operator, operate instantly and independ-

ently of his will. The "means" of the patent constitute devices entirely separate from the rack, while working in co-operation therewith. The rack is itself the second element of the claim, and cannot therefore be the means of the fourth element, which is an independent and additional element, and shown to be such by its separate description. The method of the patent for automatically supporting the latch is by the use of a supplementary rack or auxiliary quadrant. This, as already indicated, is not only an essential element of the claim, but is the only novel one. The patentee, while suggesting modifications and variations of the means therein referred to, nowhere attempts to get away from the auxiliary quadrant or something equivalent thereto pivoted or attached to the main quadrant. It is true that in the specifications he speaks of other and separate quadrants for series notches each having its own spring; also of a separate spring tooth or dog pivoted on the main quadrant adjacent to each notch; and again at another place says that, while the drawings show the invention applied to a curved rack or quadrant, it can within its scope also be applied to a straight rack, if desirable; but no matter what form or variation is suggested, it is always something outside and independent of the quadrant; that is, something which, as the specifications say, can be "applied" to it. For instance, at one place it is said:

"While the drawings show the invention applied to a curved rack or quadrant, yet it is manifestly within the scope of my invention to apply it to a straight rack, should it be desired so to do."

This language conveys a decided intimation that the patentee's entire invention exists outside of the rack or quadrant, to which, moreover, it is capable of application. The defendant's device does not have any supplemental rack or quadrant to support the latch. It has but one rack, and that is like Priest's in the prior art. The latch when lifted from the rack is supported manually and not automatically; of course it has to contact with the rack at some time and place, otherwise it could not take the next notch of the rack, but it is not supported by it in the way that the latch in the patent in suit is supported by the auxiliary rack or quadrant. The claim in issue provides means for supporting the latch when raised out of a notch, which means operate automatically and immediately once the latch is raised, and that, too, without any intervening movement of the controller handle. The specifications say that, "when the latch is lifted by a momentary pressure on the thumb-piece, the instant the latch clears the top of the auxiliary quadrant, the spring, I, throws this quadrant endwise so that its tooth, h, comes under the latch and prevents its falling." This is done, it will be noticed, automatically and not manually. The following question addressed to the defendant's expert and his answer thereto show the method of operation of the defendant's latch:

"Q. Please state exactly during what part of the operation of the controller handle the latch is out of contact with the rack in defendant's structure? A. As the handle moves to the rear, the lug at the outer end presses on the inner end of the latch and finally disengages it from the tooth. At this instant the latch is pulled forward and put into a position where it cannot enter the notch it has just left. The latch does not touch the rack at this time, but is at some distance from it. Being now in a position where



it cannot possibly enter the notch it has just left, a forward movement of the handle brings the latch in contact with the tooth, and a further forward movement of the handle brings the latch against the succeeding tooth, the whole handle having advanced by one notch."

The complainant's invention was not broadly new; it did, however, make some advance upon the art, and is entitled to a reasonable but restricted application of the doctrine of equivalents. It will be observed that the claim in issue is very broad, broad enough indeed to embrace any and all means of supporting the latch, no matter whether the means were new or old or within or without the range of equivalents. The fact, however, that the defendant's device may be within the language of the claim does not of itself prove that it is an infringement. Infringement is not a mere matter of words.

In *Westinghouse v. Boyden*, 170 U. S. 537, at page 568, 18 Sup. Ct. 707, at page 722, 42 L. Ed. 1136, Mr. Justice Brown in delivering the opinion of the court, said:

"But even if it be conceded that the Boyden device corresponds with the letter of the Westinghouse claims, that does not settle conclusively the question of infringement. We have repeatedly held that a charge of infringement is sometimes made out, though the letter of the claims be avoided. *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Ives v. Hamilton*, 92 U. S. 426, 431, 23 L. Ed. 494; *Morey v. Lockwood*, 8 Wall. 230, 19 L. Ed. 339; *Elizabeth v. Pavement Company*, 97 U. S. 126, 137, 24 L. Ed. 1000; *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; *Hoyt v. Horne*, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713. The converse is equally true. The patentee may bring the defendant within the letter of his claims, but if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he is as little subject to be adjudged an infringer as one who has violated the letter of a statute has to be convicted when he has done nothing in conflict with its spirit and intent. 'An infringement,' says Mr. Justice Grier in *Burr v. Duryee*, 1 Wall. 531, 572, 17 L. Ed. 650, 'involves substantial identity, whether that identity be described by the terms, "same principle," "same modus operandi," or any other.' \* \* \* The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term 'equivalent.'"

See, also, *Standard Computing Scale Company v. Computing Scale Company*, 126 Fed. 639, 649, 61 C. C. A. 541; *Norton v. Wheaton* (C. C.) 97 Fed. 636, 641. If the complainant's patent had consisted in moving back the rack or quadrant when the latch was raised, and the defendant's device had merely moved forward the latch while the rack or quadrant remained stationary, the defendant would have probably infringed. There would then have appeared simply a reversal of action, and the one method would have been the equivalent of the other. But that does not adequately represent the present situation. In the claim in suit the rack is made the third element of the combination. This rack is stationary at all times, and to provide for the means of supporting the latch, which is the fourth element of the combination, there is introduced an inner and movable rack parallel to the fixed rack which performs no part of the function of the fixed rack, but is designed and intended by means of a spring to pass under and support the latch instantly after it has been raised out of the notch

by pressure imposed upon the button on the handle. This auxiliary rack the defendant has done away with, and has provided no equivalent therefor. He has utilized the fixed rack and latch of the prior art and made the latter movable, but manually supported at the very time the patent calls for automatic movement and support of the latch. The defendant has applied a different principle, and uses different means to accomplish the desired result. In view of the admitted fact that the Priest patent ties the patent in suit down to means for automatically supporting the latch, and as the defendant has ignored the means of the Potter patent and adopted other radically different means, and means working upon a different principle, I think the defendant has not infringed.

The complainant's patent has never been used to any considerable extent. Only about 50 of them were ever made, and their use was abandoned 8 or 9 years ago. On the contrary, the defendant's device has provided a successful notch-to-notch movement, and, when used normally and naturally, cannot act otherwise.

A decree will be entered dismissing the complainant's bill, with costs.

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#### AMERICAN THERMOS BOTTLE CO. v. VACUUM SPECIALTY CO.

(Circuit Court, S. D. New York. May 13, 1909.)

#### PATENTS (§ 328\*)—INFRINGEMENT—DOUBLE-WALLED VESSELS.

The Burger patent, No. 884,567, for a double-walled vessel, the invention consisting of a spacing or stiffening device, introduced between the vertical walls of vacuum insulated vessels and supported in position "wholly by its frictional contact with the walls of the vessel," is not infringed by a device in which spacing blocks are used and held in position by being cemented to one of the walls and which are not compressed between such walls.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328\*.]

In Equity. On final hearing.

Alfred Wilkinson, for complainant.

Hillary C. Messimer, for defendant.

NOYES, Circuit Judge. This is a suit in equity to restrain the alleged infringement of letters patent No. 884,567 for a double-walled vessel, granted April 14, 1908, to Reinhold Burger, assignor, to the complainant.

The patentee thus states the object of his invention:

"This invention relates to vacuum insulated vessels and has for its object to provide a novel device for spacing the inner and outer portions of the vessel apart at a distance from the mouth of the vessel so that the vessel may be reinforced at such point by the said device and thus reduce the liability of the vessel to become cracked or broken."

The claims alleged to be infringed are as follows:

"1. A vacuum insulated vessel having its inner and outer portions connected at the mouth of the vessel, and a stiffening device interposed between the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vertical walls of the inner and outer portions of the vessel for spacing them apart at a distance from the mouth of the vessel; said device being supported in position wholly by its frictional contact with the walls of the vessel.

"2. A vacuum insulated vessel having its inner and outer portions connected at the mouth of the vessel and a stiffening device interposed between the vertical walls of the inner and outer portions of the vessel for spacing them apart at a distance from the mouth of the vessel; said device comprising a plurality of yielding spacing blocks compressed between and supported wholly by their frictional contact with the walls of the said vessel."

These two claims are similar. The only real distinction seems to be that the stiffening device of claim 2 must comprise "a plurality of yielding spacing blocks," while the stiffening device of claim 1 may be of a different construction. Possibly a band of yielding material extending around the bottle would infringe claim 1 and not infringe claim 2.

It is true that claim 2 requires the stiffening device to be "compressed between" the walls of the vessel, and that this requirement does not appear in claim 1; but, according to both claims, the device must be supported "wholly by its frictional contact with the walls of the vessel," and I think that it cannot be supported unless it is compressed between such walls. Moreover, the specifications in different places speak of the yielding blocks being compressed between the vertical walls of the vessel so that they will be held in position by friction only—without any special holding means. In my opinion both claims require the blocks to be compressed between the walls of the bottle so that they can be held in position by friction and by no other means.

Now in the defendant's structure the yielding blocks are cemented to the outer vertical wall of the inner vessel and are intended to be held in position by the cement. Sometimes they touch the inner wall of the outer vessel, but they are not wedged between the walls. When the cement has failed to hold them, they have either fallen, or have remained up between the walls subject to be moved by the slightest touch. Reading the element of compression between the walls into both claims, noninfringement is obvious.

Taking, however, claim 1 as it stands, and reading nothing into it, infringement can only be shown by establishing that a block cemented to one of the walls of a double-walled vessel is yet "supported in position wholly by its frictional contact with the walls of the vessel." And this can only be established by the adoption of the theory that the presence of cement only increases friction—that the addition of a surface of cement merely adds to the frictional adhesion or resistance previously existing between the block and the glass, or, as stated by the complainant's expert:

"In order, however, for the plug to move, it would be necessary for it to overcome the static friction of the cement surface on the glass surface under very high pressure due to the force of adhesion. Thus, even in this case, the factor which prevents the plug from sliding down the side of the bottle is friction. Consequently, whether the plug is compressed between the outer and inner walls of the vessel, or is pressed against either wall by any agency, the factor which prevents displacement along the surface is friction."

This theory may be scientifically correct; but it involves too strained an interpretation of the words "frictional contact" to be adopted in

construing the claims. In language in common use an article cemented to a wall is held in place by the cement, and not by friction. Indeed, were the yielding blocks shown in the drawings of the patent in suit cemented to the inner wall of the vessel, in addition to being compressed between the walls, it would ordinarily be said that "special holding means"—which the patent seeks especially to avoid—were provided.

The patent is found not infringed, and the bill is dismissed, with costs.

A decree may be entered accordingly.

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MORTON TRUST CO. et al. v. STANDARD STEEL CAR CO.

(Circuit Court, W. D. Pennsylvania. July 24, 1909.)

No. 16.

PATENTS (§ 328\*)—INVENTION—BENDING MACHINE.

The Flinn patent, No. 736,834, for a bending machine adapted specially for bending pipes or tubes for car and locomotive builders, is void for lack of patentable novelty and invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On final hearing.

Cyrus N. Anderson and Bakewell & Byrnes, for complainants.  
Kay & Totten, for respondent.

BUFFINGTON, Circuit Judge. In this suit complainants charge respondent with infringement of all three claims of patent No. 736,834, granted August 18, 1903, to Christopher Flinn for a bending machine. To our mind the case falls within narrow limits and turns on the validity of the patent. The device in question is adapted especially for bending pipes or tubes for car and locomotive builders.

After hearing full arguments of counsel and on due consideration, we are of opinion this binder is a mere mechanical construction and is lacking in patentable novelty. The bending of pipes and bolts was old. The individual elements in Flinn's device are not new, and it produces no novel result or new product. The use of a bending former at the head of its piston was known. Moreover, take, for example, the best machine. The cylinder was adjustable longitudinally of the table by removing one of its pins and swinging it on the other, which connected it to the table. The cylinder could be radially adjusted "at any position on the table to suit the location of the bend in the pipe." In so operating the cylinder was held against rebound by putting a bolt through the table and the front cylinder bed plate. To us it is clear that mounting and holding the cylinder by a single pivot adjusted to engage in an undercut T-slot was a mechanical expedient that would naturally occur to a skilled man who sought to impart greater adaptable flexibility to a bending mechanism. Pivoting or swinging cylinders were in use. Undercut slots and clamps to hold

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tools in adjustable thrust positions were in common use in machine tool construction, and while the Flinn machine may be, and we doubt not is, a clever, commercial, and effective means of adapting a cylinder to impart a bending thrust in any direction, yet when all its features are summed up, we are satisfied they are mechanical and not inventive in character.

A decree may therefore be submitted dismissing this bill.

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VICTOR TALKING MACH. CO. v. STRAUSS et al.

(Circuit Court, S. D. New York. June 28, 1909.)

**PATENTS (§ 328\*)—INFRINGEMENT—GRAMOPHONES.**

An injunction granted against infringement of the Berliner patent, No. 534,543, for improvements in talking machines.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity.

Horace Petit, for complainant.

Edmond E. Wise, for defendants.

LACOMBE, Circuit Judge. Manifestly complainant is entitled to the ordinary injunction against infringement of claims 5 and 35 of the Berliner patent. What defendants may do with the infringing discs they now own is a question to be dealt with when it arises. If they ship them abroad, and sell them after they get there, it would be difficult to see how they would infringe. If they find some one who owns and uses a mechanical feed device, they would run the risk, upon selling to him, of his putting them to an infringing use to which they would have contributed. If they wish to test their right to sell a licensee of the complainant, they might do so by selling a single disc to him, notifying complainant promptly of such sale. Then the text of the license would be before the court, and the question could be disposed of understandingly. In the event of adverse decision under such circumstances, the court would surely not impose more than a nominal fine.

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In re COVENTRY EVANS FURNITURE CO.

(District Court, N. D. New York. July 9, 1909.)

**1. BANKRUPTCY (§ 328\*)—CLAIMS—TIME FOR PROOF—"CLAIM LIQUIDATED BY JUDGMENT."**

A creditor of a bankrupt, whose debt was paid within four months prior to the bankruptcy, but from whom the amount was recovered by the trustee by suit as a preference, is one holding a "claim liquidated by judgment," within the meaning of Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1907, p. 3444), and he may prove the same against the estate within 60 days thereafter, although more than a year after the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 328.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 171 F.—43

2. BANKRUPTCY (§§ 223, 368\*)—COMPENSATION OF TRUSTEE.

Bankr. Act July 1, 1898, c. 541, § 72, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), added by amendment by Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 (U. S. Comp. St. Supp. 1907, p. 1033), which provides that "neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act," is an absolute bar to any extra allowance, however onerous or valuable the service rendered may have been.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 223, 368.\*]

3. BANKRUPTCY (§ 474\*)—COSTS AND FEES—ALLOWANCE TO CREDITOR.

A court of bankruptcy will not allow costs or attorney's fees from an estate to a creditor whose claim was unsuccessfully contested.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 474.\*]

In Bankruptcy. Review of order of referee herein disallowing claim of the Citizens' Trust Company for \$2,000 and interest on a note, refusing to make an allowance to the attorneys for a creditor whose claim was unsuccessfully contested, and refusing an extra allowance above the percentage compensation fixed by the bankruptcy act to the trustee.

See, also, 166 Fed. 516.

Chas. G. Irish, in pro. per.

T. H. Ferris and E. C. Rice, for claimant.

RAY, District Judge. The ground for rejecting the claim on the note was that it was not proved within the year succeeding the adjudication. The facts are that the note was paid by the bankrupt prior to the filing of the petition; that suit was brought by the trustee to recover the amount, the claim being that it was a preferential payment; and that in such suit as to such note the Citizens' Trust Company was defeated and compelled to pay back the amount. Thereupon, and more than one year after the adjudication, the note was duly proved and presented for allowance, and rejected by the referee, for the reason not proved and presented within the year, or time fixed by section 57 of the act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]). This was erroneous. *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790. That case is decisive of the question. The claim must be allowed.

The claim of the trustee for extra compensation was properly disallowed. Section 48 of the bankruptcy act fixes the compensation of trustees at \$5, deposited with the clerk, and on all moneys disbursed by them 6 per centum on the first \$500, 4 per centum on moneys in excess of \$500 and less than \$1,500, 2 per centum on moneys in excess of \$1,500 and less than \$10,000, and 1 per centum on moneys in excess of \$10,000. This is the compensation fixed by the amendments of February 5, 1903, which amendatory act also provides in section 72, a new section:

"That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 (U. S. Comp. St. Supp. 1907, p. 1033).

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Prior to the amendment it was customary to make extra allowances to trustees, and this was in some cases upheld; but it is seen that the amendment is prohibitory on the court, and absolutely bars all such allowances, however onerous, meritorious, and valuable the services of the trustee. It has been the uniform practice of this court to refuse allowances of costs to successful claimants, creditors, even in cases of contest. I do not think it was intended that costs should be awarded or allowances from the estate made in such cases. Once enter on the practice, and it must be uniform, and in many cases a reasonable allowance, considering the work done, would exceed the claim, and in some cases small estates would be eaten up by such allowances. The claim by the attorneys for an allowance was properly disallowed.

The order of the referee, disallowing the claim on the note, is reversed, and he is directed to allow the claim. The order of the referee, disallowing the application for costs to the attorneys for creditors and extra compensation to the trustee, is affirmed.

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UNITED STATES v. PROVENZANO.

(Circuit Court, S. D. New York. July 15, 1909.)

1. COUNTERFEITING (§§ 9, 11\*)—STATUTES—CONSTRUCTION.

Rev. St. § 5431 (U. S. Comp. St. 1901, p. 3671), declares that every person who, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, or sell, or brings into the United States with intent to pass, publish, utter, or sell, or keeps in possession or conceals with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be punished, etc. *Held*, that it is a crime, under such section, either to pass, utter, publish, or sell any counterfeit obligation of the United States, if done with intent to defraud, or to attempt to do so with like intent, or to bring such a counterfeited obligation into the United States, with intent to pass, publish, utter, or sell it, irrespective of an intent to defraud, and also to keep in possession or to conceal any counterfeit obligation or other security of the United States with like intent.

[Ed. Note.—For other cases, see Counterfeiting, Dec. Dig. §§ 9, 11.\*]

2. COUNTERFEITING (§ 16\*)—STATUTES—"WITH LIKE INTENT"—INDICTMENT.

The words "with like intent," as used in the part of the section prohibiting the bringing into the United States, with intent to pass, publish, utter, or sell, or keep in possession or conceal, any falsely made, forged, counterfeited, or altered obligation of the United States, refers only to the intent to defraud, and not to the intent to pass, publish, utter, or sell, so that an indictment charging possession with knowledge of the counterfeit character of the obligation was not defective for failure to charge an intent to pass, publish, utter, or sell the same, in addition to an intent to defraud.

[Ed. Note.—For other cases, see Counterfeiting, Dec. Dig. § 16.\*]

3. COUNTERFEITING (§ 9\*)—"INTENT TO PASS, UTTER, OR SELL."

The words "intent to pass, utter, or sell," in Rev. St. § 5431 (U. S. Comp. St. 1901, p. 3671), prohibiting the bringing into the United States, with intent to pass, publish, utter, or sell, any forged obligation of the United States, means to dispose of the same as genuine, and thus defraud the taker or takers.

[Ed. Note.—For other cases, see Counterfeiting, Dec. Dig. § 9.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On Motion in Arrest of Judgment.

F. W. Bond, for the motion.

Henry A. Wise, opposed.

RAY, District Judge. Section 5431 of the Revised Statutes of the United States reads as follows:

"Every person who, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish or sell, or brings into the United States with intent to pass, publish, utter or sell, or keeps in possession or conceals with like intent any falsely made, forged, counterfeited, or altered obligation, or other security of the United States, shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than fifteen years." U. S. Comp. St. 1901, p. 3671.

Under this section it is made a crime to pass, utter, publish, or sell any counterfeit obligation of the United States, if the act be done with intent to defraud. It is also a crime to attempt to pass, utter, publish, or sell any such counterfeit obligation, if done with intent to defraud. It is also made a crime to bring such a counterfeit obligation into the United States, with the intent to pass, publish, utter, or sell it, irrespective of intent to defraud. Then it is made a crime to keep in possession or conceal any falsely made, forged, or counterfeited obligation or other security of the United States "with like intent." It is contended that, where there is mere possession with knowledge of the counterfeit character of the obligation, it is necessary to charge in the indictment, and prove, not only an intent to defraud, but an intent to pass, publish, utter, or sell the same. In short, that one who passes, etc., or who attempts to pass, etc., must do so with intent to defraud, but that mere possession of such a counterfeit, and keeping in possession with knowledge of its character, and with intent to use it to defraud, is not a crime.

I do not so construe this section of the Revised Statutes. The words "with like intent" refer to the intent to defraud, not to all of the intents previously named, or to the intent attached to bringing counterfeits, etc., into the United States. Possession with intent to defraud, or with intent to pass, or utter, or sell, or publish, is sufficient. Mere possession with knowledge of the counterfeit character is not sufficient. There must be, with keeping in possession, an intent to defraud. An intent to pass or utter counterfeit silver certificates as good and genuine for a consideration would be an intent to defraud. It is plain that Congress intended to make the intent to defraud the criminal intent; for the section starts off by saying, "Every person who with intent to defraud" does certain things, or who attempts to do certain things, or who brings certain counterfeits into the United States with intent to pass, etc., or who keeps in possession or conceals any counterfeit, etc., "with like intent," meaning plainly the main intent first mentioned, is to be punished.

As the objection is as to the indictment, which charged an intent to defraud and did not charge an intent to pass, utter, publish, or sell, and the evidence showed possession of counterfeit silver certificates with knowledge of their character and an intent to pass, or utter, or sell same—that is, dispose of same as genuine—and thus defraud the tak-



er or takers, and the jury was told they must find such intents in order to convict, and did so find, I hold the conviction good. I am not willing to hold, in face of the statute referred to and quoted, that it is not a crime to have and keep in possession, knowing their spurious character, counterfeit silver or gold certificates, with intent to defraud some person or persons therewith. I think the statute, reasonably construed to effectuate the plain intent thereof, makes such a possession with such knowledge and such an intent a crime.

The motion in arrest of judgment is overruled.

# JAMES DE FREMERY & CO. v. UNITED STATES.

PASCAL, DUBEDAT & CO. v. UNITED STATES (four cases).

(Circuit Court, N. D. California. April 13, 1909.)

Nos. 13,552-13,556 (1,642-1,646).

## CUSTOMS DUTIES (§ 31\*)—MEASUREMENT—GAUGE OF VERMUTH.

Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1654), provides that any excess over one pint or one quart found in bottles of vermuth "shall be subject to a duty of five cents per pint or fractional part thereof." *Held*, that such duty should be assessed on each bottle containing such excess, rather than on the basis of the total excess per case or per importation.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 31.\*]

On Application for Review of Decisions by the Board of United States General Appraisers.

Stanley Jackson, for importers.

Robert T. Devlin, U. S. Atty.

VAN FLEET, District Judge. These cases involve five several appeals from decisions of the Board of General Appraisers sustaining the action of the collector of customs at San Francisco in ascertaining, assessing, and collecting duty on certain importations of vermuth from France. While the appeals are separate, they all involve but one and the same question, and that one of law, the facts not being in controversy, and, having been briefed and submitted as one case, may be so considered.

The importations were by the case of one dozen quart bottles each, and the ascertainment of the duty, except as to the rate, which is fixed by the reciprocity treaty with France, fell within the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1654), by the terms of which, so far as pertinent, vermuth is taxed as follows:

"In bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or twenty-four bottles or jugs containing each not more than one pint, one dollar and sixty cents per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of five cents per pint or fractional part thereof; but no separate or additional duty shall be assessed on the bottles or jugs."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The bottles being found to contain an excess in quantity over the specified capacity amounting to a fraction of a pint each, the collector construed the paragraph to require the imposition of the excess rate upon each bottle; that is to say, in addition to the prescribed case rate, he imposed the excess duty prescribed by the treaty upon the excess in each bottle of the importation as a fractional pint.

The contention of the importers was that this excess duty should be levied upon the whole or aggregate quantity of the excess found in the importation at the specified rate per pint or fraction thereof, or, as an alternative, that as the unit of duty is the case the duty should be levied on the excess per case at the rate provided, and not on the excess in each bottle assessed separately. Their protests to the Board of General Appraisers having been overruled, they have applied to this court for a revision; the sole question being as to the propriety of the construction thus given the act.

As a matter of first impression the appellants make a strong and persuasive presentation in favor of their construction of the paragraph in question; and their view is sustained by the United States District Court of Porto Rico in the case of *United States v. Cerecedo* (T. D. 27,706), where the precise point was involved. But unfortunately for that view the decision of the lower court in the *Cerecedo* Case has, since the submission of these appeals, been reversed by the Supreme Court of the United States (209 U. S. 337, 28 Sup. Ct. 532, 52 L. Ed. 821), and the construction given to the provision by the collector and the Board of General Appraisers sustained. As that case is decisive of the question here, it results that the ruling of the Board of General Appraisers must be affirmed in each instance.

Judgments may be entered accordingly.

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SHEAR et ux. v. SINGER SEWING MACH. CO.

(Circuit Court, E. D. Pennsylvania. June 18, 1909.)

No. 410.

MASTER AND SERVANT (§ 305\*)—MASTER'S LIABILITY FOR ACTS OF SERVANT—  
TORTS COMMITTED IN PERFORMANCE OF DUTY.

Where an employé of a sewing machine company, sent out to look up and take back leased machines, committed an assault in attempting to take a machine from a lessee, the company was liable therefor, although he acted contrary to his instructions.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1223, 1224; Dec. Dig. § 305.\*]

At Law. On motion for judgment notwithstanding the verdict.

William O. Armstrong, for plaintiffs.

Arthur B. Eaton, for defendant.

HOLLAND, District Judge. This is a claim for damages on the part of the plaintiffs for injury to Clara Shear, the wife of Meyer Shear, resulting from an alleged assault committed upon her by one

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Harry Stoops, employed by the defendant company. It appears from the testimony of L. W. Tallman, supervising agent for the Philadelphia Division of the Singer Sewing Machine Company, that Mr. Stoops was an employé of the defendant. In response to the question as to whether Stoops had been sent to take back the machine, Mr. Tallman stated:

"Where they were willing to give them up. Mr. Stoops' position was one of hunting up lost cases; people that had moved without giving us their address. Mr. Stoops was put on the trail and looked up the case. If he found the case, and the people were willing to give up the machine, he had authority to take it; but he had specific instructions not to take it if there was objection. We take it up with the sheriff under those conditions."

From this it appears that Stoops was employed in hunting up lessees whose places of abode had been changed and had taken the leased machines with them upon which payments were still due. In this case the plaintiff was a lessee who had moved, and was what was styled a "lost case." Stoops called upon her for the purpose of securing the machine. The business of finding these "lost cases" and securing the property was committed to Stoops by the defendant company, with instructions to take a machine when the parties were willing to give it up. Although instructed by his employer not to take a machine where objections were offered by the lessee, if he violated these instructions in the performance of the duty for which he was employed, and secured the machine or attempted to secure it by violence, and inflicted an injury upon the plaintiff, instead of proceeding under the lease as directed, his employer would be liable, and the questions as to whether he was acting within the scope of his employment, and whether he committed the alleged assault, were questions properly to be determined by the jury. *Grant v. Singer Co.*, 190 Mass. 489, 77 N. E. 480, 6 L. R. A. (N. S.) 567; *McClung v. Dearborne*, 134 Pa. 396, 19 Atl. 698, 8 L. R. A. 204, 19 Am. St. Rep. 708; *Brannan v. Merchant Co.*, 205 Pa. 258, 54 Atl. 891.

These questions were accordingly submitted to the jury, and a verdict was rendered in favor of Clara Shear, the wife, in the sum of \$200. The defendant had submitted a point requesting binding instructions in its favor, which was refused by the court, and in accordance with the Pennsylvania practice act a motion was duly filed moving the court to enter judgment non obstante veredicto.

As the questions involved were questions entirely for the jury, and not for the court, the motion of the defendant for judgment notwithstanding the verdict must be overruled; and it is so ordered.

CHICAGO, R. I. & P. RY. CO. et al. v. INTERSTATE COMMERCE  
COMMISSION et al.

CHICAGO, B. & Q. R. CO. et al. v. INTERSTATE COMMERCE  
COMMISSION.

(Circuit Court, N. D. Illinois, E. D. August 24, 1909.)

Nos. 29,247, 29,472.

1. COMMERCE (§ 85\*)—INTERSTATE COMMERCE COMMISSION—POWERS.

The Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Hepburn Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1907, p. 900), does not confer power on the Interstate Commerce Commission to lower through rates between certain points, as between Atlantic seaboard points and Missouri river points, and between Mississippi river points and Denver, without changing the rates to intermediate points, or finding that existing rates are unjust or unreasonable, or otherwise in violation of the act; the sole purpose and effect being to arbitrarily create zones of trade, tributary to given trade and manufacturing centers, and counteract the commercial advantages possessed by certain cities by reason of their geographical position or otherwise, by giving Atlantic coast and Missouri river cities an artificial advantage over intermediate points in shipments to the Missouri river and westward to points east of Denver, and the east Mississippi cities, and Denver an advantage over Missouri river cities to points west of Denver.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 85.\*]

2. COMMERCE (§ 98\*)—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS BY THE COURTS.

Orders made by the Interstate Commerce Commission, which are beyond the power conferred on it by the statute, are subject to review by the courts, which may enjoin their enforcement.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 98.\*]

Baker, Circuit Judge, dissenting.

In Chancery. On motion in one case for permanent injunction, and in the second case for a preliminary injunction.

In No. 29,247:

W. D. McHugh and Colin C. H. Fyffe, for complainants and intervening co-complainants.

Edwin W. Sims, U. S. Atty., and Luther M. Walter, Sp. Asst. U. S. Atty., for defendant.

John H. Atwood and John L. Webster, for intervening codefendants.

In No. 29,472:

W. D. McHugh and S. A. Lynde, for complainants.

Edwin W. Sims, U. S. Atty., and Luther M. Walter, Sp. Asst. U. S. Atty., for defendant.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

GROSSCUP, Circuit Judge. The bill in No. 29,247 is to restrain the Interstate Commerce Commission from putting into force an order entered June 24th, 1908, relating to rates from the Atlantic sea-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

board to the Missouri River. Since the filing of the bill, six railroads, other than the complainants, have intervened; as also nine individuals and corporations, representatives of the trade and manufacturing interests of St. Louis, Chicago, Milwaukee, Detroit and Cleveland. To defend the order, certain commercial and manufacturing firms in Missouri River cities have also intervened. Indeed, the contest, in its larger aspect, is a contest, not so much between the shippers and the railroads, as between the commercial and manufacturing interests of the Missouri River cities and of the Atlantic seaboard on the one part (their interests being identical) and the commercial and manufacturing interests of what is known as the Central Traffic territory (the territory west of Buffalo, Pittsburg and Parkersburg, and east of the Mississippi River) on the other part.

The bill in No. 29,472 is a bill to restrain the Interstate Commerce Commission from putting into force an order entered on the 2d day of March, 1909, on complaint of George Kindel, a manufacturer of Denver, Colorado, relating to joint rates from Chicago and St. Louis to Denver; the question raised, in its larger aspect, being again a question, not so much between the shippers and the railroads, as between the commercial and manufacturing interests of Denver and of the territory east of the Mississippi River on the one side, and the commercial and manufacturing interests of the Missouri River cities on the other.

Case No. 29,247 is on final hearing, while case No. 29,472 is upon a motion for a temporary injunction upon the bill and a demurrer thereto. In the latter case certain affidavits were filed which, in view of the conclusion to which we have come, it is unnecessary to consider.

The rate now in force from the Atlantic seaboard to the Missouri River, on first class matter, is \$1.47 per hundred pounds. The proposed reduction by the Commission is to \$1.38 per hundred pounds. The through rate now in force on the same matter from the Atlantic seaboard to the Mississippi River is 87 cents per hundred pounds, which, plus the through rate from the Mississippi River to the Missouri River (60 cents per hundred pounds) makes the same total, \$1.47 per hundred pounds, as the rate from the Atlantic seaboard to the Missouri River. It is not proposed by the Commission that these through rates, or either of them, should be reduced. On the contrary, the Commission proposes to retain them, to the end that the manufacturers and jobbers on the Atlantic seaboard may deliver their goods to the Missouri River cities on a joint rate nine cents less per hundred pounds on first class matter (and a corresponding differential upon second, third and fourth class matter) than would be done if the goods, or (in the case of manufacturing) the raw material going into the goods, were first sent to the cities in the Mississippi River territory, and then re-sent from those cities to the Missouri River cities.

The joint rate now in force from Chicago to Denver, on first class matter, per hundred pounds, is \$2.05, and from St. Louis to Denver, \$1.80. The proposed reduction by the Commission is to \$1.80 in the Chicago rate, and \$1.62 in the St. Louis rate—the through rates, however, from Chicago and St. Louis to the Missouri River cities, and

from the Missouri River cities to Denver, to remain unchanged—the effect of which will be that the manufacturers and jobbers to the eastward of the Mississippi River may deliver their goods to Denver at a joint rate of 23 cents less per hundred pounds, on first class matter—and a corresponding differential on second, third and fourth class matter—by way of St. Louis, and approximately the same by way of Chicago, than would be done if the goods, or, in the case of manufacturing, the raw material, were first sent to the cities along the Missouri River and then re-sent from those cities to Denver; from which it is apparent that, whatever may be the principle on which these orders are based, the effect will be, by means of the differentials named, to protect to a certain degree the Missouri River jobbers and manufacturers within a given zone of territory against the jobbers and manufacturers in the Central Traffic Association territory, and to protect, to a certain degree, the Denver jobbers and manufacturers, within a given zone of territory, against the competition of the Missouri River jobbers and manufacturers, as also to open up to the Atlantic seaboard, in its trade with both the Missouri River and the Denver zones of territory, the advantages contained in the differentials, against the competition of both the intervening Central Traffic Association territory and the Missouri River territory. That such a power, exercised upon any principle outside of cost of carriage, or the conditions created by competitive carrying lines, or any other natural conditions, and exercised with substantial effect—power artificially to apportion out the country into zones tributary to given trade centers to be predetermined by the Commission, and non-tributary to others—would be a power essentially different in principle from the mere power of naming rates that are reasonable, is, we think, too clear on its face to render discussion necessary.

There is no testimony that the cost of carriage from the Atlantic seaboard to the Missouri River, or the cost of carriage from Chicago and St. Louis to Denver is less on through traffic than on traffic that goes first to the Mississippi River and then is re-shipped to Missouri River cities, or that goes first to Missouri River cities and then is re-shipped to Denver. On the contrary, it was stated at the argument and not controverted, in the case of shipments from the Atlantic seaboard to the Missouri River cities, that the cost of service is not greater on re-shipments than on through shipments. Cost of service, therefore, is neither the principle upon which the Commission's orders are founded nor the purpose for such orders.

There are no natural competitive carrying lines, such as the water lines that affect rates to Minneapolis and St. Paul, or to the Gulf cities, or to the Pacific Coast, that call for or suggest a less joint rate in either of these cases than the sum of the two through rates. Indeed, no suggestion, based upon competitive lines of carriers, or upon increased cost of service, or upon any other consideration than the one hereafter named, is offered as a reason for the orders of the Commission involved.

What then is the principle upon which the orders of the Commission are based; what their purpose; and what will be their effect? Upon

the answer to these questions the power of the Commission to make the orders turns.

The trade centers of the country, as they exist to-day, have grown up as the result of conditions, some of them natural, and some of them more or less artificial. For many years the Mississippi River was the country's frontier. To reach it, the eastern roads were built and consolidated, and at the Mississippi River they stopped. In time the frontier was pushed to the Missouri River. To reach that country, the western roads were built; from the Mississippi River they started; and at the Missouri River all the earlier ones stopped. The Mississippi River thus became a dividing line between the eastern and the western system of carriers, and on that account, perhaps more than for any other reason, became what is known as a base line for the fixing of through rates; that is to say, through rates from the Atlantic seaboard were made to the Mississippi River somewhat less than the sum of the intermediate local rates, and through rates were made from the Mississippi River westward somewhat less than the sum of the intermediate local rates; no rate, however, through or joint, before the orders here involved, having been made that ignored the Mississippi River as the base line. Subsequently, the Missouri River became a dividing line between the railroads east of it and the railroads west of it—becoming at the same time a base line for the fixing of through rates; that is to say, through rates were made to the Missouri River, from the eastward, somewhat less than the sum of the intermediate local rates between the rivers; and through rates were made from the Missouri River westward somewhat less than the sum of the intermediate local rates; none of the rates, however, ignoring the Missouri River as the base line.

That the purpose of the Commission, in the orders involved, is to annul these conditions upon which the trade centers of the country have grown up, interposing a rate-making principle entirely different, is not controverted. That principle, as stated by the Commission itself, in its most general terms, is that the rates "through" the basing lines—that is, from any point east of such basing line to any point west of such basing line—shall always be less than the sum of the rates from the initial point to the basing line and from the basing line on to the point of delivery. As thus stated, the principle, abstractly, may not be wrong. We are not prepared to say that the Commission has not power to enter upon a plan looking toward a system of rates wherein the rates, for longer and shorter hauls, will taper downward according to distance, provided such tapering is both comprehensively and symmetrically applied—applied with the design of carrying out what may be the economic fact that, on the whole, it is worth something less per mile to carry freight long distances than short distances.

But it does not follow that power of that character includes power, by the use of differentials, to artificially divide up the country into trade zones tributary to given trade and manufacturing centers, the Commission, in such case having, as a result, power to predetermine what the trade and manufacturing centers shall be; for such a power, vaster than any that any one body of men has heretofore exercised,

though wisely exerted in specific instances, would be putting in the hands of the Commission the general power of life and death over every trade and manufacturing center in the United States.

Now, is it this power—the one last stated—that the Commission, in the orders before us, is actually exerting? And will the effect of these orders be to put such power, on the part of the Commission, into substantial effect? These are the questions on which these cases turn.

That the Commission, in the orders under consideration, is entering upon the exercise of such power, and intentionally doing it, is, we think, clearly shown:

(a) By the express avowal of the Commission, in the body of its opinion in case No. 29,247 (giving the reasons why the inter-river rates are not reduced). The occasion that gave rise to the order in favor of the Missouri River cities was the complaint that St. Paul and Minneapolis could invade territory naturally tributary to the Missouri River cities, because of the lower joint rate from the seaboard to the Twin Cities than from the seaboard to the Missouri River cities; and one of the purposes of the Commission in reducing the rate between the Mississippi and the Missouri Rivers, as part of the seaboard-Missouri River joint rate, undoubtedly was to ameliorate that disadvantage. But that an additional purpose was to protect the Missouri River cities against the competition of the trade and manufacturing of the Central Traffic Association territory, and to give to the Atlantic seaboard advantages in rates over Central Traffic territory, is clearly set out in the opinion, as follows:

"That if the local rates between the Mississippi and Missouri Rivers were reduced, it would give the same degree of advantage to all the producing and distributing centers on and east of the Missouri River, and their relative advantages and disadvantages would not be changed;"

And also by this further paragraph in the opinion:

"It seems patent that any change in the rates east of the Mississippi River, even if warranted, would fail to accomplish what the complainants desire, because whatever of advantage accrued therefrom to Missouri River cities, would accrue to a like degree or extent to their principal competitive commercial centers;"

(b) By the fact that there was no inquiry by the Commission respecting the "reasonableness" or "unreasonableness" of the rates between the Mississippi River and the Missouri River, or between the Missouri River and Denver, other than on the zone theory of apportioning trade—no attempt to arrive at a rate that would be reasonable, other than on the postulate that there must be a differential against the Central Traffic territory in favor of the Missouri River cities, and against the Missouri River cities in favor of Denver; and by the fact,

(c) That the Commission, under circumstances inviting explanation, does not disavow its claim of power, or the effect of these orders. The excerpt quoted from the Commission's opinion in the Missouri River rate hearing, was used as the ground upon which the preliminary order in No. 29,247 was chiefly based. Since that time, the Commission has spoken in the Denver rate hearing and also in its annual report. In neither has there been a disavowal of the power said to be claimed or the effect said to be produced; and



(d) By the differentials themselves—differentials in both cases that bear no indication whatever that they are parts of a comprehensive and symmetrical tapering system based on the possible economic fact that, on the whole, it is worth less per mile to haul long distances than short distances; but, on the contrary, differentials that are applied at given lines abruptly and decidedly—just so adjusted as to protect the one zone against the competition of the other. Indeed, it is our judgment that the Commission believes itself possessed of this power—claims such power as belonging to it under the law, and as beneficial to the trade and commerce of the country—and that if the question were put plainly to that able body of men, there would be no effort to conceal their ultimate purpose under any pretext that, in the orders under review, they were dealing merely with the “reasonableness” or “unreasonableness” of the specific rates involved.

Such being, in our judgment, the principle on which the orders were actually based, and the purpose of the Commission, the question remains, what is their substantial effect? Much testimony on that question has been introduced. A manufacturer of fiber cans in Detroit, testifies that his principal competitors are on the Atlantic seaboard; that from the east he gets his raw material, paying regular railroad rates; that considering the rates as they now are, the eastern man gets to the Missouri River country on an even basis with him; but that if the differential in the order is applied, it will give to the seaboard, as the place for the manufacturing of cans, an advantage in trade with the Missouri River cities that will put the Detroit manufacturer, so far as that field is concerned, out of business. “Business is done on such a close margin that that would control the business. He [the eastern competitor] would get it and I would lose it.” In other words, in such manufactures, where the Central Traffic Association territory must bring its raw material, or a substantial part of it, from the east, with no differential in their favor, the differential that the Commission applies, in the orders before us, would make it commercially disadvantageous to have the manufactory located in Central Traffic Association territory. Or, as Mr. Hill tells us, respecting the application of zone rates in Australia, the centers of manufacturing and trade would build up at the ends of the lines only.

The Sherwin-Williams Company, manufacturers of varnish, paint, etc., at Cleveland, say:

“Raw material brought into the seaboard and shipped west to Chicago and the Mississippi River is on the basis of fourth class rate. The same is true with regard to the manufactured product. Were the manufacturers on the seaboard allowed the differential of four cents between the rivers, I can see no other way but what it would actually close the varnish factories west of Buffalo if such a combination were strong enough or cared to control the entire output.”

And again:

“Assuming our profits were 20 cents a hundred pounds and the new adjustment occasioned a diminution of profits to 16 cents, I think our establishment would be wiped out of business. There is no question but that the eastern manufacturers would fill the territory with their salesmen and get the business until you could not do business at a profit.”

Whitelaw Brothers, of St. Louis, jobbers and commission merchants in heavy chemicals, say: That should an attempt be made to add to the advantage that Missouri River cities already get in the way of carload commodity rates—two, three, five, seven or nine cents a hundred more—the result would be that they could not do business in the Missouri River country; “that two cents a hundred in the lot of merchandise that we handle is our profit, and we don’t always get it.”

Other witnesses testify to the same effect; many of them admitting, however, that the differential would not wipe out their profits; but all of these insisting that the very fact that their seaboard competitors could say to the merchants in the Missouri River country that the seaboard had an advantage of nine cents in freight over the intervening Central Traffic Association territory would create such an impression upon the minds of the Missouri River dealers as to put the manufacturers in the intervening territory at a great disadvantage.

It was said at argument that in none of these cases was the entire profit wiped out—that in many cases, on the contrary, in Central Traffic territory, owing to natural advantages, the profits even then would remain larger to the Central Traffic territory manufacturer than to his seaboard competitor. But that is not the point of the inquiry. The inquiry is not, are the trade and manufacturing of the intervening zone put out of competition; but are they, by this artificial differential, put at a disadvantage in competition that they otherwise would not suffer; for unless the Commission has power over the trade and manufacturing of the country, every commercial house and manufacturer is entitled to all the advantages that their natural situation gives them. And why, unless the effect is a substantial one, was it sought by the initiating commercial and manufacturing interests of the Missouri River cities, and why is it asked for by the manufacturing interests of the seaboard? Is it not enough, upon the question presented to us, that the change is wanted by those, who know better than we do, its value to them, and is resisted by those, who know better than we do, its disadvantages to them? Indeed, but for the consciousness of the Commission that by such differentials natural advantages in the way of competition could be overcome, these orders would never have been entered, for their very purpose was to countervail the differentials that the Twin Cities, by reason of their natural situation, had been obtaining—differentials only a little larger than the ones here involved.

That being the case, the question recurs, what power on this subject did Congress intend to confer upon the Commission? The manufacturers of the Atlantic seaboard say that inasmuch as their competitors in the Central Traffic Association territory are in closer proximity, both to the consumers of the West and to the raw material originating in the West, as in the case, for instance, of the shoe and leather industry, it is only fair that a rate differential may be interposed that, to some extent, will counterbalance such disadvantages. Did Congress intend, in the Interstate Commerce Act, that this counterbalancing power should be given to the Interstate Commerce Commission? The merchants and jobbers of the Missouri River cities claim that as against the merchants and jobbers of St. Louis, Chicago and Milwau-

kee, the jobbing centers next contiguous to them (and it appears that the jobbing trade is largely dependent upon contiguity), they are fairly entitled to the trade of the Missouri River territory; and likewise, the merchants and jobbers of Denver, as against the merchants and jobbers of the Missouri River cities next contiguous to them, claim that they are fairly entitled to the trade of the territory tributary to Denver. Did Congress intend to confer upon the Commission, through its supervision over rates, power to determine the fairness of such claims, and to carry out such determination? The protective tariff policy of the nation, as a nation, against the competition of alien nations, has been carried out by Congress in the imposition of rates or burdens upon imported articles. Did Congress intend, in the Interstate Commerce Act, to extend that principle so as to have it protect given zones into which the country, intraterritorially, might be divided, against the natural advantages of contiguous zones, to be effectuated by the fixing of carrier rates as the general protective principle is effectuated by the fixing of customs rates by Congress? If so, the first and necessary step would have been to have conferred upon the Commission power, full and express, to fix rates.

But when we come to the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), we find that Congress has left the fixing of rates initially, not with the Commission, but with the railroads. The sole power conferred upon the Commission is, in any given case of a rate being found unreasonable in the amount charged, or unduly discriminatory between individuals or localities, to command the carrier to desist, and, as a corrective, to name a rate in the place of such given rate that will not be unreasonable or unduly discriminatory. These provisions, as we read them, were designed, so far as localities are a factor in the question, to prevent localities from being built up or destroyed by artificial rates, not to continue the policy that, by artificial rates, builds up and destroys localities—to take away from the railroads the power of life and death over the manufacturers and commerce of given localities, not to transfer such power to the Commission or any other single body of men. Possibly there remains to the railroads, as the law now stands, power to lower the rates “to what the traffic will bear”—temper the rates to peculiar conditions—in the case of some new promise of commerce struggling to get upon its feet; moved thereto, as a matter of course, by their judgment that what may appear to be largely a matter of benevolence now will turn out to be a sagacious and profitable planting of seed. But surely Congress did not intend to invest the Commission with power to compel the railroads to make such ventures. Nor could the railroads themselves enter upon them as parts of a scheme to rearrange trade zones and trade centers. Indeed, it was largely upon the complaint that such power was the exercise of arbitrary power, and was being usurped by the railroads, that led Congress, in the first instance, to enact the Interstate Commerce Act; and until Congress speaks with more certainty than it has already spoken, we do not feel at liberty to read into the act an intention that the manufacturers and commerce of any given locality have, by the enactment of the Inter-

state Commerce Law, simply been changed from the keeping of the railroads to that of the Commission.

The right of the courts to review these orders is challenged, and *Union Bridge Company v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, is urged upon us as a ruling of the Supreme Court of the United States that the finding of the executive power of the Government, when such finding is constitutionally committed to the executive power by law, shall not be reviewed by the courts. With that case, we have no dispute. In that case the act clearly put it within the power of the Secretary of War to determine whether the bridge involved was an unreasonable obstruction of the Allegheny River; and the bestowal of that power on the Secretary of War was held to be constitutional. The whole question, therefore, in that case, was a question of fact, constitutionally committed by the law to the executive department of the Government.

But in the case here, the question involved is not a question of fact, but a question of power—the question is not whether, by the application of correct principles, a given rate has been decided by the Commission to be unreasonable, but whether the principles applied are themselves within the power of the Commission; for Congress did not intend to confer upon the Commission power to do by indirection what it could not directly do—did not intend to include within the word “reasonable” every power over the trade and manufacturing of the country that the Commission should determine it was reasonable that it (the Commission) should possess.

Again, it is urged that though the effect of the order in the Missouri River case is to discriminate in favor of the Atlantic seaboard and the Missouri River cities against the Central Traffic territory, and in the Denver case in favor of Denver and the east Mississippi River country against the Missouri River cities, the discrimination is not “undue” within the meaning of the Interstate Commerce Act; and that therefore the Courts have no power to enjoin. The difficulty with this argument is that it draws no distinction between the power that the Commission is actually given—a power that carries with it, as a necessary incident, the right to make discriminations if they be not “undue”—and a power that the Commission is usurping; no distinction between the case where the question is whether a lawful power is unlawfully exercised, and a case where the question is, is there any law at all for the power claimed. Were the Commission exercising its power under the Interstate Commerce Act, attended with discrimination, the question would be whether the discrimination was “undue.” But here the question is not one of discrimination, due or undue, under the Interstate Commerce Act; but has the Commission any power to do what it is seeking to do? No question of discrimination being “undue” arises, except in the wholly different sense of whether the advantages and disadvantages artificially accruing to the localities affected are substantial enough to call for the interposition of a court of equity.

In No. 29,247 a permanent injunction will be granted.

In No. 29,472 the temporary injunction prayed for will be granted.

It must be understood, however, that these orders of the Commission

are enjoined solely because, in our judgment, they lay upon the commerce and manufacturing of the localities affected an artificial hand that Congress never intended should be put forth, and therefore are outside the power conferred on the Commission by Congress; for with the question of a reduction in rates, or a re-adjustment of rates, from which such artificial results have been eliminated, we are not now dealing.

KOHLSAAT, Circuit Judge, concurs.

BAKER, Circuit Judge (dissenting). By the Hepburn act (Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1907, p. 900]), the following provision, among others, was added to the interstate commerce law (Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]):

"It shall be its [the Commission's] duty, whenever, after full hearing upon a complaint, \* \* \* it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged or collected by any common carrier or carriers \* \* \* are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, \* \* \* to determine and prescribe what will be the just and reasonable rate or rates to be thereafter observed in such cases as the maximum to be charged. \* \* \* All orders \* \* \* shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction."

Complainants are common carriers whose rates on certain traffic are directed to be reduced by the order complained of. Two grounds for injunction are alleged. One is that the new rates are confiscatory. There is no proof whatever that the rates which the Commission prescribed as just and reasonable are not sufficient to pay the cost of handling that traffic, to cover that traffic's full proportion of maintenance and overhead expenses, and to return to the carriers an ample net profit. Furthermore, proof is lacking that, if the carriers should reduce other rates to correct what they claim is the maladjustment caused by the Commission's order, the reduction would not leave them abundant net returns. For the purposes of this hearing, therefore, it must stand as an agreed fact that the present reduction is neither directly nor indirectly obnoxious to the charge of taking private property without just compensation.

Discrimination is the other ground adduced by complainants. But the alleged discrimination is not against the carriers. It is against certain classes of traffic of Chicago and St. Louis and other places similarly situated. If it be true that loss or injury will be inflicted by the Commission's order upon Chicago and St. Louis shippers, they, if any, are the ones to complain. Nothing is added to the carriers' case by attempting to count upon the grievances of others.

There is only one aspect that I can discover in which the carriers' case remains for consideration. If the action of the Commission is outside of its lawful powers—if the grant of the rate-making power is itself void, or if, the grant being valid, the present action of the Com-

mission is not within the grant—the order complained of is the act of intermeddlers and trespassers. And on that basis the threatened invasion of the carriers' revenues would require an injunctive decree, whether the reduction would be confiscatory or not, or whether the interference would cause discrimination or not.

Certain shippers have been permitted to intervene and adopt the complainants' allegations regarding discrimination. I am doubtful of their right to stand in these suits as complainants. It is unnecessary, however, to consider that question, for on the evidence they have failed to establish preponderantly and clearly that the alleged discrimination is undue discrimination. Take the Detroit fiber-can maker, for example. He pays 19 cents a hundredweight on the raw material into Detroit and 56 cents a hundredweight on the finished product out to the Missouri river cities. His New York competitor pays 17 cents on the raw material into New York and 76 cents on the finished product out to the Missouri river cities. The Commission's reduction of 5 cents a hundredweight, instead of putting the Detroit maker under the heel of his Eastern competitor, would merely deprive him of a small part of the existing advantage in his favor. On the basis of last year's business, the Detroit man might suffer (if the Eastern maker should give Missouri river purchasers the whole benefit of the reduction) a diminution in his \$27,000 net profits to the extent of \$1,500—about five-eighteenths of that part of the net profits attributable to the Detroit man's advantage in freight rates. In the other instances relied on, a weighing of the testimony leads to the same general conclusion, namely, that if the carriers, of their own initiative, had made the reductions in question, the shippers in Central Traffic territory could not establish by the evidence in this record that there was undue discrimination. If, however, these interveners are proper co-complainants, they are entitled to have their existing advantages protected from an invasion that has no warrant in law. But since that is the same question that arises on the bills of the complainant carriers, it is immaterial whether the interveners have any better standing than that of friendly advisers of the court.

Is the Commission's order void for want of jurisdiction to make it? The question is not whether a lawful power or authority has been shown to have been wrongly exercised, but whether there is any law at all for the power or authority claimed and exercised.

No contention is made that the portion of the Hepburn act herein above quoted is void on account of its being an unconstitutional delegation of legislative power. I assume, in the absence of specific assault, that the precedents have virtually placed that question beyond profitable debate. If Congress cannot constitutionally make a general declaration that the rates shall be reasonable and not unjustly discriminatory, and then trust an executive body to hear evidence and decide questions of fact respecting reasonableness and just discrimination, the power of Congress over rates would be worthless, for it would be utterly impracticable for Congress itself to make enactments to cover the specific instances.

No contention is directly made that the rate provision of the Hepburn act is void for indefiniteness and uncertainty. A direct answer, sufficient for present needs, I think, would be that the instructions to the Interstate Commerce Commission are as definite and certain as those given by state Legislatures to state commissions in commerce acts that have been upheld by all the courts. But that the rate provision of the Hepburn act is void for indefiniteness and uncertainty may indirectly be asserted in and by complainants' proposition that the particular way in which, or ground upon which, the Commission proceeded in these cases to reduce rates is not a way or ground included among those ways and grounds along and upon which Congress authorized the Commission to act.

I find in the rate provision no naming of specific grounds upon which the Commission must base its action. Such a naming would, of course, exclude all other grounds except those of the same nature. It is true that the initiative in rate changing remains with the carriers, and that the Commission can take jurisdiction only of those rates that are complained of, and can change such rates only after a full hearing. But neither can courts, of their own initiative, investigate and decide controversies. Limitation of procedure by which a subject-matter may be reached is no limitation of the power to deal with the subject-matter after it has been reached in accordance with the prescribed procedure. And I believe that the judicial department should not claim the exclusive right to make wrong decisions which shall be impervious to collateral attack.

Going further, and assuming that it is proper to inquire into the Commission's reasons for making these orders, I do not find that complainants' criticisms are justified.

Taking the opinion of the Commission in the Missouri river case in its entirety, it seems fairly clear to me (though certain parts removed from their context may create a doubt) that two issues were separately considered and passed upon. The first was the reasonableness of the \$1.47 seaboard-Missouri river rate in and of itself. The fact that the \$1.15 rate from the seaboard to St. Paul and the Chicago-Kansas City rate of 47 cents on traffic destined to Texas common points were profitable rates was considered as evidence that on the basis of cost of operation the seaboard-Missouri river rate was "unreasonably and unjustly high." The other issue was what, if any, reduction could be made "without doing injustice elsewhere." In substance, it was found that the St. Paul rate was influenced by lake competition, and the Texas rates by Gulf competition; that it would not be fair to the Twin Cities to deprive them of that part of the difference (all the difference except nine cents) which was fairly attributable exclusively to lake competition; and that the reduction to Western jobbers could be made, with probably great benefit to the prosperity of the country as a whole by reason of the extension and increased usefulness of centers of distribution, and without probably unduly affecting the commercial situation of Chicago and St. Louis. In short, it seems to me that the Commission took into consideration

all the pertinent facts and circumstances affecting the questions presented by the complaints before them.

If, however, it were conceded that the controlling consideration, without which the rate would not have been changed, was the Commission's intention to establish additional basing lines, the orders, in my judgment, would be within the power granted by Congress. One possible system of rate-making would be to adopt the postage method of a uniform charge throughout the whole country, irrespective of distance. Another would be to divide the country into zones, and adopt a uniform charge from any place within one zone to any place within another zone irrespective of distance. Another system would be to base the charge absolutely upon mileage. None of these has ever become established on American railroads (though I believe the use of any of them, because not expressly denied, was open to the Commission). But, if any serious meaning is to be attributed to the rate-making provision in the Hepburn act, there should be no doubt that Congress did not intend to deny to the Commission the right to use the very system which the railroads have developed and established in this country.

While cost of service must not be lost sight of in any system of rate-making, in the American system the prime factor has been the character of the merchandise and the volume of the traffic therein. That is, the prime factor has been the value of the service to commerce rather than the cost of the service to the carrier. In other words, the prime factor has been to charge what the traffic will bear; that is, not to charge what the traffic will not bear. For example, the discovery of natural gas in Indiana led to the establishment of steel, glass, and tinplate mills, which could be operated profitably on account of the cheap fuel. When the natural gas failed, those mills would have been compelled to quit on account of the high cost of transporting their manufacturing materials, if they had not obtained very cheap coal. The traffic managers of the railroads considered the situation and greatly reduced the rates on coal consigned to those mills, while maintaining the old rates on the very same kind of coal from the very same fields to other consumers in whose cases the carriers' cost of the transportation service was the same. The Indiana Railroad Commission held this not to be an unjust discrimination. This illustration gives a glimpse of the statesmanlike breadth of vision which traffic managers have quite generally employed in building up and maintaining the commerce of the country (and thereby the ultimate interests of their companies).

The principle of considering what the traffic will bear—what rates will best promote traffic as a whole—early led to the establishment of tapering rates. And while in former times competition (or pooling or other arrangement to avoid competition) was influential in determining rates to basing points (places common to two or more railroads), tapering rates invariably developed on the lines separately (in the absence of competition) by reason of the desire to encourage and promote traffic.



The first consolidations of minor lines into main lines from the East terminated at Buffalo, at Pittsburg, and at Parkersburg. Through those cities was drawn the line that separates Trunk Line territory from Central Traffic territory. The next extensions were to Chicago and St. Louis—to the line that separates Central Traffic territory from Trans-Mississippi territory. The rate from New York to Buffalo was less than the rate from New York to Syracuse, say, plus the rate from Syracuse to Buffalo. The New York-Buffalo haul was on one line, and the rate structure was built on the tapering plan. But when the new and separate line was extended to Cleveland, the rate from New York to Cleveland was likewise made less than the rate from New York to Buffalo plus the rate from Buffalo to Cleveland. And similarly the rate from New York to Chicago was made less than the rate from New York to Cleveland plus the rate from Cleveland to Chicago. The same thing was true of traffic from the Pacific coast; the San Francisco-Chicago rate being less than the sum of the in and out rates of Salt Lake City, Denver, or Kansas City. That is, in considering what rate in relation to distance a commodity could pay consistently with the largest volume and increase of volume of traffic, it was found (railroad economics being empirical) that the tapering plan should, as a general rule, be carried across the separate ownerships and across the dividing lines between "traffic territories."

When the federal government in quite recent years began to lay an effective restraining hand upon traffic management, the separately incorporated carriers had not extended the tapering plan across the dividing line between Central and Trans-Mississippi territory. Rebating was condemned (and may have been stopped). Discriminating in favor of industries or localities in which the carriers were privately interested was condemned (and may have been stopped). That was unjust discrimination. But the just discrimination which traffic managers founded on an untainted discernment of commercial conditions, growths, relations, and possibilities has never been condemned by Congress. Congress has not indicated any disapproval of the rate system that was actually developed between the Atlantic seaboard and the Mississippi. The presumption is, I think, that Congress desired the development of the tapering system of rates to continue, and expected that the carriers, when the population and purchasing power of the West should have sufficiently increased, would extend the same system beyond that they had brought to the Mississippi. The river is insignificant as a physical obstacle. The difficulty of arranging through transportation, if not already negligible on account of community of interests and various intercorporate relations would be no greater than it was in the cases of the lines east and west of Buffalo and of Pittsburg. The initiative has been left to the carriers; but not the ultimate determination. If the carriers have decided that a barrier shall stand till they say otherwise, nevertheless the growth in population and commerce will go on in the West and increasingly call for the removal of the barrier. If, by reason of the carriers' refusal, the Commission is required to act, I believe Congress in the Hepburn act expressed its intent that the Commission should be free to employ the

system of tapering rates (to be applied as a general, not an unalterable, rule); should be free to make the same kind of discriminations that the carriers could lawfully make if they had taken the initiative; should be free to consider the value of the service to the country's commerce rather than merely the cost of the service to the carriers; should be free, while securing to the carriers an ample immediate return, to adjust the rates so as to bring forth the largest volume and increase of volume of the country's commerce as a whole.

Complainants say that such vast power in the hands of the Commission might be used arbitrarily, to the ruin of particular regions or cities. That, of course, is not a conclusive argument that the power does not exist. To allow carefully selected public officers to exercise under the sanctity of their official oaths the same power over cities and regions that the carriers confessedly may exercise does not strike me as such a monstrous thing. And if dangers appear in the exercise of the grant, I think the remedies lie with the appointive power that determines the personnel of the Commission, and with the legislative power that can at its pleasure amend or repeal the interstate commerce law.

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WESTERN R. OF ALABAMA v. RAILROAD COMMISSION OF ALABAMA  
et al. LOUISVILLE & N. R. CO. v. SAME. CENTRAL OF GEORGIA  
RY. CO. v. SAME. NASHVILLE, C. & ST. L. RY. CO. v. SAME. SOUTH  
& NORTH ALABAMA R. CO. v. SAME.

(Circuit Court, N. D. Alabama, M. D. July 7, 1909.)

1. COURTS (§ 508\*)—JURISDICTION OF FEDERAL COURTS—SUSPENDING OPERATION OF STATE STATUTE.

Section 21 of the Declaration of Rights in the Constitution of Alabama, which provides that no "power of suspending laws shall be exercised except by the Legislature," does not affect the power of a federal court to enjoin the enforcement of a state statute adjudged to be in violation of the Constitution of the United States.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 508.\*]

2. COURTS (§ 508\*)—FEDERAL COURTS—PRIORITY OF JURISDICTION—ENJOINING PROCEEDINGS IN STATE COURTS.

Where a federal court has acquired exclusive jurisdiction to determine the constitutionality of a state statute establishing railroad rates and has granted a preliminary injunction restraining its enforcement *pendente lite*, it has power, on a proper showing, to enjoin the county solicitors, sheriffs, and clerks of the state courts from taking threatened action to institute and prosecute criminal and civil suits for violation of such suspended statute against the complainants in the federal suit.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 508.\*]

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

In Equity. On demurrers to supplemental bill.

This case is submitted on the demurrers to the supplemental bill by members of the Railroad Commission of Alabama, and the numerous parties defendant named as sheriffs, solicitors, and clerks of courts. The allegations

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the bill are fully set forth in the report of the cases under the style of the Louisville & N. R. Co. v. Railroad Commission of Alabama et al. (C. C.) 157 Fed. 944, and Central of Georgia Ry. Co. v. Railroad Commission of Alabama et al. (C. C.) 161 Fed. 925. The grounds of demurrer assigned are numerous; but the substance of them only need be here stated.

The demurrers by the commission challenge so much of the bill as seeks relief by enjoining the commission from reducing freight and passenger rates below those in force at the time of the commencement of the suit, on the ground that such relief "restrains legislative action on the part of the commission," and because the "statute conferring the power to reduce rates is a valid enactment of the state, and no facts are shown why the commission should be restrained pending the litigation." The members of the commission further demur to so much of the bill as seeks to have "superseded or suspended" the acts of the Legislature prescribing the rates complained of, on the ground that this court has no jurisdiction or power to "suspend or supersede an act of the Legislature of Alabama," and also "because the suspension of an act of the Legislature is a legislative and not a judicial function."

The defendants named in the bill as sheriffs, clerks of courts, solicitors, and deputy solicitors, and each class of state officers, separately and severally, demur to so much of the bill as seeks to enjoin their exercising their functions in performing their duties as officers of the state of Alabama, respectively, on the following grounds: They have no such connection with the enforcement of the statute as would justify making them parties defendant. The making of them such parties as representatives of the state is "an attempt to make the state a party defendant, and to sue the state in contravention to the eleventh amendment to the Constitution." Such injunction against the parties defendant as prayed by bill would amount to restraining the state courts from acting in cases brought before the courts, and amount to an injunction against action by the state grand juries; also, because "clerks of courts do not initiate civil or criminal proceedings, and perform their duties under the orders of the courts of which they are respectively clerks." They also demur to so much of the bill and prayer for injunction as seeks to restrain "all other executive and ministerial officers, state, county, and municipal, not specifically named in the bill, who are empowered to make arrests and execute warrants," etc., on the ground that it is not shown that the unnamed parties, not parties to the bill, bear any relation to or privity with, or are properly represented by, the officers named, and there is no allegation of conspiracy between the unnamed persons and those who are named as defendants.

Steiner, Crum & Weil and Geo. P. Harrison, for complainants.

Alex. M. Garber, Atty. Gen., H. C. Selheimer, and S. D. Weakley, for defendants.

JONES, District Judge (after stating the facts as above). Every question now raised by the demurrers, though then presented in a different mode, was decided adversely to the respondents in Central of Georgia Ry. Co. v. Railroad Commission of Alabama et al. (C. C.) 161 Fed. 925, and on appeal the Court of Appeals sustained this court's ruling upon the matters raised by the demurrer, except as to the injunction to prevent the commission from further reduction of the rates before the court, pending the final hearing.

The considerations which controlled this court in issuing that injunction were that as the statutes made the carrier's rates in force on January 1, 1907, the maximum rates thereafter, save wherein the eight group acts and the passenger statute reduced them, and complainant insisted on maintaining the rates it actually had in force when the suit was brought, and, further, that the statutory rates as a whole were unreasonable and confiscatory, necessarily any further re-

duction in those rates must present a controversy which inevitably was included in that already pending, and the exercise of the power to reduce rates, whatever the extent or nature of the reductions, could have no other effect than to raise in another form, without a particle of difference in substance, an issue which already formed a part of a controversy pending in the court, and could effect nothing more than to impede the court in the maintenance of the status quo which, by the other injunctions issued at the same time, this court had adjudged was the proper status to be observed and enforced pending final decree.

The other ground was: That the commission had no authority to reduce statutory rates, and therefore its action should be restrained, regardless of the reasonableness of the rates themselves. This view was reached on the conclusion that, the specific rates complained of being fixed by statute, the Legislature could not authorize an executive agency to change them, except upon the ascertainment by it of some state of facts which the Legislature itself set forth in the statute, upon the happening and finding of which the executive agency might then change the rates to the extent such statute provided; that the acts conferring power upon the commission to change the statutory rates did not thus provide, but, instead, merely authorized the commission to change the classifications and rates "from time to time, as conditions may in its judgment render it expedient or proper to do so"; and that, by thus leaving the whole matter in the uncontrolled and undefined discretion of the commission, the Legislature had attempted to delegate legislative power to the commission in violation of the state Constitution, as construed by its highest court.

The Circuit Court of Appeals did not take this view. It held the fair construction of the particular acts was that the rates fixed by the Legislature in the statutes were commanded to be enforced only until otherwise ordered by the commission, and that the Legislature must not be held, in granting the power to alter rates, to intend to confer any authority to be exercised at the mere will or caprice of the commission, but only to confer a power to be exercised reasonably, upon the ascertainment by the commission of such conditions as justly enter into the reduction or increase of rates, and hence had not attempted a forbidden delegation of legislative power.

The opinion of the Court of Appeals, however, did not pass upon what might be the duty or power of the court, if the commission acted unreasonably in the exercise of the power, making repeated orders, reducing specific rates, from time to time, while they are being contested and testimony is being taken, preparatory to final decree. It seems different principles would necessarily apply in a case of that kind, than where reductions are made by the Legislature itself pending contest of the particular rates before the court. The Legislature could not be made a party to a bill like this. Here the Railroad Commission is necessarily a party defendant, and occupies that relation, as well as the status of being the repository of the power to reduce rates from time to time. Taking into consideration this dual relation of the commission and the nature of the controversy, it would seem

inevitably to follow that a court of equity has the right to charge the conscience of a party before it not to exercise its power in such manner, in the preliminary stages of the litigation, as to oppress its opponent by changing the issue from time to time, with the further result of impeding the court in its efforts to bring the issues before it to final decision.

2. The demurrer to so much of the bill as seeks to have "superseded or suspended the acts prescribing the rates complained of," etc., on the ground that the "court has no power to suspend or supersede an act of the Legislature, which is a legislative and not a judicial function," must be overruled. Section 21 of the Declaration of Rights in the Constitution of Alabama, it is true, declares that no "power of suspending laws shall be exercised except by the Legislature." The well-known history and intent of this constitutional provision make its meaning clear. It has no reference whatever to the admitted power and duty of the courts to annul and refuse operation to statutes which transgress the fundamental law. To hold otherwise would require the court to affirm that it had no power to arrest the execution of a statute, or limit or stop its operation, when it adjudged it to be unconstitutional—a power and duty which in this day is universally admitted, and now beyond the pale of controversy. Besides, the statutes here under review are assailed for violation of the Constitution of the United States, and no provision in a state Constitution can limit the extent of the judicial power of the United States in dealing with them, if found to violate the fundamental law.

The parts of the bill to which the demurrer relates seek, among other things, "a perpetual injunction, annulling and suspending the rates prescribed in the statutes hereinbefore recited," etc. If, on final proof, it be shown that the rates are unreasonable or confiscatory, it would be the duty of the court to prevent or enjoin the execution of the statutes, without prejudice to the right of the authorities, if subsequent conditions justified it, to seek to have the rates enforced in the future. Such, indeed, is the form and effect of the decree which the Supreme Court declares must be entered when the effect of a rate statute is adjudged unreasonable or confiscatory. It is perfectly accurate therefore, in law and common parlance, to declare that an act is "suspended or superseded" when such a decree is made. A statute, which is denied force until future events rightfully bring its power into play, is certainly "suspended and superseded," in the meantime. The allegations and prayer of the bill in this respect are not objectionable on any grounds, and in its last analysis the criticism now made of them has no stronger foundation than a play upon words. Plainly, a decision that a statute is unconstitutional, or that its operation upon a particular person is forbidden by the Constitution, and a consequent decree that it shall not be executed as to such person, is the exercise of the judicial, not of the legislative, function. The nature of that function is not changed, or converted into "the power of suspending a law," because the necessary result of declaring the act unconstitutional is to deny it force and operation. Besides, an unconstitutional enact-

ment is in no sense a law, and suspending or superseding its operation cannot therefore be an exercise of the "power of suspending laws."

3. The demurrer to so much of the bill as seeks to enjoin sheriffs, clerks of courts, and solicitors from making arrests, issuing summons and complaints, procuring indictments, and prosecuting and imprisoning defendant's servants, etc., must be overruled. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714; *L. & N. R. R. Co. v. Railroad Commission of Alabama et al.* (C. C.) 157 Fed. 944. The necessity for making sheriffs, solicitors, and clerks parties is manifest from the allegations of the bill, which sets forth facts of which this court can take judicial knowledge, though not mentioned. *Taylor v. Barclay*, 2 Sim. 213. The Circuit Court of the United States, by the filing of the bills, had obtained exclusive jurisdiction to determine the reasonableness of the rates whose enforcement was contested, and every other matter, civil or criminal, which arose in the case regarding the enforcement or denial of the property right involved. No other court, state or federal, after that, could rightfully draw the same matter before it, no matter how attempted, and, by entertaining and deciding civil suits or criminal, for violations of the rate statutes, oust the jurisdiction of this court, and enable the defendants or any other persons to defy its orders, or punish the officers or servants of the carriers for doing that which the orders of this court adjudged they had a right to do.

The bill alleges positively: That the officers and servants of the carriers will be arrested, indicted, and prosecuted by the solicitors and sheriffs, and civil suits commenced, in every instance in which carriers depart from the tariff of rates fixed by the statutes; that such officers have threatened to issue summons and complaints, to procure indictments, and to arrest and imprison the defendant's servants, whereby the jurisdiction of this court will be ousted, and the very matter before it tried and determined in other courts, causing complainant to be subjected to a multiplicity of suits and irreparable damage, as well as inflicting great harm to the public, unless injunctions be issued against such action of the officers named. The bill also sets forth solemn public utterances of the highest executive officer of the state, to the effect that it was his duty to see that the officers sued out warrants, procured indictments, and made arrests, and imprisoned the officers and servants of the carriers, who did not observe the rate statutes, and that he would "so charge" them, notwithstanding this court had acquired exclusive jurisdiction of the case, and enjoined such conduct pending final action. If complainant has any right to be protected, certainly such allegations would entitle it to injunctive relief against such illegal acts.

There is no such difficulty on principle, as respondents suggest, to the court's enforcing the authority of the Constitution, and causing its commands to be respected and obeyed by executive officers in a case like this, whether they be clerks of courts, sheriffs, or solicitors. *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497. Courts of equity, from time immemorial, have enjoined parties from prosecuting actions in the law courts, and such procedure, by its operation

upon the parties, as effectually prevents the law courts from trying the cases as if the injunction had included the law court by name. There must necessarily be an actor, a res, and a judex before a judgment can be rendered. If the actor is silent, or prevented from presenting his case, there can be no trial or judgment. Nowadays, it is settled, whatever may have been the contention in the earlier days, that such orders of the court of equity do not imply any superiority over the law court, and are not invasive of its jurisdiction, or in any wise improper. Even after solemn trial and judgment in the law court, the court of equity, operating in personam upon the parties, may arrest the execution of the judgment, and decree that it be held for naught, if the equity of the case requires. That a court of equity may control a ministerial officer as well as a party, either before or after the illegal act, in order to prevent it, or undo its effects, is not matter of dispute in this day. What difference is there in principle between preventing a mere ministerial officer, in advance, from doing the illegal act to bring before the law court matters which ought not to be brought there, since the questions to be tried have fallen within the exclusive jurisdiction of another court, and laying hands upon the ministerial officer after the law court has passed upon such matters and preventing the ministerial officer from carrying the judgment into effect? Interference in the first, rather than in the last, stage, would seem to be the better course. The fourteenth amendment denies to any agency of the state the power to accomplish the result it forbids. All courts, state as well as federal, in order to enforce the Constitution, must control every agency sought to be illegally used, in the name of the state, to deprive any one of life, liberty, or property without due process of law, or in any other manner to evade the supremacy of the Constitution, or laws. "Where the end is required, the means are given."

Ordinarily, it is not customary or needful to make executive officers of a court parties to injunction suits. If the parties before the court obey the injunction, no order can result or process issue, which the officer will be called upon to enforce. In that event, there is no necessity to deal with the ministerial officer at all. There are, however, numberless cases where the relief sought involves the staying of the execution of alleged invalid statutes, under which officers, though not interested in the property right asserted and denied in the litigation, claim and insist that they have duties to perform in the execution of the statute called in question, and in consequence take, or threaten to take, action, which does or will inflict irreparable injury to the property rights of complainant, and interfere with the jurisdiction of the court which has first undertaken to adjudge the matter in dispute. Whenever that is the case, it is proper to make such officials parties, and to order their conduct just as the court would in the case of a person directly interested in the right asserted in the suit; this no more "enjoining the court itself" than an injunction which forbids parties to prosecute suits therein, or an injunction, after the case has been tried and judgment rendered, preventing execution, which can be ordered whenever essential to the ends of justice.

The injunction originally issued on this point, and which it may become the duty of the court to reinstate on the final hearing, if the ultimate proof establishes the right contended for, neither invades nor interferes with the jurisdiction of any other court. In this particular case, the penalty provisions of the statutes are void, and the civil suits, the bringing of which is sought to be enjoined, are not proper to be brought in state courts, regardless of the reasonableness of the rates, since the bringing of them there to enforce those rates is an interference with the exclusive jurisdiction which the Circuit Court has already acquired to adjudge and settle those very matters. The injunction does not stay the judicial hand itself, in any event. The grand jury is left free to find indictments. The law court, if it so chooses, may try the indictments. The solicitor, however, who prosecutes, the sheriff who arrests, and the officer who issues the *capias*, each does so at his peril. Thereby they wrongfully put state power in motion to accomplish ends which the Constitution forbids the state and its agencies combined from effecting, when they will result in irreparable injury to rights given or secured by the Constitution, and violate rightful orders of a court which has obtained exclusive jurisdiction of the entire question. The officials thus enjoined were simply prevented from exercising ministerial power, as to matters with which they were no longer concerned, matters as to which they were not only under no duty to act but, on the contrary, were under the highest duty to refrain from undertaking anything. The injunction operates only in personam upon the officer, and does not touch the court.

There is no sanctity about the office of a clerk of a court which forbids that he be restrained from issuing process, which will result in a multiplicity of suits and irreparable injury, any more than in the case of any other ministerial officer whose acts may effect a like result. It is not to be presumed that any court will instruct its ministerial officer to meddle with matters which have already been drawn into the exclusive jurisdiction of another court, if advised that such is the case. In such event, it would be the plain duty of the court to instruct its clerk to obey the injunction issued against him by the court having exclusive jurisdiction of the matter. The court itself, whose clerk was enjoined, would have no power to invade the jurisdiction of the other court, much less the right to instruct a subordinate ministerial officer, in violation of an injunction, to issue summons and complaints or *capiases* to bring before the court matters which it could not determine, without usurping the exclusive jurisdiction of another court. *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390. The consideration which state and federal courts owe to each other, in the exercise of their respective jurisdictions, in order to prevent conflicts, is based upon something stronger than mere courtesy, and has become "a principle of law and right, and therefore of necessity." The duty of a court not to attempt to exercise jurisdiction over matters over which another court has taken jurisdiction is as obligatory upon courts as any other duty imposed upon them. The whole matter of those suits and arrests having been withdrawn from the jurisdiction of the



state court, its clerk and officers had no functions to perform in reference to them, and no discretion to exercise relative thereto. The state court, in view of these well-settled principles, would be bound to advise its clerk, if he applied for directions, to observe the injunction. There is no room therefore, if the Constitution and laws be obeyed, as it must be presumed they will be obeyed by every court, for conflicting directions from the different courts to the ministerial officer. The directions of the federal court to the clerk to refrain from acting as to matters with which he no longer has duties or concern derogate in no way from the dignity of the state court, or its proper control over its own officer, and is not provocative of conflict. The directions given the clerk simply subordinate him to the operation of the Constitution and laws in a particular case, from which no court, which maintains its allegiance to the supreme law, would seek to free him. The fact therefore that "the clerk performs his duties under the direction of the court" is not of the slightest importance in determining the propriety of issuing an injunction against the clerk.

It is common practice for courts of equity, in order to prevent irreparable injury, to restrain clerks and ministerial officers from certifying to facts or doing ministerial acts which will put in motion a train of illegal consequences. In *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, the Supreme Court affirmed an injunction which prevented the Railroad Commission from certifying any copy or copies of a tariff, or delivering a certified copy thereof to the Attorney General of the state. A like order, in principle, was approved by that court in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. Other striking instances of the approval by the Supreme Court, of the exercise of the power, in cases like this, to enjoin court officers and other executive agencies, are to be found in *Re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584; *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714. If, as these cases hold, the Governor, the Attorney General, and the constable may properly be made parties to the suit, and enjoined, by what system of logic can it be held that it is improper to make defendants of sheriffs, solicitors, clerks, and executive officers of any kind, and enjoin them, when necessary to prevent irreparable injury to a property right, secured or guaranteed by the Constitution?

The relief prayed in these cases on this point was necessitated by the anomalous condition of affairs brought about by the vain device of stripping state officers of the power to enforce the rate enactments, in order to defeat the jurisdiction of this court to pass upon the reasonableness of the rates involved, and yet, at the same time, practically lodging the power of the state in the hands of every private citizen to inflict injury upon the property right asserted, which, when attempted by the official in the name of the state, it was admitted the Constitution forbids, and which the Supreme Court held could be arrested by enjoining the official, whenever the power and duty were

put upon him to execute the statute. What the state cannot effect directly, it cannot effect indirectly.

It is always sufficient, to warrant the making of an officer a defendant and enjoining him, that he has it in his power to inflict irreparable injury upon complainant, and has threatened to do so, and will do so, unless enjoined. The power to inflict the injury, and the fact that the party is "about" to do so, and will do so, unless enjoined, constitute all the "relations" of the officer to the statute which is required to make him a defendant to an injunction suit. The public—that is, all the persons having the right to demand transportation service at the hands of the carriers at the rates fixed by the statutes—are parties to a suit to annul these statutes, by representation, through the rate making officials with whom the carrier contests the rates in the courts. "The public," which includes numberless thousands of individuals, cannot be specifically named in the bill for injunction. By well-known rules of equity practice, certain persons may be selected as representatives of a particular class and made defendants, and injunctions awarded against them, and all others similarly situated, if the justice of the case requires it. The right of complainant to relief of this sort, if the case entitles him to it, cannot be effectually enforced in any other way.

"The same considerations apply to the relief sought against all other executive and ministerial officers, not specifically named, who are empowered to make arrests," etc. It is not objectionable, because it does not appear that "those unnamed parties are in privity with or properly represented by the officers named, and there are no allegations of conspiracy between them," etc. They are of the same class, have the same power, and are charged with the same intent to make arrests, etc., and the same relief is sought against them as against the individual officers who are made defendants. "Attempting to make them parties" in the manner stated hampers no defense, nor interferes with any right of the demurrants. If therefore such practice be improper, which is not decided, it is of no concern to respondents. The question could become material only in event some of the designated classes, not made a party defendant by name, should disobey the orders of the court and be called to account therefor.

There is nothing of substance in the contention that these bills are in reality suits against the state, if such injunctions are allowed against officers of the state courts, or other executive officers, to prevent their participating in the bringing and prosecution of criminal proceedings to enforce the execution of the rate statutes. Repeated and solemn decisions of the Supreme Court of the United States, time and again, have adjudged that such suits and injunctions are not suits against the state, and are not improper in themselves. The Supreme Court is the final arbiter of such questions. Respect for its decisions forbids any other court to treat the question as longer open to contestation. The contrary insistence, however, is again urged here. It is no longer to be disputed that, under our jurisprudence, neither state nor federal government has any power beyond the limitations which the state and federal Constitutions place upon their authority; and whenever the

Legislature of a state, or Congress, attempts to go beyond these limitations, their enactments are nullities, and those who attempt to execute them are mere trespassers. The legislative power having no authority to speak for the state or the United States, beyond the limits of the power assigned, its enactments, when they transgress in this respect, do not speak the will of the state or of the United States, and are not their act or deed in any sense. Denying force to such legislative excesses impairs no power or right of the state. It merely prevents an illegal, individual aggression, in its name, which it did not command, and could not authorize.

As said in *Re Ayers*, 123 U. S. 433, 8 Sup. Ct. 164, 31 L. Ed. 216, if the individual, acting under the assumed authority of the state and under the color of its laws, "comes in conflict with the commands of the Constitution of the United States, he is stripped of his representative character and subjected in his person to the consequences of his individual conduct." If the suitor or person whose property rights are assailed and threatened with irreparable injury, under the guise of enforcing an unconstitutional enactment, could not resort to equity in the first instance to prevent such wrong, but must simply stand on the defensive and wait until he is illegally assailed, and it may be irreparably injured, many of the most sacred constitutional safeguards for the protection of the liberty and property of the citizen, against invasion under the forms of law, would be practically nullified, and in many cases he would stand as defenseless as though the Constitution had not at all provided for his protection. Helpless and pitiable indeed would be the plight of the citizen, if such a suit against officers, asking preventive relief, in advance, to forbid their enforcing an unconstitutional statute to the irreparable injury of a property right, be a suit against the state, which the citizen cannot maintain in any court without its consent. Acceptance of such a doctrine would prevent the enforcement of the checks and limitations imposed upon the several departments of government for the protection of the life, liberty, and property of the citizen. It is in plain hostility therefore to our whole scheme and purpose of constitutional government. It goes further than the old doctrine that, "The king can do no wrong," which never denied the right to call his officer or agent to account, and invests the officer or agent with prerogatives and immunities, which, even in monarchical governments, are never extended save to the king himself.

There is no affidavit that the demurrers are not interposed for delay. It was stipulated, however, in open court, with its approval, since the defendants were numerous, and delay would ensue in procuring their affidavits and getting the cases at issue, that no objection would be taken because of the absence of such affidavits.

The several demurrers must be overruled, with the single exception of that relating to future reductions of rates by the commission, which is sustained. The parties having agreed upon the time in which the answers will be filed, no order will now be made in that regard.

The cases of the Louisville & Nashville Railroad Company, the Central of Georgia Railway Company, the Nashville, Chattanooga & St. Louis Railway Company, and the South & North Alabama Rail-

road Company were submitted with this case, upon like demurrers to the supplemental bills, and the same orders will be entered in them as in this case.

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GILBERT et al. v. HOPKINS et al.

(Circuit Court, W. D. North Carolina. July 8, 1909.)

PARTITION (§ 17\*)—SUIT FOR PARTITION IN FEDERAL COURT—EQUITY JURISDICTION—DISPUTED TITLE.

Where, in a suit for partition in a federal court, whether brought in or removed into such court, defendant denies complainant's title and pleads sole seisin in himself, an issue is raised triable only at law, and the court, on motion therefor, at any time, even after issue has been joined and testimony taken, will stay the suit to permit the plaintiff to establish his title by an action at law.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 54; Dec. Dig. § 17.\*]

In Equity.

This is a suit for partition, originally instituted before the clerk of the superior court of the county of Graham, N. C. Upon application of the defendants, the cause was removed to this court and docketed on the equity side of the docket. In the petition upon which this suit is based, it is alleged: That, on the 3d day of November, 1860, and subsequently, the state of north Carolina issued to W. H. Peet and L. W. Gilbert a number of grants, to which reference is made by giving the number of said grants, the number of acres contained therein, etc.; that the said L. W. Gilbert is dead; and that the plaintiffs are his heirs, and only heirs at law, and as such inherited from their father an undivided interest in half of said lands. It is also alleged on information and belief that the defendants above named, "by sundry means of conveyances, acquired and now own an undivided half interest in said lands which was granted by the state to the said W. H. Peet; so that the said plaintiffs and the said defendants both own and claim their respective interests in the said lands through and under the grants issued as aforesaid." The petitioners prayed that the court "appoint three commissioners to divide the same into two equal shares, and by proper metes and bounds to allot to each petitioner jointly one share thereof; and, if an equal division thereof cannot otherwise be made, then to charge the more valuable dividends with such sums as they shall deem necessary to be paid to the dividends of the lesser value in order to make the division equal, and to report their proceedings under their hands and seals to this court."

The defendants, in their petition to remove this cause, among other things, allege:

"Your petitioners, the defendants in said suit, deny and resist the said claim of the said plaintiffs to any interest in the said lands and to any relief set forth and prayed for in said suit and petition, and aver that the said plaintiffs have no interest in the said lands and are not entitled to any judgment in their favor in this respect, and that the said defendants are the sole owners of said lands."

In the answer filed herein, the defendants, among other things, aver:

"That these defendants have not any knowledge or information thereof sufficient to form a belief as to the truth of that portion of the second paragraph in the said complaint, which alleges that L. W. Gilbert is dead, and that the plaintiffs named are his heirs and only heirs at law, and they deny the same; but they specifically deny that the plaintiffs, either as heirs at law or in any other way, acquired or had, at the filing of this petition, an undivided one-half of the said lands or any interest therein. On the contrary, they aver that at the time of the commencement of this proceeding, and now,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

they, these defendants, are the sole owners in fee of the said lands, and that the said plaintiffs have not, and did not have at the commencement of this proceeding, any interest therein. And these defendants, replying to the allegations contained in the third paragraph of the said petition, allege: That they are the owners in fee, and, as such, are seised, not only of an undivided half interest in said lands, but of the entire estate and interest therein, and that it is not true, as therein alleged, that the plaintiffs have any interest in said lands whatever. That it is not true, as alleged in the fourth paragraph of said complaint, that the petitioners are the owners in fee, as tenants in common, with the defendants, of the said lands, or that the petitioners have an undivided, or any other, interest therein; nor is it true that the petitioners, or any one of them, have had any possession of the said lands, or made any claim thereto, for more than 20 years prior to the commencement of this suit. On the contrary, these defendants aver: That the said petitioners never had a one-half or any other interest in said lands; that the defendants are the sole owners and solely seised of the entire interest and estate therein, and the defendants and those under whom they claim have been for more than 20 years prior to the commencement of this suit in open, notorious, continuous, and adverse possession thereof as against the said petitioners and all other persons, under and by virtue of their title as sole owners of the said lands."

The defendants also filed a cross-bill, in which they set out fully their chain of title, showing what purports to be a legal title to the premises in question, which had been set forth in the answer, to which reference has heretofore been made. They allege that "in the month of —, in the year 1865, certain persons, pretending to be the heirs of William H. Peet, attempted to convey a one-half interest in the said lands to the said Lyman W. Gilbert, the alleged ancestor of the defendants to this cross-bill, by a certain deed of conveyance, which has been recorded in Cherokee county, in the state of North Carolina, being the county whose original boundaries contained these lands; but that in fact such conveyance was inoperative and void under the laws of the state of North Carolina, and conveyed no interest, and yet is a cloud upon the title." And accompanying this allegation is an averment to the effect that cross-complainants are remediless at law, and a prayer to the effect that they may have the relief which can be obtained in a court of equity.

Thereafter the defendants filed an amendment to the cross-bill to which reference has been made, section 5a of which reads as follows:

"And your orators further allege and show: That the deed of conveyance from the said L. W. Gilbert, for his interest and estate in said lands, to the said W. H. Peet, executed on or about the 1st day of March, 1861, as hereinafter set forth, was duly and properly executed, and in law and equity conveyed to the said W. H. Peet, in fee, all the right, title, interest and estate which the said Gilbert then had in said lands. That the execution of said conveyance was duly proved, and it was adjudged to be recorded, and shortly afterwards was recorded, in the office of the register of deeds in and for the county of Cherokee, state of North Carolina; the said lands then being situate in the said county. But nevertheless, as complainants are informed, the officer making such registration of said deed failed to copy upon the record thereof the seal, or device used and adopted by said Gilbert as and for his seal in the execution of said deed; and your orators are advised and believe that the defendants in this cross-bill now, and for some time back, insist and claim that by reason of the failure of said officer to copy said seal, upon said record, the registration thereof was wholly invalid for any purpose, and that no title was conveyed thereby. And your orators aver that the original of said deed of conveyance would show not only that it was properly executed and properly proved, and the register of deeds, indorsed thereon that the same had been correctly recorded; but now it is, and the said officer is long since dead, and your orators have, after most careful and diligent searches of the papers, records, and muniments of title of themselves, and each of them, of the various persons under whom they claim, of the office of the register of deeds for said county of Cherokee, and all other places where it was suggested that it might be found, but they have been unable to find said original. And they aver and show unto your honors that they never had said original

deed in their possession and never saw it; but in all their investigations and uses of said conveyance in the assertion of their rights thereunder they relied upon certified copies from the office of the register of deeds of Cherokee county, and it was never suggested or claimed by any one until about the time the defendants brought their suit for the partition of said lands, as set forth herein, that said deed was never executed with the formalities required, or alleged to be required to make it effectual to convey the interest and estate by the said L. W. Gilbert.

"And your orators are advised, and so aver the fact to be, that this unjust and unconscientious claim so now set up by the defendants constitutes a cloud upon the title of your orators to the said lands, and seriously threatens to and does interfere with the enjoyment and profitable use and disposition of their interest and estate in the said lands; and your orators aver that they are advised and believe that they are entitled to the relief by this honorable court that it be adjudged by the said court that the said deed from the said Gilbert to the said Peet was duly executed, admitted to probate, and recorded, and that the effect in law and equity of such deed so executed, admitted to probate, and recorded was to convey in fee all the right, title, and interest of the said Gilbert in and to the lands aforesaid to Peet, his heirs and assigns, and that these defendants have since duly and lawfully acquired the entire estate and interest of the said Peet and Gilbert in and to the said lands, and are now the true owners thereof, and that the said claim of the said plaintiffs so set up in their said bill of complaint as hereinbefore mentioned, as well as their contention that the said deed from ancestors of the said Gilbert to the said Peet, was not duly executed and proved, and was invalid for any purposes, and should be adjudged to be a cloud upon the title of these defendants to the said lands, and that the same should be removed.

"And your orators pray your honor may adjudge and decree: That the alleged claims of the defendants in the cross-bill herein are invalid and void; that the defendants herein have not, nor has either of them, any estate or interest in said property or any part thereof; that your orators are the owners in fee of the said property; and that the defendants and each and every of them are forever barred from the same, or claiming any estate or interest therein."

On the 1st day of July, 1907, an examiner was appointed, who is proceeding under the order of the court to take the testimony as provided therein.

Dillard & Bell, Merrimon & Merrimon, and Moore & Rollins, for plaintiffs.

Davidson, Bourne & Parker and C. B. Matthews, for defendants.

PRITCHARD, Circuit Judge (after stating the facts as above). As shown by the statement of facts, this is a petition for partition filed by the plaintiff in the superior court of Graham county, and which, upon application of the defendants, who are nonresidents, was removed into this court. Notwithstanding issue has been joined, and a cross-bill and amendment thereto filed, and a considerable amount of evidence taken by the examiner, it is insisted by counsel for plaintiffs that, inasmuch as the defendants in their answer interpose the plea of sole seisin, the proceedings herein should be suspended, and that the plaintiffs should be directed to institute an action at law for the purpose of establishing their title to the lands in controversy, and that the proceedings in this court, in so far as they relate to partition, should, in the meantime, be held in abeyance in order that the issue as to whether the plaintiffs have title to said lands may be determined.

I will first consider the question as to whether, in a case like the one at bar, wherein partition proceedings have been instituted and the de-

fendant files an answer which raises an issue as to the plaintiff's title to the land sought to be partitioned, a court of equity would have jurisdiction to determine the issue thus raised. It has been repeatedly held that, where one institutes partition proceedings, and the defendant raises the issue as to whether the plaintiff is the owner of the premises in question, the issue thus raised is cognizable in a court of law, and the parties are entitled to a trial by jury; and this is precisely the kind of case that is presented to the court at this time, the plaintiffs alleging that, as heirs at law of their ancestor, L. W. Gilbert, deceased, they are entitled to a one-half interest in certain tracts of land of which the said Gilbert was seised and possessed at the time of his death. The defendants deny the allegations of the petition, and also deny that the plaintiffs have any right, title, or interest in any of the said lands whatsoever, and further aver that they are the true and sole owners of the boundaries of land sought to be partitioned. It is true that the defendants insist in their cross-bill that a certain deed made by the heirs at law of the said Peet is void, and seek to have the same canceled, and urge that the same is sufficient to give a court of equity jurisdiction of the subject-matter. The defendants, with great particularity, set out their chain of title, beginning with the grant from the state of North Carolina, and, among other things, include certain proceedings instituted by administrators and others so as to form a complete chain of what purports to be a title to the lands in controversy.

It is insisted that this deed was made by the heirs at law of the said Peet at a time when the title to the same had passed from the said Peet, and that therefore the deed is absolutely void. Thus it will be seen that, according to the contentions of the defendants, as set forth in their pleading, the defect of which they complain in this respect, can be taken advantage of in a court of law. Such being the case, the defendants can therefore obtain a complete and adequate remedy at law, and are not entitled to invoke the aid of a court of equity upon that score. The defendants, by their own pleading, have shown that this case is not cognizable in a court of equity, and cannot now, by pleading or otherwise, change the character of this proceeding so as to deprive the plaintiffs of the right of trial by jury on the issues thus raised by themselves.

The plaintiffs insist that upon the issue being thus raised they are entitled to a trial by jury. In the case of *Baylis v. Traveler's Insurance Company*, 113 U. S. 316, 5 Sup. Ct. 494, 28 L. Ed. 989, Justice Matthews, who delivered the opinion of the court, said:

"The right of trial by jury in the courts of the United States is expressly secured by the seventh article of the amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury only when the parties waive their right to a jury by a stipulation in writing. Rev. St. §§ 648, 649 (U. S. Comp. St. 1901, p. 525)."

The rule which applies in a case like this is well-stated by Street, in his work on *Federal Equity Practice* (page 940), in which it is stated:

"In the practice of the federal courts, the direction of an action at law is indicated as proper in partition suits. Upon well-accepted principles a plaintiff cannot maintain a bill of partition unless he shows title in himself, and such a title as will establish his right, as against the defendant, to a partition. Where the plaintiff's legal title is disputed, the court of equity declines jurisdiction to try the question, but, in analogy to the case of dower, will retain the bill for a reasonable time, until an action has been brought and the issue of title determined at law."

This is a clear and concise statement of the doctrine that the plaintiff cannot maintain a bill of partition unless he shows title in himself, and that, when such title is disputed by the defendant, a court of equity will decline to try such question, but will retain the bill for a reasonable length of time to enable the plaintiff to have his title determined in an action at law.

In the case of *Brown et al. v. Cranberry Iron & Coal Company* (C. C.) 40 Fed. 849, Judge Dick, District Judge, among other things, said:

"As the plaintiffs are nonresidents, they have an undoubted right to institute their suit in this court, and are under no obligations to seek remedy and relief in a state court. They could not, on the law side of this court, avail themselves of the proceedings for partition provided for by the local laws, as such proceedings blend legal and equitable questions and modes of procedure. If such proceedings were instituted against them in a state court, and were removed to this court upon their application, the case thus removed would be placed on the equity side of the docket.

"The concurrent jurisdiction of a court of chancery to entertain suits for partition of land has long been established, and has often been exercised, both in England and in this country, where the legal title is undisputed. When the defendant denies the title of the complainant, and his right to joint possession, it is the usual course and practice of a court of chancery to retain the bill, stay proceedings, and allow the complainant a reasonable time for trying his title and re-establishing the unity of possession with his alleged co-tenant by an action of ejectment. Questions pertaining to a legal title and the nature of possession are matters of law, and should be decided by a judge and jury in a legal tribunal. This was the method of practice and procedure that prevailed in the courts of equity in this state before the abolition of such courts by our new Constitution, and the adoption of a Code system, which required all legal and equitable remedy and relief to be sought by civil action or special proceedings. *Garrett v. White*, 38 N. C. 131; *Ramsay v. Bell*, 38 N. C. 209, 42 Am. Dec. 163; *McBryde v. Patterson*, 73 N. C. 478. These state statutes cannot limit or regulate the jurisdiction of a federal court sitting in this state, enforcing and administering the rights of nonresident litigants, although such rights, subsist, or have been acquired, under the laws of the state. There is no doubt as to the jurisdiction of this court in the case before me.

"The plaintiffs have not set forth their own and title of the defendant with that particularity and detail that would entitle them to a decree of partition of the property in controversy. This defect could be cured by an amendment, which I would readily allow on account of the peculiar features of this case. In allowing the plaintiff time and opportunity for bringing an action on the law side of the court, to establish their legal title and unity of possession, no injustice or hardship will result to the defendant company or its legal title. Its sole seisin and long adverse possession, and the alleged matter of equitable estoppel, can be employed in defense in such action at law. *Kirk v. Hamilton*, 102 U. S. 68-79, 26 L. Ed. 79. If the plaintiffs should succeed in their action at law in establishing their legal title as tenants in common with the defendants, some difficulty may arise as to how partition is to be effected, as mineral interests in lands are necessarily of unknown value, and not capable of parti-



tion without a sale; and a sale may result in depriving the owner of the soil of its possession in the minerals, or forcing it to pay an exorbitant price for such property. I will not anticipate other difficulties that may be encountered until they arise on hearing this case upon further directions.

"Let an order be drawn staying proceedings in this case, and granting the plaintiffs one year to bring and prosecute their action at law, and allowing the depositions taken in this case to be read in evidence on the trial of such action. No formal order is necessary requiring the defendant to admit an ouster on the trial, for the claim of the defendant of sole title and exclusive adverse possession amounts to an ouster for the purpose of an action at law, which will be tried on the law side of this court."

This case was then heard on writ of error by the Circuit Court of Appeals for the Fourth Circuit (72 Fed. 96-98, 18 C. C. A. 444, 446), and Judge Simonton, who wrote the opinion of the court, referred to the order made by Judge Dick, in the court below, and among other things said:

"This course pursued by the learned judge who heard this case is in strict accord with the law and practice of courts of chancery. 'When, on a bill for partition, where partition is a subject of equity jurisdiction, the legal title is disputed and doubtful, the course is to send the plaintiff to a court of law to have his title first established.' *Coxe v. Smith*, 4 Johns. Ch. (N. Y.) 271; *Phelps v. Green*, 3 Johns. Ch. (N. Y.) 302. Equity has no jurisdiction to try the title to lands. *Manners v. Manners*, 2 N. J. Eq. 384, 35 Am. Dec. 512; *Obert v. Obert*, 10 N. J. Eq. 98. An action at law was ordered, and not an issue out of chancery. This is in accord with the practice of North Carolina. 'An issue is sent from a court of equity to be tried before a court of law to aid the court of equity in the ascertainment of facts. An action is ordered to be tried in a court of law when the equity is based on a strictly legal right.' *Fisher v. Carroll*, 46 N. C. 27."

The case of *McBryde et al. v. Patterson*, 73 N. C. 480, was a special proceeding originally commenced in the probate court and carried on appeal to the superior court, where the defendant moved to dismiss the proceeding. The court overruled the motion, and thereupon the case was carried to the Supreme Court on appeal. Chief Justice Pearson, in discussing the mode of procedure under the equity practice before the adoption of the Constitution of 1868, said:

"Under the 'old mode of procedure' in a petition for partition, if the defendant pleaded 'sole seizure,' the proceeding was stayed by the court. The plaintiff directed to bring an action of ejectment to try the title, and the defendant required to confess an 'actual ouster' for the purpose of enabling the plaintiff to bring the action, as a tenant in common could not maintain ejectment against his co-tenant unless there had been an actual 'ouster.' \* \* \* The plea of 'sole seizure' is put on the construction of the rules of descent. *Bat. Rev. c. 36*, rule 2, making the point of law, is the bastard sister of a bastard brother, entitled to land purchased by him, to the exclusion of brothers and sisters born in lawful wedlock? That is a question of law which his honor ought to have decided, and one which the judge of probate had no right to decide, as it involved a question of title to real estate, which, under the old mode of procedure, could only have been disposed of in an action of ejectment, and in regard to which C. C. P., the judge of probate, had no jurisdiction. It was likewise, supposing the plaintiffs had an interest, the duty of his honor to have disposed of the question of fraud in the procurement of the execution of the deed of Carolina Gordon, by having an issue of fact tried by a jury. After this the superior court would have been in a position to issue a writ of procedendo to the judge of the court of probate, if the result of the subsequent proceedings made it necessary to order partition to be made."

Also, in the cases of *Bearden v. Benner* (C. C.) 130 Fed. 690, *Fuller et al. v. Montague et al.*, 59 Fed. 212, 8 C. C. A. 100, and *Clark v. Roller*, 199 U. S. 541, 26 Sup. Ct. 141, 50 L. Ed. 300, the view entertained by the Circuit Court of Appeals for this circuit is fully sustained.

In the case of *Klever v. Seawell*, 65 Fed. 393, 12 C. C. A. 661, the Circuit Court of Appeals for the Sixth Circuit had this question before it. Judge Taft, in that case, after referring to the fact that in cases of this character the parties are not entitled to a jury in a proceeding for partition under the statutes of Ohio, said:

"The seventh amendment of the Constitution of the United States provides that: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' Before the adoption of the Constitution, suits for partition could be brought either at the common law or in equity. In the common-law action for partition, the general issue was raised by the plea 'non tenent insimul.' It was triable before a jury. (Chitt. Pl. [6th London Ed.; 11th Am. Ed.] 1394, note); and such is the procedure under many of the state statutes for partition (*Clapp v. Bromaghams*, 9 Cow. [N. Y.] 530; *Hewlett v. Wood*, 62 N. Y. 75; *Covington v. Covington*, 73 N. C. 168; *Harding v. Devitt*, 10 Phila. [Pa.] 95; *Ham v. Ham*, 39 Me. 216). When suits for partition under such statutes are brought in the United States courts, either by original action or by removal, there is no difficulty in assigning them to the law side of the court."

Also, in the case of *Sanders v. Devereux*, 60 Fed. 311-313, 8 C. C. A. 629, 632, the Circuit Court of Appeals for the Eighth Circuit, in disposing of this question, said:

"The question then arises, which we stated at the outset, whether the United States Circuit Court for the District of Kansas had any jurisdiction to enter a decree of partition which was prayed for in the bill. It is not denied, as we understand—and the authorities to this effect are numerous and uniform—that at common law a bill for partition would only lie in favor of one who had the seisin and immediate right of entry. At common law, if a party entitled to bring a suit for partition became disseised, he could not maintain the action until he had established his right of possession by an action in ejectment, or other equivalent proceeding at law. In other words, a suit in partition could not be maintained on a mere right of possession, if the property was in fact held adversely, and it was not recognized as a proper action by which to recover the possession of real property where the plaintiff had been disseised. These principles are fundamental. *Co. Litt.* 167a; 16 Vin. Abr. 225; *Adams v. Iron Co.*, 24 Conn. 230; *Clapp v. Bromaghams*, 9 Cow. (N. Y.) 530, 560, 561; *Lambert v. Blumenthal*, 26 Mo. 471; *Burhans v. Burhans*, 2 Barb. Ch. (N. Y.) 398, 408; *Shaw v. Gregoire*, 41 Mo. 407; 1 Washb. Real Prop. p. 715. It is claimed, however, by the appellant—and that is the point on which the question of equitable jurisdiction finally turns—that under the practice which prevails in Kansas a bill for partition may be maintained by a tenant in common, though he is out of possession, and has been disseised by his co-tenant. Hence it is argued that under like circumstances a bill for partition may be entertained by the federal Circuit Court for the district of Kansas.

"We shall not dispute the first proposition, touching the practice which now prevails in Kansas. In an early case decided in that state (*Squires v. Clark*, 17 Kan. 84), Mr. Justice Brewer, then a member of the Supreme Court of Kansas, intimated a doubt whether a tenant in common, who had been disseised, could maintain a suit for partition until he had established his right of possession by a suit at law. He further called attention to a fact, which is still noteworthy, that the statutes of Kansas do not undertake to determine or to define the circumstances under which a suit for partition may be maintained. Unlike the laws of many other states, the statutes of Kansas simply reg-

ulate the mode of procedure in suits for partition. It may be conceded, however, that since the decision in *Squires v. Clark*, supra, the practice has been established, apparently without debate or controversy, of entertaining suits for partition at the instance of a suitor who has been disseised. *Scantlin v. Allison*, 32 Kan. 376, 4 Pac. 618; *Ott v. Sprague*, 27 Kan. 620. It by no means follows, however, because a practice of that nature prevails in the state courts, that a bill for partition can also be entertained by the federal courts sitting in that state, when it appears that the complainant has been disseised, and that his right of possession is disputed, and that the property sought to be partitioned is actually occupied by an adverse claimant. The federal courts cannot properly entertain a bill in chancery to partition lands unless a state of facts exists which would warrant such an action according to the general rules of equity jurisprudence and practice. In the courts of the United States, a bill for partition certainly cannot be used as a mere substitute for an action in ejectment, or interchangeably with a suit at law of that nature, to establish a plaintiff's right of possession. A practice of that kind, if tolerated, would be in clear violation of section 723, Rev. St. U. S. (U. S. Comp. St. 1901, p. 583), which provides that 'suits in equity shall not be sustained in either of the courts of the United States, where a plain, adequate and complete remedy may be had at law.' *Hipp v. Babin*, 19 How. 271, 277, 15 L. Ed. 633. Moreover, if a suitor was allowed to file a bill for partition to establish his title and right of possession after a disseisin, the adverse claimant and occupant would, in effect, be deprived of his right to a trial by jury, on a strictly legal issue, contrary to the seventh amendment to the Constitution of the United States, as was pointed out by Mr. Justice Field in *Whitehead v. Shattuck*, 138 U. S. 146, 151, 11 Sup. Ct. 276, 34 L. Ed. 873.

"This question has been frequently discussed, and, so far as we are aware, it has always been held that, where a bill shows on its face that the purpose of the plaintiff is to recover possession that is occupied by an adverse claimant, the bill must be dismissed, unless it is further shown by the complainant that the aid of a court of equity is necessary to remove obstacles which stand in the way of a successful resort to an action of ejectment, or unless it appears that the plaintiff's title has been established at law, and that equitable aid is necessary to prevent a multiplicity of suits, or that equitable aid is necessary for some other good and sufficient reason stated in the bill. In the case of *United States v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110, the government, having a title to certain lands acquired under the internal revenue laws, filed a complaint against certain persons, who were in possession of the premises, to remove a cloud upon its title, consisting of an alleged fraudulent deed. It was held by the court (citing numerous cases in support of the proposition) that as, under the averments of the bill, the United States had a legal title, which was paramount to the alleged fraudulent deed, and as the defendants were in possession, the case was not one of equitable cognizance, and that the bill should have been dismissed on that ground. In *Whitehead v. Shattuck*, supra, it was held that a person out of possession, but claiming to have the legal title to certain lands, could not maintain in the federal courts a bill to quiet title, against defendants who were in possession, although a statute of the state permitted an equitable proceeding to be brought in the state courts to establish the title and to recover the possession. The court said, in substance, that a statute of a state could not be allowed to override the federal statute, heretofore quoted, which declares that the courts of the United States shall not assume equitable jurisdiction where there is a plain, adequate, and complete remedy at law; and, in an opinion recently delivered by this court, Judge Caldwell remarked, in a case where for special reasons, disclosed by the opinion, the equitable jurisdiction was upheld, that, 'if the defendant was in possession of the property, the plaintiff had an adequate remedy at law, and could not resort to equity, although the state statute conferred equitable jurisdiction on the state courts in such a case.' *Bigelow v. Chatterton*, 51 Fed. 614, 2 C. C. A. 402, 404."

It is insisted by the defendants that the motion made by the plaintiffs ought not to be granted at this time, inasmuch as the plaintiffs have filed a replication and joined issue, and a considerable amount of evi-

dence has been taken, and that the plaintiffs, by their conduct, have treated this case as being cognizable in a court of equity.

In Street's Federal Equity Practice, § 1549, in discussing this subject, it is said:

"In the English chancery it was the practice to direct an action at law only by a decree made at the hearing after the proofs had been taken. There seems to be no fundamental reason why this should be insisted on in all cases; and it would seem to be proper to make the order either at the hearing on the proofs, or at a hearing on a demurrer, according as the question may be first presented at the one juncture of the suit or the other."

In *Brown v. Cranberry Iron & Coal Co.*, supra, Judge Dick, in referring to the condition of the suit, at the time the order was made directing the plaintiffs to institute a suit at law to determine their title to the property in question, said:

"The plaintiffs assert a legal title to such minerals as tenants in common with the defendant company. In its answer the defendant company denies the title of the plaintiffs, and avers that for many years it has had sole ownership and seisinment of the soil and of the minerals of the lands mentioned in the bill of complaint; and further insists that, if the plaintiffs ever had any legal or equitable interest as claimed, they lost their right to institute this suit by lapse of time, and they are also bound by the matter of equitable estoppel set up in the answer. Replication was filed, and proofs have been taken by the parties on both sides. On the rule day of November, 1889, a motion was duly entered on the order book in the clerk's office by the counsel of the defendants to set down this case for hearing upon the pleadings and the proofs."

Thus it will be seen that in that case proofs had been taken by parties on both sides, and a motion had been entered on the order book by counsel for defendants to set the case down for hearing upon the pleadings and proofs. As I have already stated, the Circuit Court of Appeals for this circuit gave their unqualified approval of the action of Judge Dick in making the order he did at that time, notwithstanding the fact that proofs had been taken by parties on both sides and the case had been matured for final hearing. The ruling of the Circuit Court of Appeals in this respect is conclusive in so far as this court is concerned upon the point thus sought to be raised by the defendants.

The fact that the defendants, in their petition for removal, deny that the plaintiffs have title to any portion of the lands referred to in the petition for partition, and also in their answer reiterate the same and plead sole seisin, might well raise the question as to whether, in the first instance, owing to the pleading, the record when removed to this court did not constitute a case cognizable at law, and as to whether the same should not have been docketed on the law side of the docket; but, inasmuch as the plaintiffs seek to have partition of the premises, I deem it advisable to treat the partition proceeding as properly cognizable in equity, feeling, as I do, that by so doing the ends of justice may be best subserved.

Let an order be drawn staying proceedings in this case, and granting the plaintiffs one year to bring their action at law, and allowing the depositions taken in this case to be read in evidence in the trial of such action.

I have not determined the questions involved in the plaintiffs' motion to dismiss the cross-bill and amendment thereto, and will therefore withhold my decision on that point for the present.

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COLUMBUS IRON & STEEL CO. v. KANAWHA & M. RY. CO.

(Circuit Court, S. D. West Virginia. May 27, 1909.)

No. 156.

COMMERCE (§ 89\*)—INTERSTATE COMMERCE ACT—JURISDICTION TO ENJOIN ESTABLISHMENT OF RATES.

A Circuit Court of the United States possessed no jurisdiction, prior to the enactment by Congress of legislation regulating the transportation of interstate commerce, to enjoin the promulgation and enforcement generally by a carrier of a particular rate or schedule of rates as unreasonable, its power being limited in any case to the protection of an individual shipper against the exaction from him of an unreasonable rate or charge, either local or interstate, when it had jurisdiction by reason of diverse citizenship; nor has it jurisdiction under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), to enjoin the filing, publication, or enforcement of a proposed rate alleged to be unreasonable, in advance of action thereon by the Interstate Commerce Commission, which is by said acts vested with exclusive jurisdiction to determine the reasonableness of rates in the first instance.

\* [Ed. Note.—For other cases, see Commerce, Dec. Dig. § 89.\*]

Jurisdiction of federal courts of suits under interstate commerce act, see note to *Bailey v. Mosher*, 11 C. C. A. 318.]

**In Equity.** On motion for preliminary injunction and demurrer to bill.

On April 10, 1909, complainant tendered to a judge of the United States Circuit Court for the Southern District of West Virginia its bill against Kanawha & Michigan Railway Company, seeking an injunction to restrain the defendant company from filing with the Interstate Commerce Commission a certain proposed schedule of joint rates on coal shipments between points on the line of defendant company in West Virginia and points on the Great Lakes, and from proceeding in any wise to put such proposed rates into effect. Upon the allegation contained in the original bill that the defendant proposed to file these rates with the Commission on April 12, 1909, and that there was no time to give notice to the defendant of the application for a preliminary restraining order, and that if the rates were permitted to be filed they would necessarily go into effect and be charged to the plaintiff, resulting in immediate and irreparable injury to it, the judge reluctantly granted a temporary restraining order, setting the motion for a preliminary injunction down for hearing on the 23d day of April, 1909; that being the earliest date on which the court (owing to prior engagements) would have an open date on which to hear the matter. On April 23, 1909, both parties to the bill appeared by their respective attorneys, and thereupon the plaintiff tendered and asked leave to file an amended bill, which leave was granted over the formal objection of defendant. The defendant thereupon tendered its written demurrer to the original bill, which by agreement of counsel in open court is to be treated as a demurrer to both the original and amended bills as filed, which demurrer was ordered to be filed, and the matters of law arising thereon were argued and submitted, and the temporary re-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

straining order theretofore granted was continued in force pending the decision upon the demurrer.

The matter is now before me upon the motion for a temporary injunction and upon the said demurrer. The points specially relied on in the demurrer are in effect the following: (1) That it appears by the bill that the matter in dispute arises under the act of Congress regulating interstate commerce, and that it does not appear from the bill that the court has jurisdiction of the subject-matter, for the reason that it does not appear therefrom that the question of the reasonableness or fairness of the proposed rates has been passed upon by the Interstate Commerce Commission, in whom, it is alleged, is vested the sole power to determine questions of that character relating to interstate commerce, and that it does not appear that complainant, or any other person or corporation interested therein, has filed any complaint with said Commission respecting said proposed rates. (2) That the allegations of the bill do not make a case for equitable relief. In order to see just what the case made by the bill is, I will endeavor, as briefly as may be, to present its essential features:

The complainant, reciting by way of preamble that it is a corporation organized under the laws of Ohio and a citizen of said state, brings this bill of complaint, "for itself and for and on behalf of all persons or corporations engaged in mining and shipping coal to points on the Great Lakes over and by the line of the Kanawha & Michigan Railway Company, who would be affected by the proposed increase of rates in this bill complained of, against the Kanawha & Michigan Railway Company," a corporation organized under the laws of West Virginia, and being a citizen of that state and a resident and inhabitant of the Southern judicial district thereof; that the plaintiff has two mines on the line of defendant's road in Fayette county, W. Va., and has invested about \$275,000 in its business, and has contract for the coming year for 100,000 tons of coal for what is known as the "lake trade"; that the entire product of its mines is shipped over the defendant's railway; that the defendant is a common carrier engaged in interstate commerce; that there are a great many other mines, besides plaintiff's, situate along defendant's line of road in Kanawha and Fayette counties, W. Va., which ship coal over defendant's line to lake ports; that all of these mines are in what is known as the "Kanawha District," and that all would be affected alike by the proposed increased rates from said district to lake ports; that since 1904 the defendant and its connecting lines have had in force a joint rate on coal of 97 cents per ton from all points in the Kanawha district to Toledo, Ohio, and that said rate is now in effect; that for the years 1901 to 1903 the rate from said district to Toledo was \$1.02 per ton, and that, while said rate now in existence is not highly remunerative, it is a just and reasonable rate, "because with an increase of said rates it would not be possible for the mines on said Kanawha & Michigan Railway to continue shipping into that market," etc.; that in selling coal in the lake trade plaintiff not only competes with other producers on the line of defendant railway, but with other West Virginia coal fields, to wit, Thacker, Pocahontas, and Kenova districts on the Norfolk & Western Railway, Fairmont district on the Baltimore & Ohio Railway, Kanawha and New River on the Chesapeake & Ohio Railway, and also with coal from the Eastern Ohio district and coal from the Pittsburgh district in Pennsylvania; that these competitors in the Ohio and Pittsburgh districts, although now enjoying lower rates than those in force in the Kanawha district on defendant's line, have demanded of the railway companies on whose lines they are situated, to wit, the Pennsylvania Lines, the Wheeling & Lake Erie Railway Company, and the Baltimore & Ohio Railway Company, that the existing differentials be largely increased, either by a reduction of the rates to them or by an increase on the rates from the Kanawha district on defendant's line; that in obedience to these demands pressure has been brought to bear on defendant by the Pennsylvania Lines and by the Wheeling & Lake Erie Railway Company to compel it to increase its rates by threats to bring on a general rate war, and thus, though knowing that the existing rate is just and reasonable, defendant has been forced to yield, and has announced that, effective May 15th, the rates on lake coal to Toledo from Kanawha district will be \$1.06 $\frac{1}{4}$  cents per ton; that if these

rates are allowed to be filed and go into effect plaintiff will be unable to fill its contract without loss to itself; that plaintiff is without remedy at law, because if the rates go into effect they cannot be corrected by the Interstate Commerce Commission in time to enable plaintiff to gain any business in the lake trade this year, and that this will result in loss of business in future years, etc.; that existing rates give a present differential in favor of Ohio and Pennsylvania coal operators of 9 cents per ton and that the proposed increase of freight rate will increase this differential to 18½ cents, which will practically bar West Virginia coal from the Kanawha district from the lake market. As a makeweight, probably, the bill avers that these proposed rates will be filed as the result of a combination, conspiracy, and agreement in restraint of interstate trade. It is also averred that the matter "in controversy in this suit in the case of your orators alone is more than \$2,000, exclusive of interest and costs."

Z. T. Vinson and E. W. Knight, for plaintiff.

Jas. H. Hoyt, J. T. Lewis, J. H. Holt, and Jos. I. Doran (Holt & Duncan, of counsel), for defendant.

KELLER, District Judge (after stating the facts as above). The important inquiries suggested by the motion for a temporary injunction and by the demurrer to the bill are, first, has the court jurisdiction of the subject-matter of the bill; and, if so, second, does the bill make a case for the relief prayed for?

Manifestly, if the first inquiry be answered in the negative, there is no occasion to proceed with a consideration of the second. I will therefore first address myself to the broad and important question whether the Circuit Courts of the United States possess jurisdiction to grant relief of the character prayed for in this bill, and as a preliminary it is necessary to inquire just what that relief is, and under what grant of jurisdictional power the aid of the Circuit Court is asked; for it is axiomatic that the inferior federal courts are courts of limited jurisdiction, possessing only those powers which have been conferred on them by Congress under the permissive power granted by the Constitution for their establishment. *U. S. v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259.

In the late case of *Kentucky v. Powers*, found in 201 U. S. 1, 26 Sup. Ct. 387, 50 L. Ed. 633, the same is expressed in these words:

"The subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and criminal, as may be authorized by act of Congress."

I take it for granted that there is no contention here that this court can derive any jurisdictional power by reason of the allegations of the bill to the effect that the threatened wrong complained of originated as the result of an illegal combination and conspiracy in restraint of trade, because the definite threatened injury is the filing of interstate joint rates under the provisions of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (*U. S. Comp. St.* 1901, p. 3154), as amended by Act June 29, 1906, c. 359, 34 Stat. 584 (*U. S. Comp. St. Supp.* 1907, p. 892), and I gather that the allegations to which I have referred were introduced as foundations for evidence tending or intended to show that the rates so proposed to be filed were unreasonable, as not proceeding from the necessities of the carrier for an increased rate, but imposed upon it against its will and by reason of the vis major of such combination. For the

purposes of this inquiry we need not consider whether such evidence would or would not be admissible upon the question of the reasonableness and bona fides of the rates proposed to be filed, because the question here is purely that of jurisdiction, and no relief is sought by the bill under the provisions of what is known as the "Sherman Act," nor could it be granted under the provisions of that act, were it directly so sought. *Minn. v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870; *Southern Indiana Express Co. v. U. S. Express Co. (C. C.)* 88 Fed. 659; *Id.*, 92 Fed. 1022, 35 C. C. A. 172. *Gulf, etc., R. R. Co. v. Miami Steamship Co.*, 86 Fed. 407, 30 C. C. A. 142; *Pidcock v. Harrington (C. C.)* 64 Fed. 821; *U. S. v. Atchison, T. & S. F. R. Co. (C. C.)* 142 Fed. 176.

We are remitted then, for the ground of the jurisdiction invoked by the bill, to one of two sources. Either it must have been granted by Congress under the general statutes conferring jurisdiction, or by the interstate commerce act itself. The subjects of civil jurisdiction embraced in the jurisdictional act of March 3, 1875 (18 Stat. 470, c. 137), were substantially the same as they are under the amendments of 1887 (Act March 3, 1887, c. 373, 24 Stat. 552) and 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]); but the act provided for a jurisdictional value of \$500, instead of \$2,000, as now required. Prior to the passage of the interstate commerce act no jurisdiction in respect to that subject could have existed by virtue of any special act, because Congress had not exercised its right to regulate that subject. It is also true that a suit having for its precise object the restraining of a carrier from filing a schedule of rates with the Interstate Commerce Commission could not have been brought under the general laws in any court prior to the passage of the interstate commerce act, because there was no such body as the Interstate Commerce Commission and there was neither opportunity for nor obligation upon a railroad company to file its rates anywhere.

Prior, then, to the passage of the aforesaid act, the theory of jurisdiction in a case seeking to prevent the enforcement of alleged unreasonable rates for transporting goods between any two points, whether within the limits of the same state or in two different states, was that of the inherent right of a court of equity to prevent the enforcement of excessive and unreasonable rates as against a suitor seeking its protection. The jurisdiction at that time did not arise under the Constitution or any law of the United States, and could not have existed in any inferior federal court save as it arose by reason of a diversity of citizenship existing between the parties, and in which case such court could, concurrently with the state courts, exercise the jurisdiction in equity exercised by the state courts to prevent a common-law injury for which there was no appropriate legal remedy or to enforce the common-law legal remedy for the violation of a common-law right.

But such suits in equity prior to the passage of the interstate commerce act were purely personal between the parties to the suit, and in no way affected the rights of third parties, or those of the de-



fendant transportation company in respect to third parties. For example, if defendant was enforcing a rate from Cincinnati to Chicago that A., a shipper, claimed to be unreasonable, and he brought a suit in equity to enjoin the enforcement of such rate against him, nothing in that proceeding at all interfered with the right of the defendant to enforce the rate against B. and all other shippers similarly situated, and hence the damage to the defendant was limited to the charges it had been enjoined from enforcing against A., and the means of recouping such damage might and probably would have been provided for by bond. On the other hand, if the chancellor concluded that the injunction should not be granted, or should be dissolved, his action in that regard did not preclude B., or any other shipper, from applying in any court of competent jurisdiction for like relief on his part to that prayed for by A. This was true because transportation by common carriers all stood upon the same footing, and no attempt had been made by Congress to regulate by statutory enactment the one branch thereof in respect to which section 8, art. 1, of the Constitution of the United States had provided that:

"The Congress shall have power \* \* \* to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

This power is manifestly a very extensive and important one as relates to commerce among the several states at the present time, but at the time of the adoption of the Constitution the instruments of such commerce were so meager that it was not considered important or necessary to enforce the power by legislation, and when it became apparent that the good of the public required such legislation the transportation interests had become so powerful that efforts in that direction were successfully opposed until the act of February 4, 1887, known as the "Interstate Commerce Act," was passed. During all this time the only checks upon the instruments of commerce, whether internal or interstate, were those imposed by the courts under their general powers to protect against wrong, and these checks the courts imposed, not in any attempt to regulate interstate commerce, but under their general powers to prevent wrong or to give damages for a wrong suffered, and their judgments and decrees were always limited to the matters and to the parties before them on the pleadings.

That this limited jurisdiction existed is held by the Supreme Court of the United States in which Mr. Justice White says in his opinion in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 436, 27 Sup. Ct. 350, 51 L. Ed. 557:

"It may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage, or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an

action may be maintained to recover the overcharge. 2 Kent, Com. 599, and note A; 2 Smith, Lead. Cas. (8th Ed., Hare & W. notes) pt. 1, p. 457."

It becomes important to determine what effect the passage of the interstate commerce law, with its amendments, has necessarily had upon this admitted jurisdiction, so far as that jurisdiction existed in relation to interstate rates. To properly examine that question I know of no better way to consider the intent and effect of that legislation than by glancing at "the old law, the mischief, and the remedy." As to the "old law," there was none, except the common-law doctrine already adverted to, the administration of which was necessarily confined within the narrow limits of redressing private injuries, or preventing them, upon a proper showing, by the injunctive powers of the court. The mischief of this condition was very apparent. Possibly the greatest evil to the public arose from the fact that no requirement existed for the publicity and uniformity of rates, thus enabling the carrier to discriminate between shippers with comparatively little danger of detection and consequent suit by the injured party. Another mischief was that no power existed to compel fair dealing toward the entire public, or to punish for a failure to so deal.

In *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 439, 27 Sup. Ct. 354 (51 L. Ed. 557), *supra*, Mr. Justice White, in discussing the causes that led to the passage of this act and the mischiefs remedied by it, says:

"When the act to regulate commerce was enacted, there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. *Parsons v. Chicago, etc., W. R. Co.*, 167 U. S. 447, 455, 17 Sup. Ct. 887, 42 L. Ed. 231, 234; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 275, 12 Sup. Ct. 844, 36 L. Ed. 699, 703, 4 Interst. Com. R. 92. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 494, 17 Sup. Ct. 896, 42 L. Ed. 243, 251. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers of the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, 5 Interst. Com. R. 391; *Id.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243."

The remedy for these evils provided by Congress was the act of February 4, 1887, with its amendments, commonly known as the "Interstate Commerce Act." By the ninth section of that act it was provided:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any District or Circuit Court of the United States of competent jurisdiction; but such person or

persons shall not have the right to pursue both of said remedies, and must, in each case, elect which one of the two methods of procedure herein provided for, he or they will adopt."

And by section 22 existing appropriate common-law and statutory remedies were saved.

In *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, the effect of both of these provisions was considered by the court, and it was therein held that the independent rights of individuals to obtain pecuniary redress under the provisions of Act Feb. 4, 1887, c. 104, § 9, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159)—

"must be confined to such wrongs as can, consistently with the context of the act, be redressed without previous action by the Commission; and the provision of section 22, that nothing therein 'shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies,' cannot be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the statute." Third point of syllabus.

It is conceded that this decision finally and conclusively denies the right of an individual to sue in any court to recover for an alleged overcharge, on the pure ground that the same was unreasonable per se, prior to a determination by the Commission of that fact, and it was conceded in the argument that by a parity of reasoning this court would have no jurisdiction to enjoin, prior to action by the Commission, the further enforcement of an existing rate on the ground that it was unreasonable, and that its enforcement would result in irreparable damage to complainant or give rise to a multiplicity of suits; but it is strenuously insisted that the same reasons do not apply where the relief sought is against the filing and enforcement of a schedule of rates not already filed, but notice of whose filing has been given by the carrier.

To that proposition I cannot assent. To do so would be to declare that a court may have an independent jurisdiction to prevent a threatened wrong when it would have no power to award reparation for the completed injury, a proposition utterly opposed to all ideas of natural justice and the powers of tribunals. To my mind the same reasoning which so clearly shows that the power sought to be exercised by the court in the *Abilene Cotton Oil Co.* Case was repugnant to the provisions of the act to regulate commerce applies with equal force to an attempt by the aid of the court, in an independent suit in equity, to prevent the filing of a schedule which it is made the duty of a carrier to file if he desires to change his rates. To hold otherwise would be to utterly deny to the Interstate Commerce Commission a power and duty primarily committed to it by Congress, viz., the power and duty to decide upon the reasonableness of rates, because the jurisdiction of the Commission cannot be exercised over unfiled rates.

By the act of June 29, 1906, amending section 6 of the interstate commerce act, it was provided, inter alia, that the Commission—

"may in its discretion and for good cause shown allow changes [in rates] upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting and filing of tariffs, either in

particular instances or by a general order applicable to special or peculiar circumstances or conditions."

I cannot conceive of a case in which the action of a court could exert a wider or more far-reaching effect in the way of invading the province of the Commission, or be more repugnant to the general scope and purposes of the act, than by issuing its injunction to prevent the filing of a schedule of rates with that body.

But it is suggested and pointed out in argument that the contentions of plaintiff have been practically sustained by eight courts or judges of the United States, and denied by only three of such courts or judges. Counsel for plaintiff cite *Macon Grocery Co. v. Atlantic Coast Line R. Co.* (C. C.) 163 Fed. 746, *M. C. Kiser Co. v. Central of Georgia Ry. Co.* (C. C.) 158 Fed. 194, *Jewett Bros. & Jewett v. Chicago, W. & St. P. Ry. Co.* (C. C.) 156 Fed. 160, *Northern Pac. Ry. Co. et al. v. Pacific Coast Lumber Mfrs.' Ass'n et al.* (C. C. A.) 165 Fed. 1, and the dissenting opinion of Judge Shelby in *Atlantic Coast Line R. Co. v. Macon Grocery Co.* (C. C. A.) 166 Fed. 219 et seq., as sustaining the jurisdiction of the court in a case like the present. On the other hand, they admit that the majority opinion in *Atlantic Coast Line R. Co. v. Macon Grocery Co.* (C. C. A.) 166 Fed. 206, and the dissenting opinion of Judge Ross in the case of *Union Pac. R. Co. v. Oregon & Washington Lumber Mfrs.' Ass'n et al.* (C. C. A.) 165 Fed. 13, are entirely adverse to the claim of jurisdiction in a case like the present one.

It might, perhaps, be sufficient for this court to say that the reasoning in the majority opinion in *Atlantic Coast Line R. Co. v. Macon Grocery Co.* (C. C. A.) 166 Fed. 206, and in the dissenting opinion of Judge Ross in 165 Fed. 13, accords with the view of this court more nearly than do any of the other cases cited. But I feel disposed to call attention to the fact that some of the cases apparently proceed upon a misapprehension of the powers of the Interstate Commerce Commission, or else upon a condition of facts totally unlike those existing in this case. Thus, in the *Kiser Case*, Judge Newman decided (158 Fed. 198) that:

"The court might properly enjoin carriers from establishing or increasing to an unreasonable rate, at the same time leaving the matter in such shape as that the Interstate Commerce Commission may ultimately determine whether the contemplated increase is just and reasonable."

The difficulty about such a jurisdiction is that it is utterly impracticable as applied to the present case. The Interstate Commerce Commission has been vested with no jurisdiction to determine whether a "contemplated" rate is reasonable or the reverse. Section 15 of the act, as amended June 29, 1906, limited the powers of the Commission to an investigation and action upon rates and charges "demanded, charged, or collected" by a common carrier, and could have no application to rates which had not yet been filed, but notice of whose filing had been given. So that Judge Newman's opinion is no authority for the power of injunction here invoked, but, on the contrary, the investigation of the question of reasonableness by the Interstate Commerce Commission could never occur if injunction prevented the filing of

the rates before that body. In the Jewett Case (C. C.) 156 Fed. 165, Judge Carland, recognizing this difficulty, says:

"It is only when upon complaint the Interstate Commerce Commission finds that a carrier is demanding, charging, or collecting rates in violation of law that this power to interfere with the rates arises. The carrier cannot be said to be demanding, charging, or collecting a rate until it has put the same into effect. It results that the Interstate Commerce Commission has nothing to do with the rates which are not in effect, or, in other words, which are not being demanded, charged, or collected by the carrier."

And upon the theory that, as the Interstate Commerce Commission cannot act upon a rate not in effect, a Circuit Court of the United States has jurisdiction to enjoin the filing and enforcement of an alleged unreasonable rate, if a proper case therefor is made, Judge Carland delivered his opinion to that effect, although dismissing the bill because it did not seek the court's determination of the alleged unreasonableness of the proposed rates. This opinion seems clearly to predicate the power of the court to determine the reasonableness of a proposed rate upon the failure of the interstate commerce act to provide that the Commission thereby created could suspend a rate pending investigation of its reasonableness. It may be freely admitted that this omission constitutes a defect in the interstate commerce act. In the Report of the Interstate Commerce Commission of 1908, at page 10, the following language occurs:

"In our last annual report attention was called to the fact that this Commission had no authority to restrain an advance in rates or a change in rule or regulation which imposes an additional burden. Railways may establish whatever interstate rates they choose. No proceeding can be begun before this Commission until the schedule establishing the rate has been filed. The order of the Commission, when made, cannot take effect in less than 30 days. If the investigation is to be one in reality as well as in name, if all parties are to be fully heard as they should be, several weeks, and usually several months, must elapse before a conclusion resulting in an order can be reached. Meantime the rate established by the carrier remains in effect. No carrier should be required to reduce its rates without a fair hearing. Neither, in our opinion, should the public be required to pay advanced rates without opportunity for a fair hearing. It would be easy to multiply instances and illustrations showing the confusion and discrimination which now exist. We renew our recommendation of one year ago that this Commission be given authority to restrain the advance of a rate or the change of a rule, regulation, or practice pending proceedings before it to determine the reasonableness of the advance of the change, and we earnestly call attention to the necessity for immediate action."

It is fundamental that defects in legislation can only be amended by the legislative power and it is not within the power of a court to extend its jurisdiction because the exigencies resulting from a piece of congressional legislation may seem to demand aid. That problem is for Congress alone. It is to be remembered, as already pointed out, that the power invoked in this case did not exist prior to the passage of the interstate commerce act; and if the grant of such power cannot be found in that act it does not exist.

The plaintiff in this bill seems to rely greatly in support of the jurisdiction here invoked upon the authority of that portion of the opinion of the Supreme Court of the United States in the case of Southern

Ry. Co. v. Tift, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, wherein occurs this language:

"In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions in view of our decision in *Texas & Pacific Railroad Company v. Abilene Cotton Oil Company*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, upon a different record than that before us. We are not required to say, however, that, because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates."

In most of the opinions cited by plaintiff to sustain the jurisdiction contended for, this passage has been the basis of the court's holding that the jurisdiction existed; and, stripped of all connection with its context, the dictum might seem to give encouragement to the view that it favored the existence of the jurisdiction. But, when coupled with the context, this idea is no longer tenable. Let us see what follows:

"The Circuit Court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the Commission, with its findings and conclusions, was presented to the Circuit Court, *and it was upon these, in effect, the decree of the court was rendered.* [Italics mine.] There was no demurrer to that petition, and the testimony taken before the Commission was stipulated into the case, and the opinion of the court recites that, 'with equal meritorious purpose, counsel for respective parties agreed that this would stand for and be the hearing for final decree in equity.'"

Now it was upon this record that the Supreme Court was asked to pass upon objections to the jurisdiction which, it says, upon a different record "might present serious questions"—upon a record in which the court granted no relief upon the original bill "prejudicial to appellants," a record into which was stipulated the testimony subsequently taken before the Interstate Commerce Commission upon a complaint made under the provisions of section 15 of the interstate commerce act. In view of all this, the Supreme Court proceeds:

"It was certainly competent for the appellees to proceed in the Circuit Court under section 16 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), and to apply by petition to the Circuit Court, 'sitting in equity,' for the court to hear and determine the matter 'as a court of equity,' and issue an injunction 'or other proper process mandatory or otherwise,' to enforce the order of the commission. We think that under the broad powers conferred upon the Circuit Court by section 16 and the direction there given to the court to proceed with efficiency, but without the formality of equity proceedings, 'but in such manner as to do justice in the premises,' and in view of the stipulation of the parties, recited in the decree of the court, the appellants are precluded from making the objection that the court did not have jurisdiction to entertain the petition and grant the relief prayed for and decreed."

After the above statement of the contents of the record in the Tift Case, and the view of the relief granted, I fail to see how anything in the opinion of the Supreme Court can be construed into implied approval of the doctrine that the Circuit Court of the United States has jurisdiction in advance of action by the Interstate Commerce Com-

mission to enjoin the filing or enforcement of rates alleged to be unreasonable. I conclude, therefore, that a proper construction of the act of February 4, 1887, forbids the exercise of jurisdiction in a case like the present, because it is inconsistent with the purposes of that act, as expressed therein and as construed and expounded by the Supreme Court of the United States in the leading cases of *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 436, 27 Sup. Ct. 350, 51 L. Ed. 553, and *Southern Ry. Co. v. Tift*, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124.

It follows, from what I have said, that the temporary restraining order heretofore awarded must be dissolved, and the bill dismissed for lack of jurisdiction and without prejudice; and it is so ordered.

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HOUSTON COAL & COKE CO. v. NORFOLK & W. RY. CO.

POWHATAN COAL & COKE CO. v. SAME.

(Circuit Court, W. D. Virginia. July 8, 1909.)

COMMERCE (§ 89\*)—INTERSTATE COMMERCE ACT—JURISDICTION TO ENJOIN ESTABLISHMENT OR ENFORCEMENT OF RATES.

A Circuit Court of the United States is without jurisdiction to enjoin the establishment of an interstate freight rate by a carrier, or to enjoin the enforcement of a new rate which has been published and filed, before its reasonableness and validity have been passed on by the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 89.\*]

Jurisdiction of federal courts of suits under interstate commerce act, see note to *Bailey v. Mosher*, 11 C. C. A. 318.]

In Equity. On demurrers to bills.

Vinson & Thompson, Chapman & Gillespie, Arthur B. Hayes, and Wm. A. Glasgow, Jr., for complainants.

Theodore W. Reath, Lucien H. Cocke, and John H. Holt (Joseph I. Doran, on the brief), for defendant.

MCDOWELL, District Judge. In the first of these cases the bill prays that the defendant be enjoined from filing, posting, or enforcing a proposed increased freight rate on coal from West Virginia to the "lake ports" in Ohio, alleged to be unreasonable, and for general relief. In the second case the bill prays that defendant be enjoined from establishing such increased rate, and, in the alternative, that, if not enjoined from establishing the increased rate, the defendant be enjoined from enforcing such rate until the Interstate Commerce Commission can act on the question of the reasonableness of the proposed rate. In both cases restraining orders were granted. In the Houston Case the defendant moves for the vacation of the restraining order, and in the Powhatan Case the complainant moves for a temporary injunction. Both bills have been demurred to.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It seems to me unnecessary to consider any other question than that of the jurisdiction of this court to grant the relief prayed for. The opinions of the Supreme Court in *Texas & Pac. R. Co. v. Abilene Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, and in *Southern Ry. Co. v. Tift*, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, do not seem conclusive of the questions here presented. In the former case the court had before it only the question as to the right of a shipper to recover at law for unreasonable freight charges, prior to action by the Interstate Commerce Commission. In the latter case the trial court had unquestionable jurisdiction (the Commission having acted and a petition under section 16 of the interstate commerce act [Act Feb. 4, 1887, c. 104, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165)] having been filed) before any decree prejudicial to the appellant was made, and the Supreme Court in effect merely announced that it was not in that case called upon to decide the question we are now considering. The first paragraph of the syllabus of the case is not justified by the opinion. Of the decisions of the subordinate federal courts it must be said that the current of opinion seems to have set in the direction of a denial of the jurisdiction. See *Jewett v. Railroad Co.* (C. C.) 156 Fed. 165; *Kalispell Lumber Co. v. Railroad Co.* (C. C.) 157 Fed. 845; *Kiser Co. v. Railroad Co.* (C. C.) 158 Fed. 193; *Macon Grocery Co. v. Railroad Co.* (C. C.) 163 Fed. 736; *Northern Pac. R. Co. v. Pac. Lumber Co.* (C. C. A.) 165 Fed. 1; *Union Pac. R. Co. v. Oregon Lumber Co.* (C. C. A.) 165 Fed. 13; *U. S. v. Railroad Co.* (C. C.) 122 Fed. 544; *U. S. v. Railroad Co.* (C. C.) 142 Fed. 176, 187; *Potlatch Lumber Co. v. Railroad Co.* (C. C.) 157 Fed. 588; *Railroad Co. v. Kalispell Lumber Co.* (C. C. A.) 165 Fed. 25; *Railroad Co. v. Macon Grocery Co.* (C. C. A.) 166 Fed. 206; *Columbus Co. v. K. & M. Ry. Co.* (C. C.) 171 Fed. 713.

The first question is as to the power of this court to enjoin the establishment of the proposed rate. It seems to me that the interstate commerce act shows that Congress intended to give to the Commission the sole jurisdiction to pass upon the reasonableness of a rate in the first instance. If this court assumes jurisdiction to enjoin the filing and posting of a rate, it is clear that no case for the action of the Commission could arise. A bill which prayed solely for a temporary, and finally a permanent, injunction forbidding a carrier to file and post an interstate rate, would be a pure injunction bill, in no sense ancillary; and before the permanent injunction could issue, at least, the court must investigate and determine the unreasonableness of the proposed rate. By necessary implication as it seems to me the language used in the act forbids that the court can have such power. Its exercise effectually and finally dispenses with action by the Commission. In *U. S. v. Railroad Co.* (C. C.) 122 Fed. 545, 546, it is said:

"In a recent case coming up from Kansas, the Supreme Court denied the right of the government to maintain a suit somewhat similar to this. But in that case the Interstate Commerce Commission had never granted a hearing, or made an order, in the matters involved. The Commission is the tribunal instituted by the government to inquire primarily into the fact as to whether discrimination exists. To it the shipper can bring his grievance.



Before it the railroads have a right to be heard. Until an inquiry is there made, and a finding and order had, the jurisdiction of a court of equity may not be invoked, because for the court to take hold at that primary point in the case would be to transfer the jurisdiction of the Interstate Commerce Commission—the jurisdiction to first inquire into the facts—to a court of equity. In practical application, it would abolish the Interstate Commerce Commission and devolve upon a master in chancery the preliminary inquiry into the facts. Because of this—though the reason is not stated by the court as I have stated it—the Supreme Court held that the suit thus before it could not proceed, except under the Elkins act subsequently enacted; but no opinion was expressed upon the right of the government to bring suit in cases where there had been a preliminary inquiry and finding by the Interstate Commerce Commission."

The case therein referred to is supposed to be *Missouri Pacific Ry. v. U. S.*, 189 U. S. 274, 282, 23 Sup. Ct. 507, 47 L. Ed. 811.

Let us now consider the power of the court to enjoin a carrier from enforcing a rate that has been filed and posted, but which has never been enforced. The theory on which such relief is asked is that the carrier will proceed to file and post the new rate, and that the court will merely enjoin the enforcement of the new rate until the Commission can act on the question of the reasonableness of the rate.

For argument's sake, and without considering the question, it is assumed that the federal Circuit Courts had equity jurisdiction, prior to the enactment of the interstate commerce act, to enjoin a carrier from enforcing an unreasonable interstate rate. Does not the act by necessary implication repeal the power? It seems to me that it does. If the new rate is filed and posted for the requisite period, such rate is "established." If enforcement of such rate is enjoined, what rate can the carrier enforce during the period of injunction? It is argued that the former rate can be used. But the filing and posting of the new rate establishes it, and a charge of a less rate is forbidden by the act, both as originally expressed and as amended. "When a schedule of rates is once established in the mode prescribed by the statute, a former rate is superseded and is no longer in existence." *Railroad Co. v. Kalispell Co.* (C. C. A.) 165 Fed. 25, 28. Obviously a power in the courts to enjoin the enforcement of a rate which has been duly established, prior to action by the Commission, is totally at variance with the expressed intent of the law.

Again, by Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1907, p. 900), the Interstate Commerce Commission is only given jurisdiction to pass upon the reasonableness of a rate after such rate has been "demanded, charged or collected." This language does not comport with an intent to leave in or give to the courts a jurisdiction to enjoin the enforcement of a rate which has been filed and posted; for, if such injunction be granted and obeyed, the new rate can never be demanded, charged, or collected. It was said in argument that the Commission had in an unreported ruling held that it had jurisdiction to inquire into the reasonableness of a rate prior to its enforcement; but on a careful reading of the statute I am unable to agree to the soundness of such a conclusion. I do not find in the act

that a carrier violates the law by merely filing and posting an unreasonable rate. The carrier may, by so doing, put itself in a position where it can do no business without violating the law; but until the carrier has not only established an unreasonable rate, but has demanded, charged, or collected such rate, it has not violated the act, and has not done such an act as gives the Commission jurisdiction to pass on the rate. Here, again, the expressed intent of the act is obviously at variance with an intent that the court shall have (or retain) a power to enjoin the enforcement of an established rate prior to action by the Commission, as the exercise of such power would dispense with and prevent action by the Commission.

Perhaps a word or so should be devoted to the clause in section 22 of the act preserving existing remedies at common law. Assuming, without so holding, that there was jurisdiction to enjoin the enforcement of an unreasonable rate, and that this clause refers to equitable remedies, still the decision in the Abilene Case, *supra*, makes it impossible to construe this clause according to the contention of complainants. If section 22 does not preserve an admittedly existing common-law right of recovering damages for excessive charges previous to action by the Commission, a fortiori this section does not preserve a disputable equitable right which nullifies the chief conception and intent of the act as a whole.

In the argument that the proposed action of the carrier is the result of a conspiracy to violate the interstate commerce act I can find no addition to the strength of the case of the complainants. As there is no jurisdiction to enjoin the enforcement of an unreasonable rate, the mere fact that the intent to enforce the unreasonable rate was born of a conspiracy does not alter the essential nature of the case. We still have a request that the court enjoin the enforcement of a rate said to be unreasonable prior to action by the Commission.

The argument based on Anti-Trust Act July 1, 1890, c. 646, 26 Stat. 209, 7 Fed. St. Ann. 336 (U. S. Comp. St. 1901, p. 3253), assumes the existence of a right in private individuals to invoke the power given the courts by section 4 of the act. The language used by the Supreme Court in *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 71, 24 Sup. Ct. 598, 48 L. Ed. 870, seems to destroy the basis for this argument. Again, it is a seemingly unanswerable argument against such assumption that if the power exists in individuals to enjoin the enforcement of a freight rate, previous to action by the Interstate Commerce Commission, the anti-trust act largely destroys the fundamental scheme of the interstate commerce act. It seems to me most improbable that Congress had any such intent; and the language used in *Elkins Act* Feb. 3, 1903, c. 708, 32 Stat. 847, 10 Fed. St. Ann. 170 (U. S. Comp. St. Supp. 1907, p. 880), and in the amended *Interstate Commerce Act* June 29, 1906, c. 3591, 34 Stat. 584, Supp. Fed. St. Ann. 168 (U. S. Comp. St. Supp. 1907, p. 892), seems to clearly show that such intent either never existed or has been abandoned.

The objections to the two bills at bar based on the failure to allege facts showing irreparable injury or the necessity of a multiplicity

of actions are undoubtedly of much strength. However, I have not thought it necessary to enter upon a discussion of these questions.

It follows, from what has been previously said, that this court is without jurisdiction to grant any relief whatever under either of the bills here.

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PACIFIC STATES SUPPLY CO. v. CITY AND COUNTY OF SAN FRANCISCO et al.

(Circuit Court, N. D. California. July 26, 1900.)

No. 14,811.

1. MUNICIPAL CORPORATIONS (§ 622\*)—QUARRIES—REGULATION—ORDINANCES.

A city ordinance, prohibiting the maintaining or operating of a stone quarry within the city limits, is invalid as an attempt to prohibit, rather than regulate, a legitimate business.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 622.\*]

2. MUNICIPAL CORPORATIONS (§ 594\*)—POLICE POWER—REGULATORY ORDINANCE.

Where a thing to be regulated by a city ordinance is of a character either inherently or by reason of its use calculated to endanger the health, safety, comfort, or welfare of the public, and the conditions and circumstances under which the danger arises are not susceptible of being foreseen and made the subject of uniform prescription and limitations, an ordinance regulating the same is not invalid for failure to prescribe such uniform limitations and prescriptions and leaving them to the discretionary determination of an appropriate board or officer.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 594.\*]

3. MUNICIPAL CORPORATIONS (§ 595\*)—BLASTING—REGULATION—POLICE POWER.

While blasting is not so inherently dangerous as to constitute a nuisance per se, its regulation within the limits of a populous city was nevertheless within the city's police power, and hence a city ordinance, prohibiting blasting within certain portions of the city, except under a permit to be granted by the board of supervisors, was a valid exercise of such power.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 595.\*]

4. INJUNCTION (§ 7\*)—SCOPE OF REMEDY—PUBLIC OFFICIALS—ARBITRARY ACTION.

Where city authorities arbitrarily refused to grant complainant a blasting permit under a valid city ordinance prohibiting blasting in a city without such permit, complainant's remedy was at law to compel the issuing of a permit, if the facts warranted it, and not in equity to restrain the city authorities from enforcing the ordinance.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 7.\*]

In Equity.

This is an application by the complainant for an injunction pendente lite to restrain the defendants, the city and county of San Francisco and its chief of police, from interfering by arrest or otherwise with the officers and employes of the complainant in operating a rock quarry and rock crushing plant within the municipality.

So far as material to be stated, the amended bill alleges, in substance: That at all times covered by its allegations the complainant was in posses-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sion of certain lands therein described situated within the corporate limits of the city and county of San Francisco, holding the same under a 10-year lease from April 1, 1907, upon which is situated a deposit or quarry of rock of value for use and sale for use in the construction of buildings and other designated purposes, and for which there was great demand, with the right in complainant to extract, use, and dispose of the same for such purposes; that upon said property complainant has an extensive plant, consisting of all necessary machinery and appliances for the removal and crushing of such rock; that but for the defendants' acts and interferences complained of complainant's rights under said lease would be of a value of over \$50,000, and its said plant of a value of over \$28,000; that the value of the matter in controversy greatly exceeds the sum of \$2,000; that it is necessary to the successful and proper operation of said quarry that blasting powder or dynamite be used in blasting thereon to detach and remove the rock therefrom, and for that purpose to keep and store thereat a sufficient quantity of such explosives for such requirements; that the rock crushing plant cannot be successfully operated otherwise than by the use of steam, electric, or other motive power; that the operation of said quarry and said plant by the means aforesaid can be safely carried on without danger, inconvenience, discomfort, or injury to persons or property; and that at the time of the interference complained of, and for some time prior thereto, complainant was working and had worked said quarry and blasted and removed the rock therefrom and crushed the same on said premises without causing any such injury or damage.

It is alleged: That in October, 1908, the defendants wrongfully and unlawfully and without any authority or right so to do notified complainant that it would not be permitted to blast in said quarry, or drill holes therein, or to crush rock thereat, or to "in any way" operate the same; that, if complainant should attempt to further carry on such work, defendants would arrest the officers, employes, and servants of the complainant and all persons connected in any way with the operation of said quarry, and would make such arrests upon each and every occasion that any attempt should be made to so operate the said quarry; that defendants stationed and maintained policemen at said quarry to prevent the operation of the same, and arrested the servants of the complainant for drilling in said quarry, and prevented and still prevent complainant, its officers, servants, and employes, from "in any way" operating the said quarry or rock crushing plant; and that by reason of such acts of defendants the complainant is wholly deprived of the use and enjoyment of its rights under its lease of said property and the use of its said plant.

It is alleged: That the defendants justify their refusal to permit the complainant to blast, drill, or crush rock at the said quarry under four certain ordinances of the city and county of San Francisco which are set out in full in the bill, the material part of the first of which, known as the "blasting ordinance," makes it a misdemeanor "for any person, firm, or corporation to explode or cause to be exploded, any powder or other explosive material for the purpose of blasting, or drill a hole, or make a crevice, for the purpose of inserting any powder or other explosive material for the purpose of blasting, or insert in any hole or crevice any fuse or any powder, or other explosive material for the purpose of blasting, without first obtaining from the board of supervisors a permit so to do, which permit must specify the location of the blast or blasts for which it is "anted," and providing for the giving of a bond by the applicant before receiving a license, for the protection of any person or property injured by the acts done under such permit. The second makes it a misdemeanor for any person, company, or association to maintain or operate any rock or stone quarry within certain designated portions of said city and county, within which designated territory it is alleged that complainant's quarry is situated. The third makes it a misdemeanor for any person, company, or association to establish, maintain, or use any rock crushing machine "operated by steam, gas, electric, vapor, or other motive power," within a certain designated portion of said city and county, within which territory, it is alleged, the complainant's quarry and plant are situated. And the fourth makes it a

misdeemeanor for any person, firm, company, or corporation "to manufacture, or cause to be manufactured, or bring or cause to be brought into, or receive or keep or store, or suffer to remain within the limits of the city and county of San Francisco, any blasting powder, hercules or giant powder, nitroglycerin, daulin, dynamite, or any other explosive liquid or material or compound, having an explosive power greater than that of ordinary gunpowder," except within a certain designated portion of said city and county, without which designated territory, as alleged, complainant's quarry is situated.

As to the first of the ordinances above referred to, it is alleged: That it is contrary to section 1 of the fourteenth amendment to the Constitution of the United States, and arbitrarily and unlawfully interferes with the use of said property by complainant, and with the lawful occupation of complainant in working the same, and imposes unusual and unnecessary restrictions upon such lawful occupation, in that it contains no regulations, rules, or conditions whatsoever for the granting of a permit to do any of the things prohibited thereby, but leaves the question of granting such permit to the arbitrary discretion and determination of the board of supervisors of said city and county, and does not admit of the doing of any of the said prohibited acts by all citizens alike who will comply with certain prescribed regulations, rules, or conditions. That ever since it was enacted it has been, and still is, applied and administered by defendants with an unequal hand and with unjust and illegal discrimination between persons in similar circumstances, material to their rights, in that the board of supervisors of said city and county has granted, and still does grant, permits for the doing of all said prohibited acts in various parts of the city and county, and in locations where such acts cannot be done as safely and as free from danger as regards the interest and welfare of persons and property as the same can be done at the quarry of complainant; a number of specific instances of the granting of such permits to parties other than the complainant for the carrying on of like operations being set forth in the bill. And it is alleged that by reason of the character of said ordinance and the arbitrary, unjust, and discriminating manner of its enforcement, it unlawfully abridges the privileges and rights of complainant as a citizen of the United States, deprives it of its property without due process of law, and denies it the equal protection of the law, contrary to section 1 of the fourteenth amendment of the Constitution of the United States. Similar allegations, so far as pertinent to their terms, are made as to the illegality of and the arbitrary and unequal manner of administering each of the other ordinances referred to.

It is further alleged: That notwithstanding the invalidity of said several ordinances complainant, after the commencement of the interferences alleged, in order to prevent a repetition of the same and avoid the necessity of resorting to a court of equity, filed a petition with said board of supervisors setting forth the location of its quarry, and its situation with reference to other surrounding property and other proper facts in relation thereto tending to sustain complainant's right to a permit to operate the same and requested the said board to examine said quarry and inspect the manner of working the same by complainant and to thereupon grant a permit to operate the same; "but that the said board of supervisors arbitrarily and unreasonably refused to consider the said petition or to allow your orator to show it the manner in which it proposed to drill holes, blast rock, and crush rock at said quarry, and arbitrarily and unreasonably refused to consider the rights of your orator in the premises or to grant your orator any permit to operate the said quarry." And it is alleged that, unless defendants are restrained from the acts and interferences complained of, they threaten to and will continue to prevent the complainant, its officers, employés, and servants, from operating the said quarry, and will thus entirely deprive complainant of the use and enjoyment of its property. An injunction both preliminary and final is prayed.

In response to the order to show cause, defendants appeared, by the city and county attorney, and demurred to the bill on several grounds, including that of want of equity, and likewise presented a large number of affidavits in opposition to the granting of the writ. These latter having been answered

by the complainant, the matter has been argued and submitted, both upon the demurrer and upon the merits of the application.

Walter H. Linforth and Samuel M. Shortridge, for complainant.

Percy V. Long, City and County Atty., and Jesse H. Steinhart, Asst. City and County Atty., for defendants.

VAN FLEET, District Judge (after stating the facts as above). As to the merits of the application, while I may say in passing that, in view of the counter showing made by defendants, I am satisfied the court would not be justified in granting a preliminary writ, I do not feel called upon to discuss that feature of the case, since in my judgment the questions raised by the demurrer cut deeper and render it necessary to dismiss the bill as not stating a case for equitable relief. The sufficiency of the bill turns upon the question whether the ordinances under which defendants have justified for the acts complained of show a valid exercise of the police power by the municipal authorities; not necessarily that all those ordinances are valid, but such one or more of them as may be essential to sustain the action of the authorities in stopping the work which complainant was engaged in at the time of the interference, and which it claims the right to prosecute. It is not material, under the case made by the bill, that the ordinance undertaking to prohibit the maintaining or operating of a rock quarry may be void as beyond the power of the municipality to enforce. If the justification of the acts of defendants rested upon that ordinance alone, it may be admitted that it would fail, since it is obvious, as held by the Supreme Court of California, that the ordinance is void as an attempt to prohibit, rather than regulate, a perfectly legitimate business. *Ex parte Kelso*, 147 Cal. 609, 82 Pac. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178. But while the bill alleges in terms that defendants' acts have prevented and will prevent complainant from "in any way" operating its quarry, the several averments of the bill taken together show that the work stopped by defendants was the operation of the quarry by means of blasting with explosives, and that this is the only agency through which complainant has attempted to operate its quarry, or by which the rock thereon can be successfully extracted. Nor is it material to inquire as to the validity of the ordinance prohibiting the maintenance or operation of a rock crushing machine in the part of the city in which complainant's property is located, since the bill discloses that the right to operate that feature of its property is only claimed by or valuable to complainant as an incident to and in connection with its right to operate its quarry by the means aforesaid; that without the latter right the former is of no material consideration. It results therefore that the only material inquiry presented is as to the validity of the ordinance prohibiting blasting, since, if complainant cannot employ that method in operating its quarry, the right to keep or store the explosives prohibited by the last of the ordinances pleaded is of no value or concern to it.

These considerations are recognized by complainant in its presentation of its case. At the threshold of its brief, it is said:

"Assuming, for the purpose of this point, as we must, that all of the ordinances under which the defendants justify their right to interfere with the

operation of the quarry are invalid, the case presented by the bill, so far as this point is concerned, is simply one to prevent the municipality and its officers, under the guise of invalid ordinances, from interfering with the complainant's right of property, and from depriving the complainant of such rights of property and utterly destroying the same."

This proposition being true, the converse of it follows, that if either one of the ordinances justifies the acts of defendants, and that regulation is found to be valid, the complainant must fail, and a consideration of the others becomes immaterial.

In pursuance of this theory, the stress of the argument by both parties is devoted to the question as to the validity of the so-called "blasting ordinance." That this ordinance embodies a perfectly proper and valid exercise of the police power I entertain no doubt. No question is made but that the defendant municipality is invested under the Constitution and laws of the state with competent and plenary power to make and enforce all suitable and proper regulations of the kind, not in conflict with general laws, deemed necessary for the protection of the health, safety, and well-being of its inhabitants; but the sum and substance of complainant's objections to this particular ordinance, as indicated by the averments of the bill and contended for in argument, are: First, that the ordinance prescribes no fixed or uniform rules or regulations under which all applicants alike may be awarded the privilege of engaging in the occupation to which it relates, but leaves the determination of the question whether a permit shall be granted in any instance to the absolute will and arbitrary discretion of the board of supervisors without any controlling limitation whatsoever, which it is contended is in excess of a proper exertion of the police power and renders the ordinance void upon its face; and, second, that, even if valid in form, the ordinance is void because of the partial and arbitrary manner in which, as alleged in the bill, it is administered and enforced.

It is obvious to my mind that the first of these objections ignores the nature and character of the business or operations with which this ordinance undertakes to deal. It is quite true that where the state undertakes to regulate a business or thing lawful in itself and not ordinarily obnoxious or hazardous to public health, safety, or comfort, and which may be usually and ordinarily done or carried on without harm, under regulations common to all in like circumstances, and which circumstances may be readily foreseen and provided for by the lawmaking power, a by-law or ordinance intended to regulate such business or act must in order to be valid keep within those limitations; but where the thing regulated is of a character, either inherently, or by reason of the agencies necessary to be employed, that the prosecution of the business or doing of the act under certain conditions and circumstances is calculated to endanger the health, safety, comfort, or welfare of the public, and those conditions and circumstances are not in their nature susceptible of being foreseen and made the subject of uniform and common prescription, then those limitations may be departed from, and the right to the prosecution of such an enterprise or performance of such an act may be competently left by the lawmaking body to the discretionary determination of some appropriate board or officer, without endangering the validity of the regulation.

The ordinance in question obviously, as it seems to me, falls within the latter category, and in no way transgresses the constitutional limitations urged against it. While blasting is not perhaps so essentially and inherently dangerous under all circumstances as to constitute a nuisance per se, it is nevertheless, by reason of the necessity of employing the agency of high explosives, universally recognized as a work which, under certain conditions and surroundings, may be and is attended by great danger and hazard to people and property in the near vicinity of its prosecution; and it is quite obvious that, as applied to a thickly populated district such as is comprised within the greater part of the territory of the city and county of San Francisco, it would be impossible for the city authorities to foresee and prescribe by fixed rule the conditions under which, and the district within which, the work could in all instances be permitted with safety. Under such circumstances the work must either be entirely prohibited, or, as in this instance, the discretion lodged in some proper functionary to determine as occasion arises under what circumstances and in what particular localities it may, with due regard for the rights of others, be permitted to be carried on; and but for the right so to provide no adequate provision could, in many instances, be made for the protection of the rights of the public.

The principles which uphold such regulations are well recognized and thoroughly established, and have been applied not only to by-laws and ordinances regulating the industry here involved, but to many others of a kindred character; and regulations of this character have been uniformly upheld as not obnoxious to the objection that they in any just sense infringe upon the constitutional provisions as to the rights of property here invoked.

In *Commonwealth v. Parks*, 155 Mass. 531, 30 N. E. 174, the Supreme Judicial Court of Massachusetts sustained a municipal ordinance of precisely similar import to that here involved, prohibiting blasting within the city of Somerville without the written consent of the board of aldermen, as being fully within the police power of the state, conferred by proper legislative enactment upon the municipality; and the court, speaking through Mr. Justice Holmes (now an associate justice of the Supreme Court of the United States), in response to objections against the constitutionality of the regulation of like character to those here urged, say:

"It is settled that within constitutional limits not exactly determined the Legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by so doing it affects the use or value of property. *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560. It is still plainer that it may prohibit a use of land which the common law would regard as a nuisance if it endangered adjoining houses or the highway, and the Legislature may authorize cities and towns by ordinances and by-laws to make similar prohibitions. *Salem v. Maynes*, 123 Mass. 372, 374; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. Furthermore, what the municipal body may forbid altogether it may forbid conditionally, unless its written permission is obtained beforehand. We see nothing in *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464, or *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, and *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, to



make us doubt the correctness of the decision in *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860. Nor do we think it matters that the permission required is that of the aldermen, and not that of the whole city council.

"In view of the foregoing principles and decisions, we are of opinion that the power, when deemed for public safety, to prohibit blasting rocks with gunpowder without written consent, is among the powers given by Pub. St. c. 27, § 15."

And it was held that the prohibition was not such a taking of property as to be beyond the police power, nor a trenching upon the rights of ownership to such an extent as to necessarily require compensation.

In the case of *In re Flaherty*, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529, the Supreme Court of California, having under consideration a municipal ordinance forbidding the beating of drums in the traveled streets of a city without the permission of the president of the board of trustees of the municipality, held it to be a valid exercise of the police power, and in discussing the principal objection here made it is said:

"But the point urged by petitioner is that the ordinance is void because it gives a certain officer authority to give permits to beat drums on special occasions, and this position is the only one which needs examination. It is contended that the clause authorizing a permit is partial and oppressive because it gives too much power to the president of the board, and is violative of general constitutional principles against abridging the privileges of citizens, depriving a person of his rights without due process of law, denying him the equal protection of the law, etc.

"The continuous or daily beating of drums on the streets of a city would be an intolerable nuisance, endangering the safety of teams and the occupants of vehicles drawn by animals, as well as of pedestrians liable to be injured by runaways, and stunning the ears with din so constant as to be almost insufferable. On the other hand, there is usually no objection to such noises on a few special occasions, either when there are patriotic celebrations generally participated in by all the people, or processions of a part of the people united in civic societies, political parties, etc. These occasions are comparatively few and usually well known, so that people are prepared for them; and the processions and drums are generally preceded by policemen who give notice of the approaching uproar. But how can these occasions be provided for? By an ordinance which shall anticipate and state in detail beforehand every occasion on which the noises may be made? Such a thing is practically impossible. No human foresight could conjure up all the circumstances under which the people might want a band (with a drum) on the streets. It would not do to name legal holidays alone; that, for obvious reasons, would be too narrow a provision. Neither would it do to single out, in addition to legal holidays, certain other enumerated days, as, for instance, the first Monday of every month. The president of the United States, or some other distinguished man, whose advent should be celebrated with drums might come on Tuesday. Neither would it be possible to schedule the kinds or characters of occasions of which drumbeats would be a necessary part. And so the practical result of petitioner's contention is that all persons must be allowed to beat drums on all occasions as they may choose, or no person must be allowed to beat a drum on any occasion whatever.

"In dealing with this and similar questions—such as repairs of wooden buildings within fire limits, carrying concealed weapons, using public buildings and grounds, ringing bells on buildings where many operatives are employed, haranguing on the streets of lecturers, preachers, etc., singing or playing of musical instruments on the streets, and the like—our federal, state, and municipal governments have always recognized the practical impossibility of providing in advance for proper exceptional cases, and the necessity of giving to a public officer some discretion in the premises; and

laws and ordinances based on that principle have nearly always been upheld when subjected to judicial test."

In *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 310, the objection to an ordinance of the city and county of San Francisco prohibiting the alteration or repair of any wooden building within certain designated fire limits, without permission in writing signed by a majority of the fire wardens, and approved by a majority of the committee on fire department and the mayor, was that the regulation was beyond the legislative power of the municipal government or the state in that it was unreasonable, oppressive, and not general in its operation; that it was an unwarrantable delegation of power to the officers therein named and attempted to grant absolute power, which might be used arbitrarily to the advantage of favorites, and to the prejudice of others, and denied to petitioner the equal protection of the law and deprived him of his property without due process of law, in violation of the fourteenth amendment of the federal Constitution. In discussing this objection it is there said:

"There would therefore be no doubt as to the validity of the section of the ordinance under review if it were not for the provision that certain officers may grant permissions to make repairs. It is clear, however, that a literal compliance with a regulation prohibiting the repairing of a wooden building might work, in some instances, useless hardships. The repair of a leaking roof or broken window would be necessary to the comfort and health of a family, without enhancing the danger which the framers of the ordinance sought to provide against; and repairs of a more extensive character might be made to particular houses, standing in particular localities, without increasing the fire risks; and it is equally clear that no general rule could be established beforehand that would meet the emergencies of individual cases. Therefore the power to give relief in particular instances is conferred on certain officers, and it is not to be presumed that they will exercise it wantonly, or for purposes of profit or oppression. Neither is the granting of permissions in particular instances to be considered as the taking away of any rights from those to whom such permissions are not given. The latter would be in no better position if such permissions were given to none, or if there was no power to give them at all."

The same principles have been upheld in their application to ordinances relating to the keeping of swine or dairies in cities (*Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860; *St. Louis v. Fischer*, 167 Mo. 654, 67 S. W. 872, 64 L. R. A. 679, 99 Am. St. Rep. 614; *State, etc., v. Mead*, 71 Mo. 272; *St. Louis v. Howard*, 119 Mo. 47, 24 S. W. 772); the erection and repair of buildings within certain municipal limits (*Commissioners of Easton v. Covey*, 74 Md. 262, 22 Atl. 266; *Hine v. City of New Haven*, 40 Conn. 478; *Ex parte Fiske*, supra); the beating of drums or sounding other musical instruments in public places (*Commonwealth v. Davis*, 140 Mass. 485, 4 N. E. 577; *In re Flaherty*, supra); prohibiting the storing or keeping of explosives in cities (*Hays v. Village of St. Mary's*, 55 Ohio St. 197, 40 N. E. 924; *Foote v. Fire Department*, 5 Hill [N. Y.] 99; *Hazard Powder Co. v. Volger*, 58 Fed. 152, 7 C. C. A. 130); and many other subjects not necessary to be enumerated. These considerations are, I think, conclusive of the validity of the ordinance here involved. It is true that counsel for complainant refer to some cases which at first reading seem to some extent to support the view advanced by them; but most of those cases can be distinguished upon much the same grounds as will

oe found aptly stated in *Ex parte Flaherty*, supra, and those which cannot I do not regard as supported either by the better reasoning or the weight of authority.

As to the second objection urged, I do not regard the allegations of unfair and arbitrary action of the city authorities in administering the ordinance, upon which this objection is based, as adding anything of substance to the bill in making a case for equitable relief. The ordinance being a valid regulation, however flagrantly partial its administration may be, the remedy is not in equity to restrain the city authorities from enforcing it, but at law to compel the issuance of a permit if the facts warrant it. *Mutual Electric Light Co. v. Ashworth*, 118 Cal. 1, 50 Pac. 10. The facts alleged do not, in my judgment, bring the case within the principles of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. The ordinance there involved was shown to have been aimed at a particular class—the Chinese—and practically without any purpose on the part of the authorities at its inception of administering it fairly and impartially toward all who stood in the same relation to its subject-matter.

The application for an injunction will be denied, the demurrer sustained, and the bill dismissed.

## BERMAN v. SMITH.

(District Court, N. D. Georgia, W. D. July 31, 1909.)

1. BANKRUPTCY (§ 295\*)—OFFICERS OF BANKRUPTCY COURT—MISCONDUCT—ACTIONS.

An action may be brought in the state courts to recover damages for wrongful acts of officers of the bankruptcy court entirely beyond their authority or duty to the prejudice of third persons.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 295.\*]

2. BANKRUPTCY (§ 295\*)—ACTIONS—JURISDICTION OF STATE COURT—INJUNCTION.

Plaintiff's husband having filed a voluntary bankruptcy petition, defendant was appointed trustee, and, ascertaining that there was danger of plaintiff and her husband removing assets without the state, defendant seized certain trunks, furniture, etc., at the direction of the referee. On opening the trunks he found them to contain wearing apparel and a man's wallet containing \$1,940 in cash. This he kept, but returned the balance of the articles in the trunks to plaintiff, who thereafter brought three actions in the state court against him, one to recover the \$1,940 as money belonging to her, which defendant was charged to have converted, another for the value of household and kitchen furniture of the value of \$1,000 taken by the trustee and alleged by plaintiff to be owned in her own right, and the third to recover \$10,000 for damages sustained from alleged misconduct of the trustee in seizing such property, etc. *Held*, that the acts of the trustee in so far as the property taken was concerned were in his official capacity, and hence he was entitled to an injunction restraining the prosecution of such suits, but not as to the action for damages for alleged abuse of authority.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 295.\*]

Hawes & Pottle and Jesse W. Walters & Son, for plaintiff.  
Victor Smith, for defendant.

NEWMAN, District Judge. On December 30, 1909, Morris Berman, of Blakely, Early county, Ga., filed his petition in voluntary bankruptcy in the clerk's office of the United States court. On February 19, 1909, H. G. Smith was duly appointed trustee of the bankrupt's estate. On March 22, 1909, Mrs. Fannie Berman, alleging herself to be the wife of Morris Berman, the bankrupt, presented to the judge of the District Court a petition, in which she set out: That in January, 1909, Morris Berman was duly adjudged a bankrupt by the bankruptcy court of the Northern district of Georgia, upon a voluntary petition filed by said Morris Berman, and that one H. G. Smith was appointed trustee for said bankrupt; that said H. G. Smith, on March 20, 1909, without any lawful warrant or authority of law, entered the premises of petitioner and her husband, and forcibly took possession and custody of \$1,940 in money belonging to petitioner, and to which the bankrupt had no title or claim of title. She alleges that \$1,000 of this amount was given to her as a wedding present several months ago. In proof of the same she holds, and will exhibit to the court, a canceled voucher drawn upon the bank by her relatives who made her a wedding present of this sum, and she likewise is prepared to prove that said money was withdrawn by her from the bank and retained in her possession in the form of currency until such time as she would have a need for the same. The remainder of the sum of \$1,940 was made up of money accumulated by her prior to her marriage, as a clerk in various department stores in Birmingham, Ala., and no part of said sum ever became the property of the bankrupt.

She further alleges that on March 20, 1909, H. G. Smith, without any order from the court of bankruptcy, and without any authority whatever, forcibly entered the premises and residence of petitioner and her husband in Blakely, and took possession and control of all the property contained in said dwelling, without reference to the ownership of said property or its character; said property consisting of household and kitchen furniture, wearing apparel of petitioner and her infant child of two months old, and various articles of personalty belonging to petitioner, consisting of toilet articles and articles of the like nature, suitable only for use by a woman. She alleges that all of the articles and property so taken by the trustee were her property, except certain articles of household furniture, which the bankrupt had scheduled as a part of his assets. Many of the articles so taken were wedding presents made to petitioner upon her marriage to the bankrupt. Petitioner says she apprised the trustee of all these facts, pointing out to him the property which she claimed as her own, and importuned him to at least leave her in possession of the wearing apparel and articles of personalty such as were necessary for herself and her infant, and as to which it was manifest the bankrupt had no title; but in violation of her rights, and to her great mortification and inconvenience, the said trustee took possession of practically everything in said house except the clothing upon petitioner and her child, and turned them out of the home, locked the door, and barred the windows, and denied her access to her home.

Petitioner says that she is preparing to file in the court of bank-

ruptcy her claim to the household goods and other articles of property mentioned, but is apprehensive that H. G. Smith will attempt to make disposition of the property unless restrained by the court, and that she and her infant child are suffering great distress and mortification from their deprivation of necessary articles of wearing apparel and other personalty needful for their welfare.

In reference to the \$1,940, she says: That H. G. Smith has commingled it with his other assets by depositing it to his credit in the First National Bank of Blakely, and that therefore she is unable to assert her claim to the specific money in the court of bankruptcy, and can therefore obtain no relief in this respect in said court; that she is about to file in the city court of Blakely a suit to determine and fix her title to this money, so that she may have the proper basis upon which to seek necessary relief in the court of bankruptcy; and that, unless his court will enjoin H. G. Smith from paying out and distributing the money to the creditors of the bankrupt until petitioner can set up and establish her title in the proper forum, she is in danger of sustaining great loss and of being deprived of said money. Whereupon she prays that Smith be enjoined from paying out, except by order of this court, the sum of \$1,940, to which she claims title, until she can have the opportunity of having the question of title set up and determined, and that the said H. G. Smith be enjoined from interfering with petitioner in the use, occupancy, and enjoyment of her home in the city of Blakely, and the necessary articles of wearing apparel, household furniture, and other property in said dwelling which are essential to the needs of petitioner and her infant child. This was sworn to by petitioner.

On March 22, 1909, the court made an order as follows:

"Upon reading and considering the foregoing petition, it is ordered that the defendant, H. G. Smith, trustee, be and he is enjoined and restrained as prayed in the petition, until the matters to which said petition relates can be brought before and passed on by B. T. Castellow, the referee in bankruptcy, and heard and determined; all of said matters being hereby referred to said referee to be passed on by him as such referee."

On March 22, 1909, Mrs. Fannie Berman brought suit in the city court of Blakely, as follows:

"The petition of Fannie Berman respectfully shows: First, that H. G. Smith resides in said county; second, that on March 20, 1909, the said H. G. Smith, forcibly and without any warrant or authority of law, took possession of the sum of \$1,940 in currency, being lawful money of the United States, and of the value of \$1,940, which said sum of money belonged to your petitioner. Third, that, after having so taken possession of said money of your petitioner, the said H. G. Smith deposited the same in the First National Bank of Blakely, where it has become commingled with the other funds of the said bank, so as not to be distinguishable from other money of said bank. Fourth, that for the reason just mentioned petitioner is unable to recover the specific money so wrongfully and fraudulently taken possession of by the said H. G. Smith, but petitioner claims the right to recover from the said defendant the value of said money on said date, March 20, 1909, which she alleges to have been \$1,940, besides interest thereon at 7 per centum per annum from said date, when petitioner's said money was wrongfully converted to the use of the said defendant."

She then prays process.

On March 25, 1909, Mrs. Fannie Berman brought another suit in the city court of Blakely, against H. G. Smith, alleging: That he was in possession of certain lot of household and kitchen furniture, and other articles of personalty located in a dwelling house on River street, in the city of Blakely, being the same dwelling house formerly occupied by petitioner and her husband under a contract of rental; said articles being more fully described in an itemized statement thereof, attached to the petition as an exhibit. That she is the owner in her own right of each and every article of personalty described in said exhibit. That the value of said articles of property is \$1,000. That H. G. Smith unlawfully retains possession of said articles of personalty and refuses upon demand to deliver the same to petitioner. And then the following:

"Petitioner disclaims any purpose by the filing of this suit, to recover from the said H. G. Smith the property described in this petition, but here and now elects only to recover the value of said property as alleged in this petition."

Whereupon she prays process.

On the same day on which the latter suit was filed, March 25, 1909, Fannie Berman brought another suit against H. G. Smith in the city court of Blakely for \$10,000 damages. In this petition she sets out the fact of her husband having filed a voluntary petition in bankruptcy, having been adjudged a bankrupt, and having scheduled as his sole assets a stock of merchandise in the city of Blakely, and household and kitchen furniture of the value of \$150 and alleges the fact set out in the two foregoing suits. She then alleges that:

"On the said date, March 20, 1909, the said H. G. Smith without having procured any order from the court of bankruptcy, or from any other court, came to your petitioner's home as aforesaid, and, after having invaded her said home in the manner above set forth, announced to her his purpose and intention of putting petitioner and her infant child of two months of age out of said house, further announcing that he was in possession of said premises, and that petitioner and her infant child could no longer remain therein, and in pursuance of said purpose the said H. G. Smith directed the servant of your petitioner, who was ordering over the telephone food for dinner, to desist from ordering such food, and to get out of the house. Thereafter the said Smith came to the door of the private bedroom of your petitioner, and while her husband was still absent from her home, and petitioner thereupon confronted him at the door and inquired of him by what right or authority he had to thus invade the privacy of her home. And in response to said inquiry the said Smith informed your petitioner that he was acting under his authority of trustee in bankruptcy of her said husband, and that he had been instructed to take over the possession and control of all of the property contained in said dwelling and to deprive petitioner and her husband and her infant child of the use and possession of the said home which had been rented by petitioner's husband from the said R. H. Stuckey. Your petitioner then demanded that the said Smith exhibit to her his authority for the performance of the said acts, and he failed and refused to exhibit any authority issuing from any court whatever, and your petitioner here and now charges that he had no such authority of any kind or character. Your petitioner then informed the said defendant that a certain trunk which she pointed out to him, and certain articles of household and kitchen furniture, crockeryware, silverware, wearing apparel, and various other articles of personalty which the said Smith had announced his intention of taking as such trustee, were not the property of the said bankrupt, but were the property of petitioner, nearly

all of which had been given to her by relatives and friends as wedding presents upon her marriage to the said Morris Berman upon May 14, 1907, and the remainder of the property not so given to petitioner she had purchased with her own private funds. Whereupon the said defendant Smith remarked that, notwithstanding such articles of personalty might belong to petitioner, he proposed to take possession of them and put petitioner and her said infant out of their home."

She then sets out the fact that, while she was talking with said Smith, her husband, accompanied by his counsel, came to the house, and thereupon counsel for petitioner and her husband inquired of Smith by what right or authority he proposed to commit the acts hereinbefore set forth. Thereupon defendant asserted that he had no written authority from any court authorizing him to perform said acts, but it was his purpose to do the things hereinbefore set forth in this petition without such authority.

She then alleges: That he cursed her husband, and said: "This is my house and not yours." That she pleaded with Smith with tears in her eyes not to take the wearing apparel of herself and her child, and that, notwithstanding this, he took possession of the wearing apparel of both petitioner and her infant child. She alleges that her trunk was taken to a public place in the city of Blakely and opened, and Smith took out the private articles of wearing apparel belonging to said petitioner and her infant, including underclothing and articles of a like nature, and spread them out on the floor and called to witness this disgraceful scene a number of men who lived in Blakely, at which time Smith indulged in various insolent and disgraceful remarks in reference to petitioner's property in the hearing of said bystanders. That, in addition to this, there was contained in the trunk a small box containing the sum of \$7.50 in money which she had deposited therein from time to time for the use and benefit of her child.

She alleges: That she is blameless in all the actions referred to; that Smith had no reason for the commission of any of the tortious acts above described; that she has sustained actual damages in the sum of \$1,000 on account of said tortious acts; and that defendant is liable to her for said acts. She claims \$2,940 for attorney's fee, in the prosecution of the suit, and prays for process.

H. G. Smith, the trustee named, has filed a petition in this court, setting out the fact of the institution of the suits above named, and stating that on or about the 19th day of March, 1909, Morris Berman was packing his household effects with a view of shipping them to Birmingham, Ala., outside of the jurisdiction of the court, without even turning over to the trustee the articles listed in his inventory; and thereupon the petitioner, who had refrained from taking actual custody of the household effects because of the bankrupt's statement that his wife was sick in bed, communicated with the referee in bankruptcy, who resides in another city, and asked for directions and instructions as to his duty in the premises. That the referee directed petitioner to take possession of all the property belonging to the bankrupt, and prevent its being taken out of the jurisdiction of the court, and advised petitioner that he, as trustee, had authority to do so, without any written process, as the bankrupt had elected to relinquish all claim to all of his personal estate. That, acting under such in-

structions from the referee, he went to the house which had formerly been occupied by the bankrupt, his wife, and infant child, and found that all of the household effects (except a bed in which they had slept, and a few cooking utensils, etc., which had been used in getting breakfast) were already packed and awaiting shipment, and in addition two trunks. That petitioner was admitted in the house by Mrs. Fannie Berman after he had stated to her his official character, and in a few minutes the bankrupt appeared on the scene, accompanied by his attorney, and demanded that petitioner exhibit to him some written process authorizing the seizure of the household effects, whereupon petitioner stated that he had no such written process, but was acting under orders received from the referee, and asked to be allowed to inspect the contents of the two trunks before they were taken out by the bankrupt.

Both the bankrupt and his wife disclaimed having the keys to the trunks, so petitioner announced he would decline to allow them to be taken away until an inspection of their contents could be made. That he gave them all the wearing apparel in the house except such as they stated was in the trunks, and they departed to a neighbor's house, whereupon petitioner caused the trunks to be taken to the First National Bank of Blakely and locked the other household effects up in the house, retaining possession of the keys. That petitioner procured a key which would fit the larger of the trunks, which was a new trunk with no name marked upon it, and found the same to contain the clothing of the bankrupt, his wife, and infant child. A search of the contents of the trunks revealed the fact that there was concealed therein a man's wallet containing \$1,940 in currency, which sum petitioner immediately deposited in his name as trustee of Morris Berman, in the First National Bank of Blakely, and now holds said fund subject to the order of the court. That during the day this trunk and its other contents, as well as the smaller trunk, were sent to the place where said bankrupt and his family had taken up their abode; but the larger trunk was returned with a note, purporting to have been signed by Mrs. Fannie Berman, stating it could not be accepted unless petitioner also returned the money in it, of which she for the first time made mention or asserted claim; but in a day or two later, at the instance of the bankrupt's attorney, petitioner again sent said trunk and its contents to the bankrupt's abode, and it was accepted by him, and his family restored to the use of all the clothing therein.

He then sets out the filing of the petition by Mrs. Fannie Berman in this court, the progress of the suits referred to, and the restraining order issued when the matter was referred to the referee. The referee failed to pass upon the matter, and it comes before the court on this question: Whether an injunction should be granted.

It is claimed on behalf of Fannie Berman, the wife of the bankrupt and the plaintiff in the suits in the city court, that while an action to recover specific property in the custody of the United States court cannot be brought against an officer of the United States in a state court, yet an action against such an officer as an individual for damages may be brought against a trustee in bankruptcy, or a United States marshal, or a receiver in a state court without the consent of the federal court,



and that the federal court will not enjoin the prosecution of such actions, and claim that, while the court has ample power over the res, it has not the power to protect a wrongdoer against an action for a personal tort committed by him in relation to such property. Counsel rely on: *In re Russell & Burkitt*, 101 Fed. 248, 41 C. C. A. 323; *In re Kanter & Cohen*, 121 Fed. 984, 58 C. C. A. 260; *In re Spitzer*, 130 Fed. 879, 66 C. C. A. 35; *In re Grissler*, 136 Fed. 754, 69 C. C. A. 406; *In re J. M. Mertens & Co.*, 147 Fed. 182, 77 C. C. A. 478; *McLean v. Mayo* (D. C.) 113 Fed. 106, decided under the present bankruptcy act. Counsel also rely upon the decisions of the Supreme Court in: *Leroux v. Hudson*, 109 U. S. 468, 3 Sup. Ct. 309, 29 L. Ed. 1000; *Covell v. Heyman*, 111 U. S. 176, 180, 4 Sup. Ct. 355, 28 L. Ed. 390; *Byers v. McAuley*, 149 U. S. 618, 13 Sup. Ct. 906, 37 L. Ed. 867; *North v. Peters*, 138 U. S. 284, 11 Sup. Ct. 346, 34 L. Ed. 936; *Buck v. Colbath*, 3 Wall. 334, 342, 347, 18 L. Ed. 257.

Special stress is laid on the decision in *Leroux v. Hudson*, supra, as being decisive of the question now before the court. The contention, stated again, is that, while there can be no interference with res in possession of the bankruptcy court, and it must determine the propriety of its own possession, still an action of trespass may be brought by a third person for the wrongful seizure of property by a trustee or other officer of the bankruptcy court. It is doubtful whether the decisions of the Supreme Court which have been cited and just referred to under the old bankruptcy act are entirely applicable under the present act, in view of the decisions by the Supreme Court in *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, and *Murphy v. Hofman* (decided January 4, 1909) 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. —.

In *Mueller v. Nugent*, supra, in the opinion by the Chief Justice, it is said:

"It is true of the present law, as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (*Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 806), and on adjudication title to the bankrupt's property became vested in the trustee (sections 21e, 70, Act July 1, 1898, c. 541, 30 Stat. 552, 565 [U. S. Comp. St. 1901, p. 3430, 3451]) with actual or constructive possession, and placed in the custody of the bankruptcy court."

In *Murphy v. Hofman*, in an opinion by Mr. Justice Moody, this is said:

"Before going further it is well to ascertain the principles of law which are applicable to the situation. Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), as originally enacted, did not confer jurisdiction on the District Courts of the United States over suits brought by trustees in bankruptcy to assert title to property as assets of the bankrupt, or to set aside transfers made by the bankrupt in fraud of the creditors or by way of preference, unless by consent of the defendant. *Bardes v. First Nat. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Frank v. Volkommer*, 205 U. S. 521, 27 Sup. Ct. 596, 51 L. Ed. 911. The act, however, preserves the jurisdiction otherwise existing by statute of the courts of the United States, though it is limited to courts where the bankrupt himself could have prose-

cuted the action. *Bush v. Elliott*, 202 U. S. 477, 26 Sup. Ct. 668, 50 L. Ed. 1114. But where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, federal or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379, 386. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court. *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157. On the day the opinion in the *Bardes Case* was announced, the same justice delivered the opinion of the court in *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, a case in which the facts were essentially those of the case at bar. Certain persons, copartners in trade, were adjudicated bankrupts, and the case was sent to a referee in bankruptcy. They had a stock of goods in a store, the entrance to which was locked by the referee. Certain other persons claimed title to part of the stock of goods as obtained from them by a fraudulent purchase, which had been rescinded. After the adjudication, these persons brought an action of replevin of the goods against the bankrupt in a state court, which was executed. It was held that replevin would not lie in the state court, and that the District Court had jurisdiction by summary proceedings to compel the return of the property seized. The court said: "The goods were then in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they could not be taken out of that custody upon any process from a state court." The last two cases cited proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of a res, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court. And see *Skilton v. Codington*, 185 N. Y. 80, 85, 86, 77 N. E. 790, 113 Am. St. Rep. 885, and *Frank v. Volkommer*, which, by implication, approve the same principle."

In view of this recent decision of the Supreme Court under the bankruptcy act of 1898, it is earnestly contended by counsel for H. G. Smith, the trustee, that this property was in the possession of the bankrupt as head of the family, including the trunks and everything contained in them, and that it was the duty of the trustee to take this property in his possession and hold it until the bankruptcy court could determine the ownership of the same, and whether any of it belonged to Mrs. Fannie Berman. It is conceded that he had scheduled a part of his household goods, and that the goods so scheduled were in the house when all of the property so scheduled and the other property in the house was seized by the trustee; but, whether this contention be true or not, it seems to me these suits are in effect proceedings to recover the property in the possession of the trustee. The fact that the suits are against H. G. Smith individually would not matter; for it is clear that all his actions, as indicated by the record, were in his capacity as trustee in bankruptcy for Morris Berman. He had no personal

interest in the matter whatever. While it is claimed in argument that he acted wrongfully, there is no contention that he acted in his individual capacity in any way. The first suit, filed March 22, 1909, is undoubtedly a suit to recover the personalty, an itemized list of which is attached to the petition filed in the state court. The petitioner states that Smith "unlawfully retains possession of said articles of personalty, and refuses, upon demand, to deliver the same to your petitioner."

As to the other suit for \$10,000 damages, I am not so clear whether there is enough in the suit independently of the effort to recover the \$1,940, and personal property to make a case, or if the proper proof can be submitted to sustain such a case as is sought to be made. This, however, will be for the state court to determine. There is no question that suit may be brought in the state courts for wrongful acts of officers of the bankruptcy court, where they go entirely beyond their duties as such officer and are guilty of conduct which is actionable in its character, particularly as against third persons.

An injunction will be granted against the two suits referred to—that is, the suit to recover the \$1,940, and the suit to recover the furniture—and denied as to the remaining suit, the suit for \$10,000 damages, and the restraining order in reference to the latter dissolved.

An order will be entered accordingly.

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CHARLESTON NAT. BANK v. MELTON, Ex-Sheriff.

(Circuit Court, S. D. West Virginia. July 14, 1909.)

No. 389.

1. TAXATION (§ 604\*)—TAX ON NATIONAL BANK SHARES—REMEDY FOR ILLEGAL TAXATION.

A national bank or stockholder therein has the right to go into a federal court of equity to test the validity, under Rev. St. § 5219 (U. S. Comp. St. 1901, p. 3502), of a tax levied by state authority on the stock of the bank, where there is no adequate remedy at law in such court, notwithstanding a remedy provided by the state statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1228; Dec. Dig. § 604.\*]

2. TAXATION (§ 604\*)—TAX ON NATIONAL BANK SHARES—REMEDY FOR ILLEGAL TAXATION—SUIT BY BANK.

Where a state statute provides for a tax on the stock of a national bank and requires the bank to pay it, the bank is in effect made a trustee and has the right to resort to a court of equity to determine its duty for its protection against the state, on the one hand, and the stockholders, on the other.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1228; Dec. Dig. § 604.\*]

3. TAXATION (§ 386\*)—TAX ON NATIONAL BANK SHARES—VALIDITY OF STATUTE.

The validity of a state statute providing for the taxation of national bank stock is not affected by the fact that it does not provide for any deduction from the valuation on account of any United States bonds held by the bank.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 646, 647; Dec. Dig. § 386.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. TAXATION (§ 113\*)—TAX ON NATIONAL BANK SHARES—VALIDITY OF STATUTE.

Provisions of a state statute for the taxation of national bank stock, requiring the cashier of the bank to pay the taxes assessed against its stockholders, and making him and the bank liable therefor, and for a penalty in addition in case of default, are not illegal as applied to a bank which has in its possession dividends or other funds belonging to its stockholders sufficient to pay the taxes assessed against them.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 207; Dec. Dig. § 113.\*]

5. TAXATION (§ 611\*)—TAX ON NATIONAL BANK SHARES—REMEDY FOR WRONGFUL ENFORCEMENT—INJUNCTION.

While a provision of a state revenue statute that stockholders in national banks shall not be entitled to any deduction from the assessed valuation of their shares because of debts owed by them, while owners of other "money, credits, or investments" are allowed such deduction, is invalid as applied to a stockholder who owes debts and who has not sufficient other money, credits, or investments from which such debts may be deducted, as subjecting him to taxation "at a greater rate than is assessed on other moneyed capital in the hands of individual citizens" of the state, in violation of Rev. St. § 5219 (U. S. Comp. St. 1901, p. 3502), it is not so invalid as to a stockholder who is not actually affected by it to his detriment, and a bill filed by a bank to enjoin the collection of taxes imposed on its stockholders because of such provision must allege facts showing the portion of the tax so rendered illegal, and that the valid portion has been paid or tendered, in order to entitle the complainant to equitable relief.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1250; Dec. Dig. § 611.\*]

**In Equity.** On motion for preliminary injunction and demurrer to bill.

This bill was filed on the 24th day of March, 1909, by the plaintiff for and on behalf of its stockholders generally, seeking, on several grounds, to restrain the collection of taxes assessed for the year 1908 against the shares of stock owned by all the stockholders of plaintiff bank.

The bill avers: That the defendant, Melton, was lately sheriff of Kanawha county, W. Va., and, although his term as such sheriff expired December 31, 1908, it is still his duty under the law to collect all taxes and assessments for the year 1908 still uncollected; that it has a capital stock of \$500,000, divided into shares of \$100 each, which stock is held by a large number of shareholders in West Virginia and in other states; that on the 1st day of January, 1908, it was the owner of bonds of the United States aggregating \$500,900 in value; that by section 67, c. 80, p. 366, of the Acts of the Legislature of West Virginia for the year 1907 (Code Supp. 1907, § 751), in listing money, credits, or investments, the person owning the same may have deducted therefrom the amount of the indebtedness which he owes to others as principal debtor; but that by section 79 of said chapter of said acts (Code Supp. 1907, § 763) it was provided that the shares of stock in a national banking association should be assessed at their true and actual value to the several holders thereof, in the county, district, and town where such association is located, and "no deductions shall be allowed from the valuation of such shares of stock on account of what is due another as principal debtor or otherwise, notwithstanding the provisions of any other section or sections of this chapter"; that said section further provides that the cashier of such bank shall pay the taxes assessed upon such shares, and in default of such payment such officer, as well as the bank, shall be liable for such taxes, and, in addition, for a sum equal to 10 per centum thereof, and any taxes so paid upon such shares may, with interest thereon, be recovered from

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the owners thereof, or may be deducted from the dividends accruing on such shares.

Plaintiff then pleads the provision of section 5219, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3502), that the taxation of shares in a national banking association "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," and avers on information and belief that on the 1st day of January, 1908, there were large sums of money, amounting to many hundred thousands of dollars, of moneyed capital in the hands of individual citizens of said state of West Virginia, and used by them in making loans, discounts, and investments, and periodically collected, or the interest thereon collected and reloaned, rediscouted, and reinvested, and that such transactions come into competition with the business of plaintiff and other national banks, and that by the provisions of the two sections of the assessment laws of West Virginia before referred to (sections 67 and 79) a discrimination is created against the shareholders in national banks, in violation of said section 5219, Rev. St. U. S.

Plaintiff further avers that on the 1st day of January, 1908 (as of which date the assessment complained of was made) "a large number of the shareholders of the said plaintiff were severally indebted to others as principal debtors to large amounts, and to amounts, as plaintiff is informed, believes, and so charges, in excess of other money, credits and investments owned by them respectively, and from which their said indebtedness might be deducted, and plaintiff says and alleges that, after said shareholders, or many of them, had deducted the debts which they owed as principal debtors to others from the other money, credits, and investments owned by them, there remained large sums owed by them as such principal debtors, which, by reason of said statute and said instructions, they were prohibited from deducting from the value of their said bank shares for taxation."

While the foregoing quotation violates the laws of subtraction, I think it may be clearly gathered that, as to certain unnamed stockholders, it is alleged that after they had set off, as against the amount of their debts due as principal debtors, all of their other money, credits, and investments, there still remained debts which they owed to others as principal debtor.

The plaintiff further avers: That when, in obedience to law, its proper officers gave to the assessor the list of its shareholders with the number of shares owned by each, the said assessor, in arriving at the value of the shares of stock for taxation, made or allowed no deduction for the value of the United States bonds owned by the bank; nor was any deduction provided for on account of any indebtedness of the individual shareholders. That the assessor was asked, on behalf of plaintiff and its shareholders, if he would allow the amounts owing by said shareholders as principal debtors to be deducted from the value of their respective shares, and he answered that he would not do so. That thereupon the return was made and delivered in the form prescribed, and a protest against the assessment was delivered to the assessor, a copy of which protest is exhibited with the bill, and shows that the ground thereof was the refusal of the assessor to deduct the value of the bonds owned by the bank in arriving at the value of the shares for taxation.

The plaintiff avers that the stockholders were assessed upon their shares of stock at a valuation of \$152.34 per share, making a total valuation of \$761,700, allowing no deductions on account of their indebtedness, upon which valuation taxes were assessed aggregating \$6,471.63, now in the hands of the defendant for collection. The allegation is renewed that the laws under which these assessments were made are void, and the assessments illegal and void, and that, nevertheless, the defendant, unless restrained therefrom, will proceed to collect said levies, etc.

The prayer of the bill is that said section 79, and all laws under which said assessment was made, be declared null and void, and that the plaintiff and its cashier and officers, and its several stockholders, be relieved from the payment of said taxes so assessed against them severally, and all penalties and interest thereon, and for general relief.

When the demurrer was set for argument, the plaintiff presented an amendment to its bill setting up the invalidity of section 79, c. 80, Acts 1907,

because of the requirement that the cashier of a national bank shall pay the taxes assessed against its shareholders, under penalty of being held (together with the bank) liable for such taxes, as well as a sum equal to 10 per centum thereof, regardless of the fact whether such cashier, or the bank, have in possession or control any money or funds of the respective shareholders; but it did not therein aver that, as to any of its shareholders, there were not any (or not sufficient) funds belonging to such shareholders in its hands or under its control to enable it to pay the taxes assessed against such shareholders or any of them.

Plaintiff in this amendment repeats the prayer of its original bill, and further prays that, if the court is of opinion that any taxes should be due from it, its officers or shareholders, then it refers this case to a master to ascertain what taxes may be due from whom, and what deductions should be allowed to any of its shareholders, respectively, by reason of any debts owed by them to others as principal debtors. Upon motion for a temporary injunction, and demurrer to the bill.

S. S. Green and Mollohan, McClintic & Mathews, for plaintiff.

W. G. Conley, Atty. Gen., W. M. O. Dawson, T. C. Townsend, Frank Lively, and W. R. Byrne, for defendant.

KELLER, District Judge (after stating the facts as above). On March 22, 1909, a judge of the Circuit Court for the Southern District of West Virginia granted to the plaintiff a temporary restraining order "restraining and enjoining the defendant, J. J. Melton, ex-sheriff of Kanawha county, W. Va., and his deputies, from collecting the taxes mentioned and described in said bill, or the interest or penalties thereon, or any part thereof, or any of them, from said plaintiff, its cashier, secretary, or accounting officer, or any of its stockholders, and from levying on or distraining and selling the property of the said plaintiff or any of its officers or shareholders for the satisfaction of said taxes, interest or penalties"; and the motion for injunction was set down for hearing at Charleston, and was considered in connection with the demurrer.

Various grounds presented in the written demurrer filed were argued by counsel, but I shall not consider them in order, and, indeed, shall not refer to some of them save incidentally.

The principal reliance in argument was placed upon the propositions that: (1) The plaintiff has a full and complete remedy provided by statute; (2) complainant is not entitled to the interposition of a court of equity because it has not done equity by paying or offering to pay any part of the taxes assessed against its shareholders, a large portion of which, it is averred, are, under all the decisions, unquestionably due and owing and should be paid before relief is sought against the collection of the remainder, if any; and (3) no relief can be granted because the bill does not set out the names of shareholders of the bank whose debts the plaintiff alleges should have been deducted from the value of their respective shares of stock, nor show the amounts of such shareholders' respective debts.

In the view I have taken of this case, I am compelled to overrule the first ground of demurrer mentioned, for the reason that the statutory method provided by law for the correction of an erroneous assessment does not provide a legal defense against the action of an officer seeking to enforce the collection of an assessment alleged to be wholly or partly illegal, but only provides a means by which a

taxpayer may affirmatively assert, first in an administrative tribunal, and afterwards by appeal to the Circuit Court, and thence to the Supreme Court of Appeals, his objections to an assessment made in accordance with a state statute, alleged to be in direct contravention of the federal statute which alone gives to the state the right to tax shares of stock in national banks, and for the further reason that, upon the alleged invasion of a right or privilege reserved by a federal law, plaintiff has a right to have such federal question (being a corporation created by federal law) decided by a federal tribunal, and no remedy at law in such tribunal exists.

Nor is the bank in a condition where it has an adequate remedy at law by paying the entire tax under protest and suing at law to recover it, or so much of it as may be illegal. As pointed out by Mr. Justice Miller in *Cummings v. Merchants' Nat. Bank of Toledo*, 101 U. S. 153, 25 L. Ed. 903:

The bank, in paying the money, "is acting in a fiduciary capacity as the agent of the stockholders, an agency created by the statute of the state. If it pays an unlawful tax assessed against the stockholders, they may resist the right of the bank to collect it from them. The bank, as a corporation, is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each stockholder. If it refuses, it must either withhold dividends and subject itself to litigation by so doing, or refuse to obey the laws and subject itself to suit by the state. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties pertaining to it. To prevent a multiplicity of suits equity may interfere."

The next proposition of demurrant is that "he who seeks equity must do equity," and that, applying this rule, complainant fails to show equitable grounds for relief in its bill.

Before further consideration of this point, it may be well to consider certain of the allegations of the bill, and determine from the adjudicated cases what portions of the bill present matter which, from any view of the case, would be the subject of equitable cognizance and relief. Plaintiff contends that the fact that, in ascertaining the true and actual value of the shares of its stock in the hands of its shareholders, no deduction is allowed under the assessment laws of West Virginia, on account of its ownership of \$500,900 of United States bonds, renders such assessment illegal and void. Under the decisions this fact affords no ground whatever for the claim of illegality or discrimination. *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229; *Exchange Nat. Bank v. Miller* (C. C.) 19 Fed. 372; *National State Bank v. Burlington*, 119 Iowa, 696, 94 N. W. 234; *People v. Tax Commissioners*, 4 Wall. 244, 18 L. Ed. 344; *First Nat. Bank of Louisville v. Kentucky*, 9 Wall. 353, 19 L. Ed. 701.

In the amendment to its bill the complainant insists that the provisions of section 79 of chapter 80 of the Acts of 1907, requiring the taxes assessed thereunder upon the shares of any national bank to be paid by the cashier, and providing that in default thereof such cashier, as well as the bank, shall be liable for such taxes, and in addition for a sum equal to 10 per centum thereof, etc., are illegal, null, and void, for reasons fully set out therein. It is sufficient to

say that the bill does not allege, as regards any of its stockholders, that the bank has not sufficient funds of the stockholder in its possession and under its control to pay any and all taxes legally assessed or assessable against the shares of stock of such stockholder. It might be that an attempt to make the bank pay the tax of a shareholder, when there were no accrued dividends or earnings upon the shares of stock owned by such shareholder in the hands of the bank out of which such payment could be made, would amount to an attempt to make one party pay the debt of another; but, surely, there can be no objection to the payment of the tax on behalf of the shareholders, when the bank does have funds in its hands equitably belonging to its shareholders sufficient for the purpose.

In *First National Bank v. Commonwealth of Kentucky*, 9 Wall. 353, 19 L. Ed. 703, Mr. Justice Miller, speaking of the alleged illegality and unconstitutionality of a similar statute of Kentucky, said:

"It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the state for the shares of their capital stock, when the law of the federal government authorizes the tax. If the state of Kentucky had a claim against a stockholder of the bank who was a nonresident of the state, it could, undoubtedly, collect the claim by legal proceedings, in which the bank could be attached or garnished, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the state on the bank shares."

In *Cummings v. Merchants' Nat. Bank of Toledo*, 101 U. S. 153, 25 L. Ed. 904, it was said:

"In the case of *Bk. v. Com.*, we held that a statute of Kentucky, very much like this, which enabled the state to deal directly with the bank in regard to the tax on its shareholders, was valid and authorized a judgment against the bank which refused to pay the tax. 9 Wall. 353, 19 L. Ed. 701. It is true the statute of Kentucky went further than the Ohio statute, by declaring that the bank must pay the tax, while the latter says it may."

Having thus shown that the assessment laws of West Virginia are not invalid either because they do not permit the deduction of the value of United States bonds owned by the bank, in arriving at the value of its shares for assessment in the hands of its shareholders, or for the reason that the law requires the payment of the taxes assessed to the shareholders upon their shares to be made by the cashier or by the bank, the only remaining question is whether these laws are rendered invalid, and the assessments void, by reason of the inhibition contained in section 79 against the allowance of any deduction upon the assessed valuation of bank shares because of money owed by the holder thereof to others as principal debtor.

I have no doubt but that so much of section 79, c. 80, Acts 1907, as prohibits the deduction, in a proper case, from the value of shares in a national bank, of debts due to others as principal debtor by the owner of such shares, while, by section 67 of the same act, all other private individuals are allowed to deduct such debts owed by them from the value of their "money, credits and investments," is in conflict with section 5219, Rev. St. U. S., as being, in effect, taxation of such



shares "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens" of the state, and that, to the extent that any assessment upon the holder of shares in a national bank operates to increase his rate of taxation above that upon "other moneyed capital in the hands of individual citizens of such state," the same is illegal and void; but this is far from saying that the entire assessment is void, or that, in all cases, any part of an assessment under this act is illegal or void. For example, if the shareholder in a national bank has no debts to deduct, the assessment, as to him, is unaffected by that part of the law denying the right to a deduction of debts from the value of bank shares; or if he has other money, credits, and investments of a value sufficient to permit him to deduct from it all of the debts he owes as principal debtor, he is not injured by the denial of the right to deduct such debts from the value of his bank shares. So that it is only in cases where the shareholder is prohibited, to his detriment, from deducting his debts from the value of his bank shares, that this provision of the law works any actual discrimination or injustice against the owner of such property, and it is only in the case of injury that the right to redress exists.

The bill of the plaintiff proceeds upon the theory that this defect in the law renders the assessment of any tax upon shares of stock in national banks illegal and void. If that proposition could be sustained, it would sustain this bill and warrant all the relief prayed for therein.

This precise point has been decided by the Supreme Court of the United States in a number of cases, in all of which the position taken by the plaintiff has been denied. In *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1050, the court, by Mr. Justice Miller, after accepting the construction of the act of 1866 (Laws 1866, c. 761), by the Court of Appeals of the state of New York as not authorizing any deduction for debts by a shareholder in a national bank, goes on to say:

"What is there to render it void as to a shareholder in a national bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. What legal interest has he in a question which only affects others? Why should he invoke the protection of the act of Congress in a case where he has no rights to protect? Are courts to sit and decide abstract questions of law in which the parties before the court show no interest, and which, if decided either way, affects no right of theirs? \* \* \* There is no difficulty here in drawing the line between those cases in which the statute does not apply and those to which it does, between the cases in which it violates the act of Congress and those in which it does not. There is therefore no necessity of holding the statute void as to all taxation of national bank shares, when the cases in which it is invalid can be readily ascertained on presentation of the facts."

This case establishes the general proposition that:

"In a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded."

Again, in *People's Nat. Bank v. Marye*, 191 U. S. 282, 24 Sup. Ct. 72, 48 L. Ed. 185, it is said:

"We concede that if the law were unconstitutional because, for instance, there was no constitutional power to tax the particular property, there is no necessity to pay anything; but where some part of the law may be unconstitutional because of a failure to comply with some matter of detail, but the amount which the owner of the property ought to pay is perfectly clear under the provisions of law, then, if the taxpayer desire to be exempted from paying more than his share, he must pay his proportion, before equity will aid him in his effort to escape paying a disproportionate share."

And in *State Railroad Tax Cases*, 92 U. S. 575, 616, 23 L. Ed. 663, 674, the court said:

"Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them. \* \* \*. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition of a receipt in full for all the taxes assessed."

It is true that in *Fargo v. Hart*, 193 U. S. 499, 24 Sup. Ct. 498, 48 L. Ed. 761 et seq., it was held, inter alia, that tender is not a prerequisite to injunctive relief against an assessment made upon unconstitutional principles; but the decision in that case proceeded upon the impossibility of determining what, if anything, the plaintiff ought to pay, and it was held that the company had made the only offer it could, which was to give security for the payment of any amount adjudged to be due.

That is not a parallel case to the one at bar. In this, the bill seeks to restrain the collection of taxes assessed against stockholders who are not alleged to be affected by the only provision of the assessment law of West Virginia which can render any part of the tax obnoxious to the federal law. It asserts the entire invalidity of all the taxes assessed against the stockholders; whereas, the court can see that, as to stockholders owing no debts, no defense exists, and no complete defense exists as to any stockholders except such as may have debts, as principal debtors, to the full value of their stock, and have no other money, credits, or investments from which to deduct such debts.

All of these facts, so essential to determine what relief by injunctive process, if any, the plaintiff is entitled to on behalf of any of its stockholders, are conclusively presumed to be within the knowledge of the complainant; but none of them were set up, because, as I suppose, it was relying on the entire invalidity of the tax. Having held that that claim is untenable, it follows that this case falls into the category of such decided cases as *People's Nat. Bank v. Marye*, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. Ed. 180, requiring payment, or at least tender, of the amount of tax justly and equitably due, as a condition precedent to the interposition of a court of equity to restrain the collection of the residue.

It follows that the temporary restraining order heretofore awarded must be dissolved, and the bill herein dismissed for want of equity, but without prejudice to the institution of any other suit to restrain the collection of any portion of the taxes illegally assessed against any stockholder or stockholders of plaintiff, provided that payment or tender has been or shall first be made of such portion, if any, of any such taxes as, under the views herein set forth, are held to be lawfully assessed against said stockholders, or any of them.

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**CITIZENS' NAT. BANK OF CHARLESTON v. MELTON, Ex-Sheriff.**

**KANAWHA NAT. BANK v. SAME.**

(Circuit Court, S. D. West Virginia. July 14, 1909.)

In Equity.

Nos. 390, 391.

S. S. Green and Mollohan, McClintic & Mathews, for plaintiffs.

W. G. Conley, Atty. Gen., W. M. O. Dawson, T. C. Townsend, Frank Lively, and W. R. Byrne, for defendant.

KELLER, District Judge. The bills in these cases are, in all respects, similar to that in the case of Charleston National Bank v. J. J. Melton, Ex-Sheriff, 171 Fed. 743, and, for the reasons assigned in that case, the same form of order will be entered in these cases as has been directed in that.

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**In re KESSLER & CO.**

**Ex parte LLOYDS BANK.**

(District Court, S. D. New York. July 8, 1909.)

**BANKRUPTCY (§ 324\*)—AMOUNT OF CLAIMS—SECURED CLAIMS—INTEREST.**

Under Bankr. Act July 1, 1898, c. 541, § 57h, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), a creditor of a bankrupt, holding security which is liquidated after adjudication by being converted into money "according to the terms of the agreement pursuant to which such securities were delivered" to him, is entitled to compute interest on his debt up to the time of such liquidation, and may marshal the proceeds of the security first, upon the interest, and receive dividends on any unpaid balance of the principal. [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 324.\*]

In Bankruptcy. On certificate from referee.

See, also, 165 Fed. 508.

In this case and in three others the referee certified to the District Court the following question: "Is a creditor holding security which is liquidated after the filing of the petition entitled to interest upon his claim after the filing of the petition in bankruptcy, where the proceeds of the sales of the security are inadequate to pay the face of the claim?" Two other questions were likewise certified to the court, upon which the trustee was successful, and which the claimant before the court now waives. The referee has allowed the secured creditor to marshal the proceeds of the security first against interest until the date of the liquidation of the security, and has then allowed proof for the balance of the claim after the remainder of the proceeds has been deducted. The amount of the security was much more than sufficient to pay all the accrued interest between the adjudication and the date of the liquidation of the security.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Wallace Macfarlane, for trustee.  
Rufus W. Sprague, for claimant.

HAND, District Judge. I cannot find that this question has been raised under the present bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), or under any of the other acts, although the negative of it has been the settled law for a long time in England. It is hardly necessary to cite authorities to show that the creditor, before the debtor's insolvency, has the right to marshal the security upon interest first and principal afterwards. This rule itself seems to have been in some doubt early in America, but it was laid down in the note to *Williams v. Houghtaling* in 3 Cow. (N. Y.), on page 87, and I think it cannot be disputed that it is the law, generally speaking, at present. It certainly was adopted by the Supreme Court in *Story v. Livingston*, 13 Pet. 359, 371, 9 L. Ed. 1108, and it is quite obvious that otherwise the debtor might compel the creditor to leave the interest unpaid and keep reducing the principal. Moreover, the creditor, in the absence of any provision to the contrary, has in general the right to attribute payments as he pleases.

The bankruptcy act provides that liens, as would in justice necessarily be the case, shall not be affected by bankruptcy, and the mortgagee collects all interest upon his claims if the security is sufficient. *Coder v. Arts*, 152 Fed. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372. Section 57h provides that the value of the securities shall be determined by converting them into money "according to the terms of the agreement pursuant to which such securities were delivered to such creditors." The common law being, as it is, an implied term of the agreement under "which such securities are delivered," he may marshal the securities against interest, and that right is a part of the lien itself. The statute directs that proof be made for the balance after the value as so ascertained is credited. The question comes down to what value shall be credited upon the claim. If the contract expressly provided that certain expenses of collection should first be paid out of the security, I suppose no one will contend that bankruptcy will change that provision, and that the full value of the security must be credited upon the amount of the claim without first deducting those expenses allowed by the very agreement. I think interest is in the same category as any other deduction which the agreement may allow. By the implied term of the agreement the creditor has the right before he pays any of the face of the claim to make certain deductions, among which is the deduction for interest accrued upon it. The balance is all that is applicable to payment. This is the course which the referee has adopted, and I think he is right.

As I have said, the English law has for a long time been to the contrary, and, although this is not binding upon me, I should regard it as of the greatest moment, except in a case where the rule clearly arises through inadvertence. I say it with the utmost respect. The rule appears to have originated in two cases, *Ex parte Wardell* (1787) and *Ex parte Hercey* (1792), not originally reported, except in 1 *Cooke's Bankruptcy Law* (4th Ed., 1799) p. 181. The full order made in each case may be found in Appendix A to 2 *Montague and Ayrton*,

in which the learned reporters seem to indicate a doubt as to whether the cases in fact decided what they are said to decide in 1 Cooke's Bankruptcy Law, 181. I cannot, however, doubt that they are valid precedents, and the law seems to have started out with those two cases decided by the Chancellor squarely upon the point. No opinion, however, which has come down to the present time, was given in either. In 1794 Lord Loughborough promulgated among his orders in bankruptcy an order for the liquidation of securities by a mortgagee which is at least quite ambiguous upon this point in its language. 2 Cooke's Bankruptcy Law (4th Ed.) p. 379. Indeed, from the language of this order, it would seem to follow that the creditor was entitled to prove for the whole deficiency. It is quite clear, too, that the order caused trouble at the bar; for in 1798 in *Ex parte Badger*, 4 Vesey, 165, the rule came for construction before Lord Loughborough (not Lord Eldon, as is stated in one of the later cases). Lord Eldon was at that time at the bar and argued the case for the creditor. He conceded that the two cases in Cooke were against him, but contended that the words of the order had raised doubt at the bar. Lord Loughborough, however, without discussion, construed his own order in accordance with *Ex parte Wardell* and *Ex parte Hercey*, and this seems to have settled the law in England from that time.

In *Ex parte Ramsbottom*, 2 Mont. & Ayrton, 80, Lord Eldon decided that the mortgagee must credit the full amount of the security against principal and interest up to the date of the commission, and the question came up upon appeal to the Court of Review in Bankruptcy, as to whether the rents and profits arising from the security between the date of the commission and of the selling order should be credited upon interest which arose during the same period, or whether that, too, must be credited upon the face of the claim. To hold this was too much for the obvious justice of the situation, and consequently the court, without much regard for consistency, held that the rents arising after the date of the commission should be credited against interest during the same period. This case is criticised in Appendix A to the volume in which it occurs by the learned reporters, and their criticism seems to be well founded. The analogy is ap-  
posite which they suggest, that where a creditor has security for two claims, one provable and the other unprovable he may marshal his security against the unprovable claim. They very pertinently ask whether there is any valid distinction between that and the right to marshal the security against interest falling due after the date of the commission.

In *re Penfold*, 4 J., De G. & Sm. 282, however, follows the rule in *Ex parte Badger*, as does also In *re Savin*, 7 Chanc. 760, a case in the Court of Appeal. On the other hand, Justice North, in the year 1888, in *Re Talbott*, 38 Chanc. Div. 567, made a contrary decision in ignorance of In *re Savin*; but he is said to have subsequently thought he was in error. *Quartermaine's Case*, [1892] 1 Chanc. Div. 639. In the last-mentioned case Stirling, J., wrote a long opinion, reciting the history of the law to some extent as I have stated it above, and deciding in accordance with *Ex parte Badger*. I think that settled the law beyond question; but, if any doubt remained it was settled by

Mr. Justice Vaughan Williams. *In re Bonacino* (1894) 1 Manson, 59. After that case there can be no doubt as to the rule in England.

As I have said, it was criticised, in my judgment with great effect, by the reporters in Appendix A to 2 Mont. & A., and likewise the inconsistency was pointed out by Stirling, J., in *Quartermaine's Case*, supra, of allowing to be credited on subsequent interest the rents and dividends from the securities which fall due after adjudication. No doubt the increase on the security is a part of the security itself and should follow the same rule. The only ground for an exception is that the increase between the date of the adjudication and the liquidation of the security is to be regarded as the return for the loss involved in waiting till it is realized; but, if so, consistency would require the result that a security which bears no increase should be discounted as of the date of the adjudication, a proposition which no one has suggested.

If, however, my analysis of the situation at the outset of this opinion is correct, the rule itself is wrong. I have less hesitancy than I otherwise should in departing from it, in that we have no statement which has come down to us of the grounds of its original adoption. It is quite clear that the bar had considerable doubt as to the meaning of Lord Loughborough's order of 1794, and that doubt, I respectfully insist, is much more than justified by the terms in which it was made. Lord Loughborough, in settling the construction of that rule in *Ex parte Badger*, avowedly only meant to follow precedents already in existence, which it is possible he may not have had in mind at the time the order was promulgated. Under these circumstances, in spite of the extremely persuasive character of any rule so well settled in English law, I cannot feel that it should be binding here.

Of course, in a case in which the security was not sufficient to pay the interest which accrued upon the claim from the date of the adjudication until its liquidation, I do not mean to be understood to hold that the creditor could prove for any part of that interest remaining unpaid. In no event could the creditor prove for more than the amount of the claim at the time of the adjudication. I only decide that the implied right given him under the original contract of marshaling the security in the first instance against the interest is not taken from him by the bankruptcy of the debtor.

The case of *Commissioners v. Hurle* (C. C. A.) 169 Fed. 92, 94, does not in the least militate against the construction which I have placed upon section 57h.

In the other three cases the answer to the referee's question will be likewise in the affirmative.

## In re ENNIS &amp; STOPPANI.

Ex parte ROCHE.

(District Court, S. D. New York. June 24, 1909.)

## 1. BANKRUPTCY (§ 423\*)—DEBTS DISCHARGED—LIABILITY FOR CONVERSION.

Where brokers by fraud induced a customer to authorize them to purchase stocks for him and to deposit margins therefor, and afterwards converted such stocks and became bankrupt, the customer had his option to sue for rescission of the contract on the ground of fraud, or for the conversion; and when he did the latter he waived the fraud and affirmed the contract, and has no standing to claim that the bankrupt's liability was one for obtaining property by false pretenses, and not affected by the discharge, under Bankr. Act July 1, 1898, c. 541, § 17a (2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended by (Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1907, p. 1026).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 423.\*]

## 2. BANKRUPTCY (§ 424\*)—DEBTS DISCHARGED—LIABILITY FOR CONVERSION—"WILLFUL AND MALICIOUS INJURY TO PERSON OR PROPERTY."

A conversion of property is not a "willful and malicious injury to person or property," within the meaning of Bankr. Act July 7, 1898, c. 541, § 17a (2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1907, p. 1026), which excepts liabilities for such injuries from debts from which a bankrupt is released by a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 818; Dec. Dig. § 424.\*]

## 3. BANKRUPTCY (§ 426\*)—DEBTS DISCHARGED—DEBTS CREATED BY FRAUD.

In Bankr. Act July 1, 1898, c. 541, § 17a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1907, p. 1026), which provides that a discharge shall release a bankrupt from all of his provable debts, except such as "(4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity," the phrase "while acting as an officer in a fiduciary capacity" qualifies all the preceding portion of the clause.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787-807; Dec. Dig. § 426.\*]

## 4. BANKRUPTCY (§ 391\*)—ACTIONS AGAINST BANKRUPT—STAY.

An action at law for the conversion by brokers of stocks owned by plaintiff, but held by defendants as pledgees, although it is alleged that they induced plaintiff to purchase such stocks by fraud, is not one to recover a debt created by defendants' "fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity," within Bankr. Act July 1, 1898, c. 541, § 17a (4), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1907, p. 1026), and on the bankruptcy of defendants such action may be stayed by the court of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 391.\*]

## 5. BANKRUPTCY (§ 391\*)—ACTIONS AGAINST BANKRUPT—STAY.

A pending action against bankrupts on a dischargeable debt, in which they had been arrested and given bail more than four months prior to their bankruptcy, may be permitted by the court of bankruptcy to proceed to judgment for the purpose of enabling the plaintiff therein to enforce his demand against the surety in the undertaking, in case it is in form a security for payment of the judgment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 391.\*]

In Bankruptcy. On motion to vacate stay.

This is a motion to vacate the stay of the petitioner, Roche, against proceeding to the entry of judgment in an action brought by him against the bankrupts in the Supreme Court of the state of New York. The action was for the conversion of the petitioner's stock, which had been purchased by the brokers for him and had been held by them as pledgees for the repayment of part of the purchase price. The allegations of conversion are as follows: "The defendants converted said stocks to their own use and benefit in fraud of the rights of the plaintiff." Again: "By reason of the said illegal and fraudulent sale of said shares of stock by the defendants herein as aforesaid, and by reason of the illegal and fraudulent acts of the defendants hereinabove set forth, the plaintiff has suffered damages." After serving the complaint against the defendants, the petitioner caused their arrest in the state courts and compelled them to give bail to answer the judgment. This bail was procured from a surety company, to whom the bankrupts gave indemnity; but the arrest, the bail, and the indemnity all took place more than four months prior to the bankruptcy. The trustee opposes the motion, so that in the interests of the estate he may recover the indemnity given the surety company. The petitioner now claims that he was exploited by the bankrupts from the outset; that he was induced to buy the shares of stock by a person secretly in the employ of the bankrupts, whose business it was to induce customers to trade with them, to whom he gave a power of attorney to act as he saw fit. He likewise says that \$5,000 additional margin for his purchase was procured from him by the bankrupts through fraud. The question arises whether the claim is dischargeable in bankruptcy.

Davison & Underhill, for petitioner.

HAND, District Judge (after stating the facts as above). Roche had two possible remedies open against the bankrupt. He could either sue them for willful conversion of his stock (which he did), or he could sue to rescind the whole contract for fraud, first, because of the imposition originally practiced on him by the bankrupts through their fraudulent agent, and, second, because of the imposition by which they obtained the additional margin. Had he sued to rescind the contract, he might possibly have some color to claim that under the second subdivision of section 17 of Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), this was a liability for obtaining property by false pretenses or false representations; but he has not adopted this course, for he affirmed the sale and sued for the stock which was converted. As he cannot, therefore, now sue upon the fraud, to succeed upon this motion Roche must bring his case within the second or fourth subdivision of section 17.

Prior to 1903 his case would have come squarely within the rule of *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, and *Tindle v. Birkitt*, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, and the question is whether the amendment of 1903 changed the law as there laid down. That amendment (Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1907, p. 1026]), so far as here material, changed subdivision 2 so that, instead of excepting judgments for fraud, obtaining property under false pretenses or representations, or for malicious injuries to person or property, it excepted liabilities for obtaining property under false pretenses or representations or willful injuries to person or property. As I have already shown, Roche



cannot claim here for fraud, because he has affirmed his purchase by suing for conversion. It is true that under *Bullis v. O'Beirne*, 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340, the form of the complaint is not conclusive; but the trouble here is that the action is not brought for fraud at all, but for conversion of a title obtained through the very fraud on which the victim now seeks to rely. Having, with full knowledge of the fraud, sued for the value of the stock, he can no longer as matter of law rely upon the fraud. He is therefore relegated to the second part of subdivision 2, which excepts liabilities for malicious injury to property. The only injury to his property rights considered in its conversion, and if that be a "malicious injury" to his property, so is every fraud or embezzlement, and the earlier part of subdivision 2, as well as the whole of subdivision 4, is merely elaborate tautology. This cannot be the correct meaning of the words. Injury to person and property means causing damage to the subject-matter of the rights, not depriving the owner of them. It is so used generally in the law, and *Tinker v. Colwell*, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, is no exception to the rule, because the theory was, not that the husband is deprived of his rights in his wife, but that her seduction is an actual assault upon her person.

No doubt it is hard to think of any claim which would at once be provable and also a liability for such injuries, unless it be a judgment for them. Still it may be that the clause might cover such claims as at once arose from injury to the subject-matter of property and resulted in such profit to the wrongdoer as permitted an action on the common counts. Be that as it may, I cannot interpret those words in a way so entirely at variance with their traditional meaning as to cover willful conversion, merely because I am uncertain whether they really cover any other cases than they did prior to 1903. Besides, the facts in *Re Adler*, 152 Fed. 422, 81 C. C. A. 564, although not the reasoning, make that case an authority to the contrary, because, though the money there appropriated by the factor may have been the principal's only in equity, it would be an unreasonable distinction to say that there was an "injury to property" only when the wrongdoer converted that to which the victim had legal title. *Kavanaugh v. McIntyre*, 128 App. Div. 722, 112 N. Y. Supp. 987, undoubtedly bears out the petitioner here, there being no valid distinction between that case and this; but it is not an authority binding upon me, and I regret that I cannot assent to its reasoning. Moreover, it is contradicted by *Maxwell v. Martin*, 130 App. Div. 80, 114 N. Y. Supp. 349, in the First department, a court of equal authority. I cannot, therefore, agree that the case comes within either of the clauses of the second subdivision.

Coming now to the fourth subdivision, the question is whether the amendment of 1903 has had the much-to-be-desired effect of attributing the words "in a fiduciary capacity" to "defalcation" alone. The answer to this, at least upon authority, is to be again found in *Re Adler*, 152 Fed. 422, 81 C. C. A. 564. As *res integra* I should have thought it possible that the omission of the word "fraud" in subdivision 2 might have indicated that after 1903 the same word in subdivision 4 was meant to cover all frauds, since the contrary seems to involve the

result that now, judgments for fraud not committed in a technically fiduciary capacity are discharged where formerly they were not, a result the direct contrary of the obvious general purpose of the amendment; but it may be that "false pretenses or representations" were thought to cover all the cases which were formerly covered by those words and by the word "fraud," even though such a construction does render tautologous the word "fraud" in subdivision 4. However that may be, *In re Adler*, supra, concludes me from holding that the words "embezzlement" or "misappropriation" may be construed independently of the clause "in a fiduciary capacity," and I must follow that case.

While, therefore, I cannot disguise my regret that the bankrupts should be discharged from a claim arising out of a deliberate conversion of this property, accompanied by very shameful fraud, which involved the greatest moral turpitude, yet, as I understand the authorities, I cannot see that the amendment of 1903 has changed the rule of *Crawford v. Burke*. Though I cannot wholly vacate the stay, I can, however, permit the petitioner to enter his judgment against the bankrupts, and to do so much else as may be necessary to perfect any rights he may have under the undertaking, if any. The undertaking was taken out more than four months before the petition was filed; and, assuming that the indemnity given the surety created a lien under section 67c or 67f, which it is not necessary to decide, such a lien is not invalid. If the petitioner can enforce the undertaking, I will aid him to do so.

Let an order be entered, therefore, vacating the stay so far as to permit the entry of judgment against the bankrupts, and thereafter to take such proceedings against the sureties as the claimant may be advised. If the undertaking only provides that the bankrupts shall answer a body execution, I shall not be able to aid the claimant, as I could not permit the bankrupts to be arrested for a claim which will be discharged; but, if the undertaking be in form a security for the payment of the judgment, I may be able to allow the claimant to fulfill the conditions of the undertaking, if they involve only such matters as property execution and the like. These are questions which I can decide upon the settlement of the order, when I can learn the form of the undertaking and what should be allowed.

Settle such order upon one day's notice on any morning at 10 a. m. at my chambers.

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#### WALLIN et al. v. REAGAN et al.

(Circuit Court, W. D. North Carolina. July 28, 1909.)

#### 1. EJECTMENT (§ 46\*)—PARTIES—TENANT AT WILL.

Where a tenant at will disclaimed all other interest in the property sued for in ejectment, he was not a necessary party.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 138; Dec. Dig. § 46.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. REMOVAL OF CAUSES (§ 36\*)—CITIZENSHIP—EJECTMENT—JOINDER OF TENANT.**

Joinder of a tenant at will of the same citizenship as plaintiff as a party in ejectment did not prevent the removal of the cause otherwise removable to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 70; Dec. Dig. § 36.\*]

Fraudulent joinder of parties to prevent removal, see note to *Offner v. Chicago & E. R. Co.*, 78 C. C. A. 362.]

J. M. Gudges, Sr., for plaintiffs.

Merrimon & Merrimon, for defendants.

NEWMAN, District Judge. This is a motion to remand the case, which was removed to this court from the superior court of Madison county. It appears that the suit was brought by James Wallin et al. against Marion Reagan to recover a certain tract of land in Madison county. Judgment was given in favor of the plaintiff at the May term, 1904, of the Madison superior court; the exact date of the judgment not appearing. It then appears that on August 1, 1904, Marion Reagan filed an affidavit in which he set up the fact that, in the suit referred to, summons was issued, directed to the sheriff of Madison county, commanding him to summons Marion Reagan and Louisa Freidman, as defendants to be and appear at a certain term of the superior court to be held for the county of Madison. This summons was served upon Marion Reagan by a deputy sheriff and read to him, and Reagan asked if it was necessary for him (Reagan) to notify the owners of the land of the suit, and the sheriff told him that it was, and that they would have to be notified by the plaintiff. Reagan is the tenant of Louisa Freidman, and has been ever since she became the owner of the land, and when the name of Louisa Freidman was read as one of the defendants by the deputy sheriff, at the time the summons was served, he asked why the papers were served on him, as he had no interest in the land, and not on Mrs. Louisa Freidman, and that the deputy sheriff said all parties would have to be notified, but that Reagan would not have to do so. As Reagan was ignorant of such matters, he thought the sheriff was giving him proper information, and he did not notify his landlord of the suit, or her agent at Asheville, N. C., J. H. Lange, nor did he give the suit any attention, as he supposed the owners knew about the suit and would protect themselves and their interests.

Before this suit in question, and on January 8, 1900, James Wallin had instituted a suit against Marion Reagan and Louisa Freidman, and had the summons served on affiant, and the suit pended in the superior court of Madison county, when Wallin took a nonsuit at the August term, 1901. More than one year elapsed from the judgment of nonsuit before the suit in question was instituted. No complaint was filed in this action until September 12, 1903, as the records of this court show, and "at the May term, 1904, of the superior court, affiant went to Marshall, to attend court, and stayed there two days, and was informed that there would be no court, but is informed that the judge came to Marshall on Wednesday, opened

\*For other cases, see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and adjourned the term of court on that day, and left Marshall. Affiant had gone home the previous day, and never heard of this judgment until within the past week, when he was told about it by James Wallin. Affiant was informed that the judgment was not filed by the clerk of the superior court of Madison county, until within the past week or 10 days, and that said clerk never heard of said judgment until it was brought to him by the plaintiff with the request that it be placed on the records. That no minute of the same appears on the records of the court, as affiant is informed and believes, and said judgment has been docketed, if docketed at all, within the past few days." Affiant further swears that:

"Said Wallin knew that affiant was only a tenant of Mrs. Louisa Freidman, and that he had no interest in the land, and is informed and believes that said Wallin also knew that J. H. Lange was an agent of Mrs. Freidman, and that said Wallin has for several years been trying to get affiant to surrender the possession of the land to him, and has repeatedly offered to affiant small sums of money to surrender the possession. That no nonsuit was ever taken as to the other plaintiff in this action; but in the judgment, as filed, all the plaintiffs are stricken out, and only the name of James Wallin appears as a plaintiff. That affiant was misled by the officer who served the papers on him and did not notify his landlord and by the information that the judge would not hold a term of the superior court at Madison county."

Reagan then prays for an order to restrain James Wallin from any action under the judgment until affiant can have an opportunity, or his landlord, the owner of the property, can have an opportunity to have the judgment vacated and set aside, and a trial of the cause had on its merits.

J. H. Lange also made an affidavit to the effect: That, ever since Mrs. Louisa Freidman became the owner, he has been looking after the land described in the suit in question, and Marion Reagan has been in possession of the land as a tenant of Mrs. Louisa Freidman. That several years ago James Wallin brought a suit about the same lands, affiant was notified of the suit and at once employed attorneys to look after the litigation, and he was advised that the plaintiff had been thrown out of court. That affiant then asked the clerk of the court, out of the abundance of caution, to notify him if any further litigation should ever be commenced by Wallin, or any other person, about the said land, and that the clerk promised to give him such notice. That he never heard anything about the matter further until, about a week or 10 days ago, affiant received a letter from the clerk inclosing a judgment taken in the above cause, and saying to affiant that he did not know when it had been rendered, but that it had been brought into his office that morning with the request that it be docketed. Affiant is informed and believes that James Wallin knew that Mrs. Louisa Freidman was the owner thereof, and, as evidence of such fact, avers that, in each suit brought by James Wallin, Mrs. Louisa Freidman is named as a party defendant. He believes that Marion Reagan was misinformed as to his duty to notify affiant or Mrs. Freidman for the purpose of keeping them in ignorance of the suit, of throwing Reagan off his guard. That the property is of great value, to wit, several thousand dollars. That this suit is a pauper suit, the

plaintiff is utterly insolvent and, if he obtains possession of the property, could, and will, do great damage to the same in a very short time. That Mrs. Freidman or Marion Reagan has had possession of the land for several years, and James Wallin has been endeavoring in all kinds of ways to get possession of it. That it is the purpose of Mrs. Louisa Freidman to contest the claim of James Wallin, as she did in the first suit, but she has had no opportunity to do so, as she and affiant have been utterly ignorant of this litigation until the receipt of the letter by affiant from the clerk of the superior court. He then prays the court to make an order restraining James Wallin from taking any action under the judgment obtained in his action, till the further orders of the court.

Then appears an order, signed by Fred Moore, judge of the superior court, as follows:

"This cause coming on to be heard upon the application for a restraining order, and being heard: It is ordered and adjudged that the plaintiff, James Wallin, show cause before Judge Shaw, at Marshall, N. C., on August 16, 1904, why the injunction asked for in this cause should not be granted, and in the meantime the said James Wallin is hereby restrained and enjoined from taking or attempting to take possession of the lands and premises mentioned and described in the complaint in this under or by virtue of any writ issued pursuant to the judgment rendered in this cause.

"The clerk will issue this writ upon the defendant giving bond in the sum of \$200.00, conditioned as provided by the statute.

"Asheville, N. C., August, 1, 1904.

"[Signed] Fred Moore, Judge of the Superior Court.

"The bond required by the foregoing order has been signed by J. H. Lange, and D. W. Newell and has been duly approved.

"[Signed]

Fred Moore, Judge."

Then appears an order made at the August term, 1904, by Thomas J. Shaw, as follows:

"In this cause it is agreed that Marion Reagan, the defendant above named, have leave to file answer to the complaint on file, and file such bond as may be required by law in action heard, and the restraining order heretofore issued may be continued to the hearing of such issue as may be made by the pleadings.

"This answer to be filed during the present term of Madison superior court, and, if no answer is filed during that term, the judgment herein agreed to be stricken out to stand as the judgment of the court.

"[Signed]

Thos. J. Shaw, Judge Presiding."

Then appears the following agreement signed by counsel of the parties:

"Whereas, counsel have come here on this August 20, 1904, to file answer in this cause, but their client is not here to verify same: It is agreed that said answer may be filed and treated as verified for all purposes except a trial; counsel for defendant agreeing to have same verified before trial or to then withdraw same or let it be stricken out."

Then appears the following application of Joseph L. Freidman and John W. Keiler to be made parties defendant in the cause.

"Joseph L. Freidman and John W. Keiler come into court by and through their counsel, Messrs. Merrimon & Merrimon, and respectfully show to the court that they are the owners in fee simple of the land mentioned and described in the complaint, and that Marion Reagan is their tenant. They respectfully ask the court that they be permitted to make themselves parties

defendant to this cause, and to act in the same for the purpose of protecting their interest.

"[Signed]

Merrimon & Merrimon,

"Attys. for Freidman, Keiler & Co."

Then comes the following order of Judge Shaw made at the August term, 1904:

"It being made to appear to the court that Joseph L. Freidman and John W. Keller claim to be the owners of the land in controversy in this action, and are proper and essential parties to this action for a trial and proper determination, and having moved the court for leave to become parties defendant: It is on motion of counsel for said Freidman and Keller and Marion Reagan ordered and adjudged that Joseph L. Freidman and John W. Keller be and they are hereby made parties defendant to this cause, and are given leave to take such action as they may be advised is proper to protect their interest.

"[Signed]

Thos. J. Shaw, Judge Presiding."

The answer of Marion Reagan was filed on August 20, 1904, under the agreement referred to, in which Reagan denies the allegations of the petitioner and says he is a tenant of Freidman, Keiler & Co., of Paducah, Ky., a firm composed of Joseph L. Freidman and John W. Keiler, and he is informed and believes that said firm are the owners and entitled to the possession of the lands and premises described in the complaint, and that he is holding the land for them. He disclaims any interest or title whatever in or to said land, and says he is only a tenant at will of the said Freidman, Keiler & Co. He is advised and believes that Joseph L. Freidman and John W. Keiler are necessary and proper parties for the final determination of this action, and prays that they be permitted to come in and make themselves parties defendant to the cause.

I have stated the foregoing from the record brought into this court, that it may throw light, as far as may be, on the question as to whether the controversy involved in this case was one in which Marion Reagan had any real interest. A petition is then filed by Friedman and Keiler to remove the case to the Circuit Court of the United States for the Western District of North Carolina; petitioners averring: That the suit is of a civil nature, and that the matter and amount in dispute exceed the sum of \$2,000, exclusive of interest and cost, and that in it there is a controversy between citizens of different states; that is, a controversy between the petitioners, who were at the time of the bringing of the suit, and have been ever since, and still are, citizens of the state of Kentucky, and the defendants, who were at the time of the bringing of the suit, have been ever since, and still are, citizens of the state of North Carolina. That the controversy is of the following nature, an ordinary action of ejectment to recover the land to which the plaintiffs claim title and damages for the detention thereof, which land is worth at least the sum of \$3,000. That Marion Reagan is a tenant of the petitioners, and in possession of said land as such tenant, and disclaims all right, title, or interest in or to said premises. This petition was sworn to by J. H. Lange as the duly authorized agent of the firm of Freidman, Keiler & Co., and was accompanied by the usual bond. At the August term, 1904, the judge declined to remove the case, and continued the hearing until the next

term of the criminal court in Buncombe county, and, the same coming on to be heard before Judge Shaw in Asheville, the application to remove the case was denied on the ground that Marion Reagan was a necessary party to the suit, and not merely a formal party, as set out in petition for removal. Thereupon the defendants, Freidman, Keiler & Co., obtained a transcript of the record, and filed the same in the Circuit Court on December 30, 1904.

The only question argued at the bar on this motion to remand is whether Marion Reagan is a necessary party to the suit. It is not denied, as I understand it, that he is only a tenant in possession of the land holding and caring for the same for the defendants, whom he avers, and who aver themselves, to be the true owners. I am not aware of any statutory law in North Carolina, nor has any been called to my attention, which would make the tenant in possession, when the true owners come in and make themselves parties defendant, anything more than a stakeholder, and without real interest in the controversy. Marion Reagan disclaims any interest whatever in the land, and says he is only a tenant at will. This is all that appears. How, then, can he be a necessary party to this controversy?

In *Johnston R. Frog & Switch Company v. Buda Foundry & Mfg. Co.* (C. C.) 148 Fed. 883, Judge J. B. McPherson delivers a very brief opinion on a question like this, as follows:

"The real dispute in this case is between the Johnston Railroad Frog & Switch Company, a Pennsylvania corporation, and the Buda Foundry & Manufacturing Company, a corporation of the state of Illinois. Of the three defendants remaining, the West End Trust Company is a mere stakeholder, and the interest of Edward H. Johnston and Charles H. Johnston is substantially identical with the interest of the complainant. They are its president and treasurer, respectively, are members of the board of directors, control the stock of the corporation, and took part in the passage of a resolution directing this suit to be brought against the Buda Company. Moreover, the Johnstons have filed an answer admitting the truth of all the facts set out in the bill, and submitting themselves in all respects to the decree of the court; and the answer of the trust company is to the same effect. It is therefore clear, under the decisions, that no real dispute exists so far as these three defendants are concerned, and that a proper arrangement of the parties would be a controversy in which the Johnstons should be classed with the complainant, and that the trust company may be treated as a formal party, having no interest in the result of the litigation. As a consequence, the Circuit Court has jurisdiction to entertain the suit. Removal Cases, 100 U. S. 457, 25 L. Ed. 593; *Hutton v. Bancroft Co.* (C. C.) 77 Fed. 481."

In *Rogers v. Penobscot Mining Company*, 154 Fed. 606, 610, 83 C. C. A. 380, 384, in an opinion for the Circuit Court of Appeals of the Eighth Circuit, Circuit Judge Sanborn says:

"Did the fact that the Penobscot Company was a corporation of the state of the citizenship of the complainants oust the jurisdiction of the Circuit Court? In a determination of the jurisdiction of the national courts and the right to remove causes of action to them, indispensable parties only should be considered, because all others may be dismissed or disregarded, if their presence would oust or restrict the jurisdiction or the right. *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 658, 68 C. C. A. 288, 296; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 432, 23 Sup. Ct. 807, 47 L. Ed. 1122; *Bacon v. Rives*, 106 U. S. 99, 104, 1 Sup. Ct. 3, 27 L. Ed. 69; *Wormley v. Wormley*, 8 Wheat. 421, 451, 5 L. Ed. 651; *Wood v. Davis*, 18 How.

467, 475, 15 L. Ed. 460; *Sioux City Terminal R. & W. Co. v. Trust Company of N. A.*, 82 Fed. 124, 126, 27 C. C. A. 73, 75; *Cella, Adler & Tilles v. Brown* (C. C.) 136 Fed. 439, 442; *Cella v. Brown*, 144 Fed. 742, 754, 75 C. C. A. 608, 620. An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or subject-matter which is separable from the interest of the other parties before the court, so that it will not necessarily be directly and injuriously affected by a decree which does complete justice between them, is a proper party to a suit; but he is not an indispensable party, and, if his presence would oust the jurisdiction of the court, the suit may proceed without him. *Sioux City Terminal R. & W. Co. v. Trust Company of N. A.*, 82 Fed. 124, 126, 27 C. C. A. 73, 75."

Many other authorities might be cited to the same effect, and all along the line of those referred to above.

I think the real, substantial, and interested parties to this controversy are James Wallin, on the one hand, and Joseph L. Freidman and John W. Keiler, on the other, that the presence of Marion Reagan is wholly unnecessary for the determination of the controversy, and that consequently the case is one removable to the Circuit Court.

The motion to remand to the state court must therefore be denied.

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#### THE NEW ORLEANS.

(District Court, D. Rhode Island. July 15, 1909.)

No. 1,206

#### COLLISION (§ 91\*)—STEAM VESSELS MEETING—VIOLATION OF NARROW CHANNEL RULE.

The steamer Bayport, passing up the Providence river on a half-flood tide, came into collision with the steamer New Orleans, passing down, and libeled the latter for damages. The Bayport had cast off a barge she had in tow a quarter of a mile further down, which was proceeding by its own momentum and the help of the tide to the port of the Bayport to an anchorage on the west side of the river. The Bayport was in the middle of the channel, and when they were at least 1,500 feet apart the New Orleans gave a passing signal of one whistle, which the Bayport did not hear; but she shortly gave two whistles. The New Orleans at once answered with three blasts and reversed. The Bayport repeated her signal, but held her course in the middle of the channel, not reversing until just before collision, while the New Orleans continued to back and had practically or entirely stopped when the collision occurred. *Held*, that the position of the Bayport's former tow on her port side did not justify her in violating the narrow channel rule, requiring her to keep to the side lying on her starboard side, nor in repeating the signal and keeping on after it was crossed; and that, even if proper, she did not starboard her helm in accordance with such signal, and was herself in fault, while no fault was shown on the part of the New Orleans.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187-192; Dec. Dig. § 91.\*

Signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



In Admiralty. Suit for collision.

E. P. Carver, R. E. Goodwin, and Carver, Warner & Goodwin, for libelants.

Daniel H. Hayne, Frank Healy, and Alex Thain, for claimants.

BROWN, District Judge. This libel is for a collision in the Providence river at 3:50 p. m., December 4, 1907, between the New Orleans, an iron screw steamer 249 feet long and 33 feet beam, and the Bayport, a whaleback steamer 265 feet long and 38 feet beam, loaded with a full cargo of 2,360 tons of coal.

The New Orleans was going down the river, and the Bayport up the river. The collision was in mid-channel; the channel being about 600 feet wide.

The exact place of collision is in dispute. It was between Wilkesbarre pier and Harbor Junction wharf, and, according to the preponderance of testimony, nearer the Wilkesbarre pier than Harbor Junction wharf, which along the middle line of the channel is about half a statute mile southerly from Wilkesbarre pier.

The stem of the New Orleans struck the starboard bow of the Bayport some 7 or 8 feet from the stem of the Bayport. The vessels separated immediately; the collision being described as a mere touch.

The only damage was to the Bayport, whose plates were torn and broken and her frames and forward bulkhead broken and bent in.

The charges of fault pressed against the New Orleans which require consideration are:

- (1) Excessive speed.
- (2) Failure to blow a danger signal.
- (3) Failure to starboard her helm.
- (4) Failure to perform an alleged duty to keep clear of the Bayport as a privileged vessel.
- (5) Putting her helm hard aport.

The Bayport, shortly before the collision, had in tow the barge Bombay, which was on its way to an anchorage on the westerly side of the river near the wharf of the Seaconnet Coal Company, its consignee. The barge was cast off below Sassafras light, and the engines of the Bayport, according to her log, continued to run for two minutes, when they were stopped, at 3:47. That they were stopped so soon is disputed by the New Orleans.

The tide was half flood and running about a knot and a half an hour.

After letting go the barge, and when abreast of Sassafras light (about three-fourths of a statute mile below Wilkesbarre pier), and while in mid-channel, Capt. Jansen of the Bayport noticed the New Orleans coming down and waited a second or two for passing signals. He says he heard none, and then blew two blasts, when the vessels were 1,500 feet apart; the New Orleans being on his starboard bow. He also stated that when the Bayport gave two blasts the New Orleans was a little below Wilkesbarre pier. From marks made by Jansen on a chart it appears that the vessels were more than 3,000 feet apart at this time.

His signal of two blasts was answered by three blasts from the New Orleans, and to this signal the Bayport replied by repeating her signal of two blasts.

That the above signals were exchanged by the vessels is not in dispute, i. e., two blasts from the Bayport answered by three from the New Orleans, followed by a second signal of two blasts from the Bayport. There is a dispute concerning other signals—as to whether the New Orleans gave the first passing signal of one blast, and whether she replied to the Bayport's second signal of two blasts by a second backing signal of three, or by a danger signal of four blasts—but it is an undisputed fact that the Bayport repeated her signal of two blasts after receiving a signal of three blasts from the New Orleans.

It is admitted by the Bayport that while in mid-channel she signalled her intention to go to that side of the fairway or mid-channel that lay on her own port side, and that she repeated that signal. The libellant also claims that the helm of the Bayport was not changed from the time the New Orleans was first sighted until after the collision, and says that the collision occurred in mid-channel.

The inland navigation rule ordinarily applicable in this narrow channel is as follows:

"Rule 12. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

The burden is upon the Bayport to justify herself for her departure from the rule. Her explanation is: That on her port side, and overlapping her, and about 50 or 60 feet away, was her tow, the barge Bombay, going to her anchorage on the west side of the channel under her own momentum and without motive power; that there was insufficient room for the New Orleans to pass between the Bombay and the Bayport; and that there was plenty of room to pass starboard to starboard.

The libellant contends that the circumstances existing must be regarded as special circumstances, not only excusing, but requiring a departure from, the ordinary rules.

It is urged that, though she had cast off the Bombay halfway between Field's Point and Sassafras Point, or upwards of a quarter of a statute mile below Sassafras Point, the Bayport was still privileged as a towing vessel bound to stand by her tow until she was anchored, and it is further urged that it was good seamanship for the Bayport to take the middle of the channel with her barge on her port hand.

That the barge was so near the Bombay as to make her presence a sufficient reason for the Bayport continuing in the middle of the channel and giving passing signals of two blasts seems doubtful. According to the testimony of Capt. Jansen of the Bayport, he was entirely clear of the Bombay at least a quarter of a mile below Sassafras Point, and when casting off the Bombay gave an order to the Bombay to starboard her wheel. If the Bombay followed this order, and from at least half a statute mile below Harbor Junction had been working in towards the westerly edge of the channel, she would probably

have been much farther than 50 or 60 feet off from the quarter of the Bayport.

The testimony of Capt. Jansen hardly justifies the argument that the Bayport was still standing by her tow to see her safely anchored. The Bayport had left another barge, the *Brittania*, at Jamestown, and after leaving the *Bombay* at Providence was to return to Jamestown for the *Brittania* to take her to New Bedford; the Bayport herself being bound for Boston.

Capt. Jansen testifies: That the Bayport when abreast of Sassafras Light, and after casting off his tow, was stopped, and going no faster than he was carried by the tide; that his engines were stopped when he gave the passing signal of two blasts, and when he received three blasts from the New Orleans and repeated his signal of two blasts.

Upon a consideration of the testimony for the Bayport, I doubt whether she has satisfactorily accounted for her departure from the ordinary rule which required her to go to that side of the channel which lay on her starboard hand. There is evidence from the witnesses for the New Orleans which tends to show that the Bayport, after casting off her tow, headed somewhat to the easterly side of the channel, while the *Bombay* was heading toward the westerly side. The Bayport's only justification for signaling her intention to depart from the narrow channel rule is in the alleged proximity of the *Bombay* on her port quarter. That the *Bombay* was in fact so near as to have involved risk of collision between the *Bombay* and the New Orleans, especially if the Bayport had so directed her course to starboard as to widen the distance between her and the *Bombay*, is not satisfactorily shown.

The libel alleges that, shortly before the Bayport came abreast of Harbor Junction, the New Orleans was seen abreast of Wilkesbarre pier, and that the Bayport was at the time practically stationary, and without steerage way. The evidence from the Bayport differs materially from these allegations; but, assuming their truth, the diligence of the *Bombay* in respect to her lookout is open to grave doubt. Assuming, however, that the New Orleans was sighted, as she should have been, when the vessels were at least three-fourths of a statute mile apart, and that the Bayport was justified in signaling her intention to pass to her own port, it is apparent that she did nothing to carry out this intention; for, according to her own witnesses, her wheel was not changed, and she was in mid-channel both when she signaled and when the vessels came into collision. If her signals were justifiable, she has still to account for her own failure to act upon them. Upon the libellant's own testimony she must be charged with a failure to have a competent lookout. Thornton, the sailor charged with that duty, had gone aft to aid in letting go the hawser, and was not at his post. This becomes especially important in the case since there was a complete failure upon the part of all on board the Bayport to hear, or to see the steam from, the first passing signal of one blast blown by the New Orleans.

By the testimony of the officers of the New Orleans, and of disinterested witnesses, it is proven by a decided preponderance of evi-

dence that before the Bayport blew two blasts the New Orleans gave the first passing signal of one short blast. This signal was given when the New Orleans was to the north of Wilkesbarre pier, and at the time the Bayport was about abreast of Sassafras Light.

Capt. Rich of the steam tug Howell, who was on his vessel in the vicinity, noticed particularly that the signals were crossed, and that a single blast from the New Orleans was answered by two from the Bayport. One fact seems to be established: That immediately upon receiving a signal of two blasts from the Bayport, whether as a cross-signal or as the first signal, the New Orleans at once blew three blasts and reversed her engines full speed astern. I find also that, upon the repetition of the two blasts by the Bayport, the New Orleans blew the danger signal of four blasts. That the New Orleans did all that she could to check her speed is apparent.

The Bayport also claims that her own engines were reversed before the collision. It is conceded, however, that she blew no signals to indicate it, and that she gave no danger signal. If her engines were reversed, it was only a very brief time before the collision.

The charge that the collision was due to excessive speed of the New Orleans is not made out. The New Orleans had left her dock at 3:43, and her engines were not speeded until 3:45. Running at this speed for about two minutes, with a head tide of about a knot and a half, she had probably not attained a speed of more than 5 or 6 knots. Her officers say that, owing to the head tide, she was not making more than  $4\frac{1}{2}$  knots over the ground. As her engines had been reversed for three minutes before the collision, with the tide against her, she must have been running very slowly at the time of collision. The master of the New Orleans says that she had sternway and was moving up the river, and the master of the Bayport gives the New Orleans a speed of 1 or 2 knots at the moment of collision.

At this time, and for several minutes before, the helm of the New Orleans was held amidships. She was seeking to avoid collision by going backwards.

According to the libel and the evidence for the Bayport, the Bayport was practically without steerageway and was being carried only by the tide until her engines were reversed.

Under the circumstances it is not apparent that any change of the heading of the New Orleans while reversing would have had any other effect than to change the angle of collision.

Upon the whole case I am of the opinion that the Bayport has failed to show that the collision was due to any fault in the management of the New Orleans. She was following her usual course, and, according to her officers and to the probabilities of the case, the presence of the Bombay well towards the westerly side of the channel was not a sufficient reason for a departure from the ordinary rule. Capt. Nickerson places the barge at a distance of 300 feet from the Bayport, and says that there was plenty of room for the New Orleans on the westerly side of the channel. The evidence is, in my opinion, insufficient to support the contention that the Bayport was a privileged vessel on account of the tow, which she had cast off at least five minutes

before the collision. Capt. Nickerson testifies that when he signaled by one blast the Bayport was about in the center of the channel but heading to the eastward, while the barge was heading to the westward. The Bayport bore a quarter of a point on his port bow. This heading of the barge accords with the evidence of Jansen that when the barge was cast off her wheel was ordered to starboard, and the easterly heading of the Bayport is testified to not only by the officers of the New Orleans, but by the witnesses Packard and Rich. Had the Bayport followed the usual course of an independent vessel, uninfluenced by any vague notions concerning the ability of the New Orleans to pass the Bombay safely, the collision would not have occurred.

The maneuvers of the Bayport after casting off the Bombay are not satisfactorily explained. The argument that she was still in attendance upon her tow is not supported by the testimony. Apparently the Bayport had discharged her duty to her tow and was through with her. Her next duty was to return to Jamestown for a barge which she had left there while bringing the Bombay to Providence. The Bayport was to proceed with the second barge to New Bedford, and there is no testimony to show that she herself intended to go further up the river when she sighted the New Orleans. The suggestion is made that she was about to cross over to the westerly side of the channel preparatory to her return to Jamestown when she first discovered the New Orleans, and that she then changed her intended course and went to the westerly side. This, however, is conjectural.

As I am of the opinion that the Bayport has failed to show any fault of the New Orleans, it is unnecessary to consider in detail the many faults charged to the Bayport.

The libel will be dismissed.

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#### SANDERSON v. BISHOP et al.

(Circuit Court, W. D. Arkansas, Texarkana Division. May 18, 1909.)

#### APPEARANCE (§ 9\*)—WHAT CONSTITUTES—FILING ANSWER TO MERITS.

The filing of an answer to a bill on the merits by a defendant who was a nonresident and was not served with process constituted a general appearance, and was a waiver of a pending special plea to set aside a prior appearance of such defendant by an attorney as unauthorized.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 45; Dec. Dig. § 9.\*]

#### In Equity. On special plea.

On the 12th of June, 1908, the plaintiff filed a suit at law, in the circuit court of Little River county, Ark., against the above-named defendants, and procured an attachment against certain lands, the alleged property of the defendant Bishop. The defendants being nonresidents, and no service being had, a warning order was issued. On July 6, 1908, and before either defendant appeared, an amendment to the complaint was filed, and under the state Code of Procedure the case was transferred to the equity docket. On July 11, 1908, L. A. Byrne, an attorney of this court, filed a petition for both defendants in the Little River circuit court, and tendered therewith a bond for the removal of the case to this court, and the order was made by the Little River

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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circuit court, and the case removed accordingly. Afterwards, on November 16, 1908, a demurrer was filed by said Byrne for both defendants, which was heard and overruled, and on the application of plaintiff a receiver was appointed to take charge of all the lands which are the subject-matter of the controversy. Meantime, the bill had been recast to conform to the practice of this court. Subsequently, and in vacation, on January 2, 1909, defendant Bishop filed his separate answer, and on the same day defendant Jacob L. Neff appeared specially by Henry Moore, Jr., and, without leave first obtained, filed what is denominated a "special plea," by which he prays to strike his name from the motion to transfer the case to this court, and from the demurrer filed at the November term, 1908, for the reason that he alleges the said Byrne had no authority to represent him in any of the proceedings theretofore had, or to sign his name to any papers or proceedings in this or the state court from which the case was removed, and everything done by the said Byrne was without his knowledge, consent, or authority, and that all he had done was done in the interest of his codefendant and against his interest. Evidence was heard pro and con on the special plea, and, among other things, it developed that two days after the special plea was filed the defendant Jacob L. Neff, by his attorney, filed answer to the merits of the bill, purporting to reserve therein all his rights, and waiving nothing contained in said special plea by reason of filing the said answer. Thereupon the plaintiff filed a replication to the answer.

W. H. Arnold and M. E. Sanderson, for plaintiff.

Henry Moore, Jr., for defendant Neff.

ROGERS, District Judge (after stating the facts as above). In the argument counsel for defendant Neff urged the answer was filed before the "special plea" was heard, because, as they supposed, a decree pro confesso could be taken against his client in the absence of an answer. He seems to have overlooked rules 19, 33 and 34 of the Supreme Court of the United States, which clearly indicate the practice. But if a decree pro confesso was proper at all under the condition of the pleading when the answer was filed, it would have been set aside if taken before the hearing of the special plea, certainly on presentation of a meritorious defense. I think the filing of an answer to the merits, notwithstanding the hearing of the special plea had not been disposed of, was a waiver of all irregularities in the service, indeed a waiver of service itself, and put the defendant Neff in court, if indeed he was not already there, which I do not find it necessary to determine. Under the strict practice of the English chancery courts it might be contended with much force that the special plea itself was a general appearance, but there is no necessity for determining that question now. The correct practice, I think, is laid down by Judge Hammond in *Romaine et al. v. Union Insurance Co. et al.* (C. C.) 28 Fed. 625 (an equity case), where it is practically held that leave should be first had from the court to appear especially and file motion to quash service where it is for any cause irregular. This was the practice observed in *Union Guarantee, etc., Co. v. Craddock*, 59 Ark. 595, 28 S. W. 424 (near bottom of page). But this question is not decided, and perhaps under the modern practice a special appearance might be had (certainly in common-law cases under codes like that of Arkansas) without first obtaining leave from the court. In this case, however, there was no service, but appearance by attorney, who, it is alleged, had no authority to appear. I do not think that question should be

raised by a plea. A plea goes to the bill; not to the service or to the appearance. In this case it is probable the correct practice was that a special appearance should have been first had, and a rule made on the attorney to show by what authority he acted. In that way the matter could have been brought to the attention of the court with safety and expedition. But this is not decided, because, in the view the court has taken, it is not necessary. A careful reading of the case of *Union Guarantee, etc., Co. v. Craddock*, 59 Ark. 593, 28 S. W. 424, will show that the practice in equity in the United States courts is not controlled by the principles applicable to the procedure under the codes where all pleas are abolished and every defense, whether in abatement or bar, must be set up in the answer. They are applicable to a case at law in the United States court, because by section 914, Rev. St. (U. S. Comp. St. 1901, p. 684), the practice, pleadings, and mode of procedure, so far as applicable, have been made to conform to those obtaining in the states where the United States courts are being held. *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Fitzgerald & Mallory Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608; *St. L. & S. F. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659. But the rule in equity is different. What attitude would this case be in if the court should now hold that Byrne had no authority to appear, and all his doings were stricken from the record and annulled? The defendant indeed would still be in court by his answer, which goes to the merits of the bill. *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935, is an equity case. There the defendant, upon whom no personal service had been obtained, appeared and filed the following motion:

"Comes and moves the court here to dismiss the bill of the plaintiff for want of jurisdiction apparent on the face of it, and for causes for such motion showed (among others): (1) The bill does not aver the citizenship of the plaintiff, nor does it show such facts in regard to the citizenship or residence of the defendant as gives the court jurisdiction. (2) The plaintiff shows by his bill that he has an adequate remedy at law."

Judge Bradley, whose learning adorned every subject he touched, said this:

"In this case Andrews was a necessary party, and he was not a resident of the district, and was not served with process, but he did voluntarily appear. It is true that as soon as he appeared he moved a dismissal of the bill on two grounds: (1) That it did not show such facts in regard to the citizenship or residence of the defendants as to give the court jurisdiction. (2) That it contained no equity. Whether, if he had made the motion on the first ground alone, he would have waived his personal exemption, it is not necessary to decide. His moving to dismiss for want of equity was clearly a waiver; and he was properly required to answer the bill."

That cause differs from this, it is true, in this: that the same motion which went to the jurisdiction went also to the merits. In this case the answer was not filed until two days after the "special plea." The plea was intended to get rid of an unauthorized appearance, and the answer was itself an appearance. They were absolutely inconsistent, and the answer destroyed the plea; it waived all questions of

irregularity or unauthorized appearance, and was itself an appearance, and falls clearly within the principles announced in *Jones v. Andrews*, supra. (*Romaine v. Insurance Co.* [C. C.] 28 Fed. 625, may be read with much profit.) After the filing of the answer, there was no necessity for the plaintiff to set down the plea for hearing, or to take issue upon it under rule 33. The plea itself was necessarily waived. If the plea had been heard and overruled, rule 34 expressly provides for an answer.

The conclusion is that the special plea must be overruled, and it is so ordered.

### UNITED STATES v. ONE TRUNK.

(District Court, S. D. New York. July 19, 1909.)

#### 1. CUSTOMS DUTIES (§ 67\*)—PASSENGER'S BAGGAGE—"TRUNK."

Though a passenger's baggage declaration specified only a "trunk," without any mention of its contents, it sufficiently complied with section 2802, Rev. St. (U. S. Comp. St. 1901, p. 1873), requiring that, if such baggage contains any dutiable article, it shall be "mentioned." The specification of the "trunk" was equivalent to mention of its contents.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 67.\*

For other definitions, see Words and Phrases, vol. 8, p. 7116.]

#### 2. CUSTOMS DUTIES (§ 125\*)—"ENTRY"—WHEN ENTRY BEGINS.

While it is a condition to the entry of merchandise that invoices should be carried before an American consul, this is not necessarily a part of the entry within the meaning of Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135 (U. S. Comp. St. 1901, p. 1895), relating to illegal "entry." At the earliest entry does not begin until the owner, after the goods reach this country, begins that series of acts through which, by application to the customs officials, he gains possession of the goods.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 125.\*

For other definitions, see Words and Phrases, vol. 3, p. 2408.]

#### 3. CUSTOMS DUTIES (§ 125\*)—"ATTEMPT TO MAKE ENTRY"—ABANDONMENT OF ILLEGAL INTENT.

An importer swore to a false invoice value before an American consul, but on importation presented at the custom house an invoice to which had been added a sum sufficient to make the true value. *Held*, that the case was not within Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135 (U. S. Comp. St. 1901, p. 1895), relating to any "attempt to make any entry of imported merchandise by means of any fraudulent or false invoice." The illegal intent was abandoned before any "attempt" was made to make entry of the goods.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 125.\*]

#### In Rem. Proceedings for forfeiture of imported goods.

These proceedings were brought under section 2802, Rev. St. (U. S. Comp. St. 1901, p. 1873), and Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135 (U. S. Comp. St. 1901, p. 1895), the pertinent portions of which read as follows:

"Sec. 2802. Whenever any article subject to duty is found in the baggage of any person arriving within the United States, which was not, at the time of making entry for such baggage, mentioned to the collector before whom such entry was made, by the person making entry, such article shall be forfeited,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



and the person in whose baggage it is found shall be liable to a penalty of treble the value of such article."

"Sec. 9. That if any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise by means of any false or fraudulent invoice, \* \* \* such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited."

At the trial of the case counsel stipulated the facts to be as follows:

The claimant in this case, Mrs. Anna McNally, is and has been for many years in business as a dressmaker in New York City. During the latter part of February or the early part of March, 1908, she purchased in Paris from Goupy, Perdoux, Agnès, Jeanne Hallé, and Corné, Parisian dressmakers and makers of dress models, some 33 dresses (3 white cotton gowns, and 10 blouses), all of which were for use as models. On the 3d day of March, 1908, she presented to the deputy consul general at Paris, France, a detailed invoice in triplicate of these purchases, which she valued therein at 10,246 francs. She signed the declaration on the blank form, attached to each of the three copies of the invoice, in which she declared, among other things, that the invoice annexed thereto was in all respects correct and true, and contained a correct statement of the actual cost of the merchandise—i. e., the actual price paid therefor—and that she intended to enter the merchandise at the port of New York. This invoice in triplicate was certified by the deputy consul general on March 3, 1908. Its serial number is 4,850. The first original of this invoice is presumably on file as required by law, in Paris. The triplicate original was mailed by the deputy consul general direct to the collector of the port of New York, and received at the custom house on March 11, 1908. It is marked and admitted in evidence as "Exhibit A." The duplicate original of this invoice was delivered by the deputy consul general to Mrs. McNally on March 3, 1908. Mrs. McNally thereupon embarked from France for New York on the Kronprinzessin Cecilie, with the trunk containing the dresses and with the duplicate invoice, arriving at New York on March 10, 1908. On arrival she made declaration of baggage on the usual blank form, declaring that one trunk, upon which she did not declare any value, was to be sent to public stores. This declaration, signed by her, is marked and admitted in evidence as "Exhibit B." This trunk, containing the dresses, etc., previously mentioned, was sent to public stores, where it stayed until examined, appraised, seized, and then released to Mrs. McNally under bond filed by her, under Rev. St. U. S. § 938 (U. S. Comp. St. 1901, p. 690), for the amount of the goods, conditioned upon the termination of this suit favorably to her.

On March 12, 1908, Mrs. McNally, by her brokers, Hirschbach & Smith, filed at the custom house her written entry of the dresses contained in this one trunk, which she valued at 10,246 francs (the value declared before the consul to be correct), plus 10,236.60 francs, which sum she added "to make market value," making a total valuation of 20,482.60 francs, which is approximately the amount originally paid by Mrs. McNally for the goods in Paris. The serial number of this written entry is 58,336. It is marked and admitted in evidence as "Exhibit C." At the same time with the written entry Mrs. McNally, by her brokers, Hirschbach & Smith, filed at the custom house as required by law the duplicate invoice. On this duplicate invoice Mrs. McNally had made additions to the various items as declared before the consul to the amount of 10,236.60 francs, which, added to the original invoice value, made the sum of 20,482.60 francs, the value stated in the written entry. This duplicate invoice, with additions as aforesaid, is marked and admitted in evidence as "Exhibit D." The triplicate invoice (Exhibit A) received from the deputy consul general has never been in any manner changed. The goods were subsequently examined and appraised at the sum of 20,482.60 francs, the value declared by Mrs. McNally in the written entry. They were thereupon seized and released under bond as already mentioned.

This suit is against the bond as for a forfeiture of seized goods in the possession of the government. The foreign value of the goods is \$3,953.14; duty \$2,370.63; home value \$6,323.77.

William L. Wemple and Harold S. Deming, Asst. U. S. Attys.  
W. Wickham Smith, for claimant.

HAND, District Judge. In this case the trunk must be regarded from two points of view: First, as passenger's baggage; second, as imported merchandise. As passenger's baggage, the question comes up, under section 2802 of the Revised Statutes (U. S. Comp. St. 1901, p. 1873), whether the claimant "mentioned to the collector before whom such entry was made any article subject to duty \* \* \* found in" her "baggage." The government claims that because she did not make a complete description of the trunks, as required by section 2799, the goods were forfeited under section 2802. There is no ground for such contention. *United States v. One Pearl Chain*, 139 Fed. 513, 71 C. C. A. 500. Her declaration was as though she had said:

"I have here certain goods in a trunk, which I am going to send for your examination to the stores."

I can see nothing in the government's position, except that to mention the trunk was not to mention any dutiable article. If this means that "trunk" is not the equivalent of "personal effects in a trunk," it is too trivial for notice. If it means that "personal effects" is not mention enough of "gowns," it is met by *United States v. One Pearl Chain*, supra, in which a pearl necklace was "mentioned" by the term "wearing apparel." I must certainly look at the substance, not the letter, of the statute; and it is perfectly clear that every possible purpose of the section is answered by this declaration. The case is much weaker for the government than *United States v. One Pearl Chain*.

The second consideration is whether, as merchandise, the trunk is forfeited because Mrs. McNally "attempted to enter" it. As I understand it, one "attempts" a crime where, with an intent to complete the crime, he does any part of the acts which together constitute the complete crime. I do not understand that anything which leads up to, but does not itself constitute a part of, a crime, can alone constitute an attempt to do it. It is often a matter of some casuistry as to just where the series of acts actually begins which, when completed, would constitute a crime; for by no means all those things which are necessary conditions to the commission of crime are a part of the crime itself. In this case it is no doubt a necessary condition to the entry of the goods that Mrs. McNally should take out the invoices in Paris and send one to the customs house, because that was a condition of entry; but it was not, on that account, necessarily a part of the entry. In my judgment the entry does not begin, at the earliest, until the owner, after the goods reached this country, begins that series of acts through which, by application to the customs officials, he gains possession of his goods. If this is so, the claimant changed her intent before she performed any of the series of acts which, when completed, would have constituted such entry; and so she made no attempt.

It is, perhaps, not necessary to determine with strictness just how much the term "entry" includes. All that is necessary in this case is to show that the taking out of the fraudulent invoice in Paris is not part of the entry. I am satisfied that, in the sense that the statutes use it, the entry does not begin so early as that. Besides, I consider

the case controlled by *United States v. Riddle*, 5 Cranch, 311, 3 L. Ed. 110, and *United States v. 28 Packages of Pins*, Gilp. 306, 28 Fed. Cas. 244.

I direct a verdict for the claimant.

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UNITED STATES v. WHITE et al.

(Circuit Court, S. D. New York. June 12, 1909.)

1. **INDICTMENT AND INFORMATION (§ 110\*)—ALLEGATION IN WORDS OF STATUTE.**  
It is no objection to an indictment for conspiracy that the agreement constituting the conspiracy is laid in the words of the statute.  
[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. § 110;\* *Conspiracy*, Cent. Dig. §§ 95, 97.]
2. **INDICTMENT AND INFORMATION (§ 108\*)—ALLEGATIONS OF FACT—PRESUPPOSITION OF EXISTENCE OF LAW.**  
An indictment that describes smuggled property in terms which presuppose the existence of some law is not bad on that account, as where it describes the goods "as subject to duty and which should have been invoiced."  
[Ed. Note.—For other cases, see *Indictment and Information*, Dec. Dig. § 108.\*]
3. **CUSTOMS DUTIES (§ 134\*)—SMUGGLING—INDICTMENT—SUFFICIENCY OF ALLEGATION.**  
An allegation that defendants knowingly smuggled goods meets the requirement that it must be alleged that they knew that the goods were dutiable.  
[Ed. Note.—For other cases, see *Customs Duties*, Cent. Dig. § 337; Dec. Dig. § 134.\*]
4. **CONSPIRACY (§ 43\*)—DEFAUDING GOVERNMENT—CUSTOMS DUTIES—INDICTMENT—SUFFICIENCY OF ALLEGATION.**  
An allegation of conspiracy to defraud the government of customs duties is sufficiently made in an indictment that alleges conspiracy with respect to merchandise to be imported into the United States without invoicing or entering the same and without paying the duties then and there accruing thereon.  
[Ed. Note.—For other cases, see *Conspiracy*, Dec. Dig. § 43.\*]
5. **WORDS AND PHRASES—"IMPORTED."**  
The word "imported" means at least *prima facie* dutiable.  
[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 4, pp. 3438, 3439.]
6. **INDICTMENT AND INFORMATION (§ 111\*)—NEGATING AN EXCEPTION IN STATUTE—STATUTE COLLATERALLY INVOLVED.**  
The rule in respect to negating an exception when the statute is that under which the right is claimed does not extend to every statute collaterally involved in the description of every incidental allegation of the pleading, as, in an indictment for conspiracy to defraud the revenue on imports, the allegations need not cover the possibility that the dutiability of the merchandise might be avoided by change of its destination. It is more than enough advantage that the defendant may at trial prove such an exception without pleading it.  
[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 295-298; Dec. Dig. § 111.\*]

On Demurrer to Indictments for Conspiracy to Defraud the Customs Revenue.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This is a demurrer by the defendants to an indictment charging them in six counts with conspiracy, under section 5440 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 3676). The first, third, and fifth counts charge conspiracies to violate section 2865 of the Revised Statutes (U. S. Comp. St. 1901, p. 1947), and the second, fourth, and sixth counts to defraud the United States. The indictment in each count consists of the allegation of a conspiracy, and then of several paragraphs alleging different overt acts done in partial fulfillment of the conspiracy. The allegations of the conspiracy in the first and second counts are typical of those objected to throughout. The allegation of the conspiracy in the first count is that the defendants, on the 30th day of January, 1907, at the Southern district of New York and within the jurisdiction of this court, did unlawfully and willfully conspire to commit an offense against the United States in and by knowingly and willfully smuggling and clandestinely introducing into the United States at the port and collection district of New York, from a foreign country, with intent to defraud the revenue of the United States, certain goods, wares, and merchandise, to wit, women's wearing apparel and materials for women's wearing apparel, a more exact description of which is to the grand jurors unknown, subject to duty by law, and which should have been invoiced, without invoicing the same, and without paying or intending to pay or account for the duty thereon. The allegation of conspiracy in the second count is that the defendants did, on the 31st day of January, 1907, at the Southern district of New York and within the jurisdiction of this court, unlawfully and willfully conspire to defraud the United States of its customs duties on certain merchandise, to wit, divers articles of women's wearing apparel and materials for women's wearing apparel, a more exact description of which is to the grand jurors unknown, subject to duty by law, to be imported into the United States from a foreign country, that is to say, France, without invoicing or entering the same, and without paying the duties then and there accruing upon said merchandise so imported, or accounting for the same.

Goldthwaite H. Dorr, Asst. U. S. Atty.

Battle & Marshall (George Gordon Battle, of counsel), for defendant White.

Walter Evans Hampton and Allan C. Rowe, for defendant William H. Kilgannon.

Van Schaick & Brice (Wilson B. Brice, of counsel), for defendant Elizabeth Kilgannon.

HAND, District Judge. The first, third, and fifth counts of the indictment are clearly good. The only portion of them open to attack is the allegation of the conspiracy. To allege that the defendants conspired is, at least, to allege that they agreed to do the matters which are set forth as the substance of their conspiracy. I do not mean to say that the mere fact that a conspiracy is alleged is sufficient to show that the conspiracy was unlawful, but that, taken at its lowest terms, to allege a conspiracy is to allege an agreement. The substance of the agreement is in the words of the statute, and none of the words stating a conspiracy contain any propositions of law, except the following, that the goods were "subject to duty by law and which should have been invoiced." Now the agreement is a fact, even if the substance of it was in the very words of the statute. No doubt the parties may contract in the words of the statute, if they so chance to do. Therefore there is no merit upon demurrer in urging that the contract of conspiracy was in legal terms. Two parties may say: "Let us convey an easement in all our corporeal hereditaments." The agreement is a fact, though the terms bristle with legal terminology.

But the objection is not good, even aside from that consideration. It is true that the description of the smuggled property is in terms which presuppose the existence of some law; but in that respect it is no worse than two or three indictments which the Supreme Court has upheld. *Dunbar v. U. S.*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; *Keck v. U. S.*, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505; *Williamson v. U. S.*, 207 U. S. 447, 28 Sup. Ct. 163, 52 L. Ed. 278. The objections, therefore, to the first, third, and fifth counts are not well taken. It is true that allegations in an indictment must be allegations of fact; but this requirement must not be pressed with a schoolman's logic. In all pleadings, from time immemorial, there have been allegations of so-called fact which presuppose for their truth the existence of certain rules of law. Allegations regarding "real property," "seisin," "possession," "ownership," and others, have been common from the earliest times, and no one has ever thought that it was necessary to allege all the facts from which the "mixed" conclusion arose. To do so would be to enormously incumber the pleadings, and the law, even in its pedantic days, has not been theoretically consistent to that degree. The decision of *Dunbar v. U. S.*, supra, clearly shows that an indictment may describe property "as subject to duty and which should have been invoiced," without being open to objection on the score raised. The authorities cited by the demurrants do not touch the questions raised here, except most generally.

The allegation that the parties knew that the goods were dutiable undoubtedly must be alleged (*U. S. v. Carll*, 105 U. S. 611, 26 L. Ed. 1135); but the allegation that they knowingly smuggled the goods meets that requirement (*U. S. v. Dunbar*, supra, at page 192 of 156 U. S., page 325 of 15 Sup. Ct. [39 L. Ed. 390]). Therefore the first, third, and fifth counts are good.

The second, fourth, and sixth counts allege the conspiracy to have been to defraud the United States of merchandise to be imported into the United States without invoicing or entering the same, and without paying the duties then and there accruing upon said merchandise so imported. The demurrants object, because the mere importation of merchandise does not include its entry into and passage through the custom house, and therefore a conspiracy to import goods without entering and invoicing the same, and without paying duties, is not a conspiracy to defraud the government. They argue that the "importation" is complete under the authorities when the goods come within a collection district of the United States, and yet that they may, before being entered and invoiced, pass outside the country, without paying duties. The word "imported" at least means *prima facie* dutiable. *Keck v. U. S.*, 172 U. S. 463, 19 Sup. Ct. 254, 43 L. Ed. 505, and cases there cited. In this indictment this meaning is reinforced by the words "without paying the duties then and there accruing." If the duties have once accrued, then entry and invoice follow as of course, unless the destination of the goods is changed. That is a possible negative which the criminal pleader need not make any more than the civil. It is more than enough advantage that the de-

fendant may at trial prove such an exception without pleading it. The rules regarding negating an exception are true enough when the statute is that under which the right is claimed. It does not at the present time extend to every statute which collaterally is involved in the description of every incidental allegation of the pleading. I think there can be no question that the indictment is alleged with sufficient particularity.

The demurrers are overruled, with leave to plead over on June 14th in open court, at which time defendants are to be prepared for trial on these indictments.

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**ARMSTRONG CORK CO. v. MERCHANTS' REFRIGERATING CO. et al.**

(Circuit Court, W. D. Missouri, W. D. July 16, 1909.)

No. 3,325.

**1. COURTS (§ 414\*)—FEDERAL COURTS—LAW AND EQUITY—JURISDICTION.**

A federal Circuit Court, on its common-law side, had no jurisdiction either to foreclose a mechanic's lien or to award plaintiff any relief against his failure to proceed to the enforcement thereof within the statutory time.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 414.\*]

**2. LIMITATION OF ACTIONS (§ 119\*)—COMMENCEMENT OF ACTION—TIME.**

On the last day allowed by law for the commencement of an action to enforce a mechanic's lien, plaintiff filed a petition therefor on the law side of the Circuit Court. The petition contained no prayer for process, and the summons thereon was returned unexecuted by the marshal by direction of plaintiff's attorneys. Thereafter, on written praecipe, subpoenas in chancery were issued by the clerk and served, after which a bill in equity, containing no prayer for process, was filed on the law side of the court. *Held*, that such proceedings were insufficient to constitute the commencement of a suit to foreclose the lien within the time required.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 119.\*]

**3. EQUITY (§ 122\*)—BILL—SUBPOENAS—PRAYER FOR PROCESS.**

Under equity rule 11, the clerk is expressly prohibited to issue chancery subpoenas until the bill is filed in his office.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 295; Dec. Dig. § 122.\*]

**4. EQUITY (§ 222\*)—BILL—PRAYER FOR PROCESS—DEMURRER.**

A bill which contains no prayer for process is demurrable.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 222.\*]

**5. COURTS (§ 414\*)—BILL—FILING.**

An amended petition or bill to foreclose a mechanic's lien, filed on the law side of the Circuit Court, was demurrable.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 414.\*]

On Pleas to the Jurisdiction.

Ashley, Gilbert & Dunn, for plaintiff.

F. V. Kander, Botsford, Deatherage, Young & Creason, E. L. Scarritt, W. C. Scarritt, W. P. Hall, A. F. Evans, and W. B. Sutton, for defendants.

POLLOCK, District Judge. The substantial question presented by the pleas filed herein arises in this manner. Under the laws of this

\* For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

state relating to liens of materialmen and mechanics, an action to foreclose such lien must be commenced within 90 days from the filing of the lien. The plaintiff in this case, under contract with the defendant the Merchants' Refrigerating Company, furnished materials of large value, which were used in converting a building on the real estate described therein into a cold storage or refrigerating plant, and to secure itself prepared and filed its lien in pursuance of the laws of the state creating such liens and providing for their enforcement, and on the last day allowed by the law for the commencement of an action to enforce such liens, February 7, 1908, caused to be prepared by its counsel a petition, according to the practice obtaining in the courts of the state, under the Code, lodged this petition with the clerk of this court, and directed it to be filed as a common-law action. This petition contains no prayer for process, and the summons issued thereon was not at any time served on defendants, or either of them, by the marshal, but was, as shown by the return of the marshal indorsed thereon, returned unexecuted by direction of plaintiff's attorneys. Thereafter, and on the 10th and 11th days of February, 1908, respectively, on written præcipe filed for that purpose, two subpoenas in chancery were issued by the clerk and placed in the hands of the marshal for service, and were, as shown by the return of the officer indorsed thereon, served on defendants on the days on which they were issued. These chancery subpoenas commanded defendants to appear at the ensuing March rules of this court and answer the complaint of the Armstrong Cork Company filed against them on the 7th day of February, 1908. As has been seen, there was no suit on the equity side of this court pending at the date of the issuance and service of these chancery subpoenas to which defendants might have appeared. Thereafter, and on the 13th day of February, there was filed in the office of the clerk of this court, and in the above numbered and entitled case, a paper styled "Amended Petition or Bill to Foreclose Mechanic's Lien," which pleading, in most part, at least, conforms to a bill of complaint in equity to foreclose a lien on real property. However, it contains no prayer for process, and none has been taken out thereon. Further, it pleads neither justification nor excuse for failure to file bill of foreclosure within the 90 days provided by statute from the date of filing the lien, and prays no relief from the court relieving it of such failure.

At the March rules of this court defendants entered their appearance as commanded in the chancery subpoenas served upon them, and have severally demurred and pleaded to the amended petition or bill to foreclose mechanic's lien, averring want of jurisdiction of this court over them and failure to commence the suit within the 90 days provided by the statute. These pleas and demurrers were set down for hearing, and have been fully presented and submitted by solicitors for the respective parties, in oral arguments and on written briefs. In this state of the record the question raised for decision is this: Were the proceedings taken to bring defendants before the court to answer the demands of the moving party, plaintiff or complainant, commenced within the statutory period of 90 days? It is needless to observe this court, on its common-law side, is competent to neither foreclose the mechanic's lien set forth by plaintiff, nor to afford plaintiff any relief against its fail-

ure to proceed to the enforcement of a purely statutory right within such limitation as to time as may be prescribed by the statute. *Security Trust Co. v. Black River National Bank*, 187 U. S. 237, 23 Sup. Ct. 52, 47 L. Ed. 147; *Thompson v. Railroad Companies*, 6 Wall. 134, 18 L. Ed. 765; *Schurmeier v. Conn. Mut. Life Ins. Co.*, 69 C. C. A. 22, 137 Fed. 42; *Id.* (C. C. A.) 171 Fed. 1.

It will be conceded an action at law is commenced by the filing of a petition and taking out writ of summons thereon; but in this case, as has been seen, the summons issued when the original petition was filed was returned by the marshal, under direction from counsel for plaintiff, without service or attempted service thereof. True, on praecipes filed for that purpose after the bar of the statute had fallen, chancery subpoenas were issued by the clerk and were served on defendants; but there was at this time no bill of complaint on file praying such process. Equity rule No. 23 provides:

"Prayer for Process.—The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process."

Equity rule 11 provides:

"No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office."

Equity rule 12 provides:

"Whenever a bill is filed the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof," etc.

Under the rules the clerk was without authority to issue the subpoenas issued and served in this case. Thereafter, and beyond the 90 days prescribed by the statute, there was filed with the clerk the amended petition or bill to foreclose a mechanic's lien. This was filed in the law action on the law side of the court, and, if effective for any purpose, operated to supersede the original pleading. If it had been filed on the equity side of the court as an original bill, and chancery subpoena had issued thereon, it would have been vulnerable to demurrer for three reasons: It contains no prayer for process, as required by the rules; it was filed after the time prescribed in the statute for foreclosing the lien asserted had expired; and there is no excuse for the delay pleaded therein. It has been held a bill of complaint in equity which omits prayer for process is demurrable. *Goebel v. American Railway Supply Co.* (C. C.) 55 Fed. 828; *U. S. v. Agler* (C. C.) 62 Fed. 824. However, this amended petition or bill to foreclose was filed in the law action, where the matters set forth therein are not cognizable over the objections of defendants, and hence demurrable.

It follows, as the law action, timely commenced by plaintiff, was abandoned by the voluntary recall of the summons issued thereon by counsel for plaintiff, and an attempt was made to proceed in equity after the expiration of the 90 days prescribed by the statute creating



the right sought to be enforced, and as the chancery subpoenas were issued and served with no bill of complaint on file demanding equitable relief to which complainant may have deemed itself entitled, and no prayer for such process, the amended pleading filed did not operate as a continuance of the law action, and as a suit in equity is, for the reasons given, entirely insufficient.

The demurrers and pleas are therefore sustained.

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**BRINCKERHOFF v. HOLLAND TRUST CO. et al.**

**ROOSEVELT et al. v. BRYANT et al.**

(Circuit Court, S. D. New York. June 30, 1909.)

**CORPORATIONS (§ 318\*)—SUBROGATION (§ 10\*)—OFFICERS—RECOVERY FROM OFFICER OF DEBT UNLAWFULLY CONTRACTED—RIGHT TO REIMBURSEMENT.**

Cross-complainant was president and a director of a trust company and also of a building association; the officers of both being the same. Such officers wrongfully and unlawfully, without authority from the stockholders, transferred property of the building association to the trust company upon the promise of that company, also unauthorized, to pay out the stock of the building association, to secure which promise certain securities were transferred to the association. The securities having proved uncollectible, and the trust company becoming insolvent, at suit of a stockholder of the building association cross-complainant was held individually liable and compelled to pay such stockholders the full value of their stock. *Held*, that he was entitled to be subrogated to the right of the trust company to the securities thus released, but had no claim in equity against its stockholders for reimbursement.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 318; \* Subrogation, Cent. Dig. § 30; Dec. Dig. § 10.\*]

In Equity. On cross-bill of revivor and supplement.

See, also, 159 Fed. 191.

Wellmann, Gooch & Smythe, for complainants.

Geo. M. Van Hoesen and Tunis G. Bergen, for defendants.

MARTIN, District Judge. This suit was originally brought in the United States Circuit Court for the Southern District of New York by Albert A. Brinckerhoff, on behalf of himself and all other stockholders similarly situated of the Holland Building Association, against the Holland Trust Company and the Holland Building Association. The same party and for the same interests brought another bill in equity against Robert B. Roosevelt in the United States Circuit Court for the Eastern District of New York. Brinckerhoff, complainant, only prosecuted to final determination said cause in the Eastern District of New York in which the said Roosevelt was defendant. The cause in the Eastern District of New York was heard before Judge Thomas, then the federal judge for that district. He justly held that the complainant therein was entitled to recover against the defendant Roosevelt for "culpable negligence" in discharging a certain mortgage. The facts in this case were so fully stated by Judge Thomas in his opinion (131 Fed. 955), by the Circuit Court of Appeals

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

(143 Fed. 478, 74 C. C. A. 498), and by Judge Ray (159 Fed. 191), that I do not deem it necessary or advisable to here repeat the facts. Judge Ray, however, had before him questions raised on the pleadings in which there are allegations of facts not sustained by the evidence. The evidence taken since the trial of the cause before Judge Thomas does not change any material fact. Upon the facts the equities of this case seem clear. The stockholders of the Holland Building Association have no further equity. They have received all that it was intended that the stockholders should receive at the time of its organization, all that the stockholders ever anticipated or expected, so the receiver of that corporation has no equitable right to the Brigantine securities, which came into the possession of the Holland Building Association through the wrongful act of Robert B. Roosevelt and his associates, who were the officers of that corporation.

In effect, said Roosevelt and his associates, without the knowledge of the stockholders and without right, canceled a mortgage on certain real estate at 33 Nassau street which afforded good security to the Holland Building Association for its equitable interest in said real estate, and also without right transferred said Brigantine securities from said trust company to said building association. Said Roosevelt, by leave of court, filed a cross-bill in this cause, by which he seeks to be subrogated to the rights of the Holland Building Association and claims to recover of said trust company the full amount he was compelled by the court to pay in the suit of Brinckerhoff against Roosevelt in the Eastern District of New York, and interest thereon. The stockholders of the trust company had nothing to do about the cancellation or annulment of said mortgage, or the exchange of the Brigantine securities from the trust company to the building association, and knew nothing about these transactions. They should not be called upon, at this late day, to take back those securities which its officers unlawfully traded off and to pay the amount that said officers tried to create as a debt due from the trust company to the building association. The stockholders of the trust company, as such, were never permitted to participate in said shifting of said securities, or said attempted creation of indebtedness. This unlawful exchange of securities by the said Roosevelt and his associates was a voluntary act, and, although made for the purpose of improving the stock of the trust company, nevertheless it was not only bad faith and "culpable negligence," but was an unlawful act. Under these circumstances, the court of equity is not now called upon to estimate what might have been the value of the Brigantine securities had they been permitted to remain in the custody and subject to the control of the stockholders of the trust company, uninvolved by litigation. They never assumed to pay the difference in value between the Brigantine securities and the mortgage aforesaid. They never consented to the creation of an indebtedness growing out of any exchange of those securities. They should not, in equity and good conscience, be called upon to account to the executor of Roosevelt's estate (said Robert B. Roosevelt having deceased), for the value of that mortgage or what Roosevelt was compelled to pay.

The receiver of the building association has no right to the Brigantine securities, and the receiver of the trust company has never

claimed any right thereto. Though the cancellation of the mortgage given as security to the building association and the passing over said Brigantine securities to said association has justly been held to be an unlawful act, yet the stockholders of the building association have received payment in full and are no longer entitled to the Brigantine securities. Said securities therefore revert to the trust company; but Roosevelt having made good all the stock of the building association, thus relieving the trust company from all obligations to said building association, the Brigantine securities do not in equity belong to the trust company, unless it be for their value in excess of the amount paid by said Roosevelt and interest thereon. No such claim is made by the receiver of the trust company.

Wherefore there may be a decree that the receiver of the Holland Building Association pass over to the executor of said Roosevelt's estate said Brigantine securities, but without costs to either party. If the parties cannot agree upon a decree, they may be heard.

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UNITED STATES v. RIGA.

(Circuit Court, D. Massachusetts. June 11, 1909.)

No. 537 (2,040).

CUSTOMS DUTIES (§ 26\*)—CLASSIFICATION—"PARTS OF RIFLES"—ROUGH-BORED RIFLE BARRELS—FITNESS FOR USE.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 157, 30 Stat. 164 (U. S. Comp. St. 1901, p. 1642), for "parts of rifles," is not limited to such as are in a finished condition, but embraces also parts, such as rough-bored rifle barrels, that have been advanced to a condition unfitting them for any other use than in connection with rifles.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.\*]

On Application for Review of a Decision by the Board of United States General Appraisers.

In the decision below the Board of General Appraisers reversed the assessment of duty by the collector of customs at the port of Boston. The Board's opinion reads as follows:

FISCHER, General Appraiser. The merchandise consists of forged rifle barrels, rough-bored. Duty was assessed on the importation at the rate of 45 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645), as manufactures of metal, and the only claim raised by the protest is that the articles are properly dutiable under the provision in paragraph 157 for "rifles and parts thereof."

These rough-bored barrels are manufactured articles in a crude form, and it is conceded that they must be rifled, and colored before they assume that state in which they are fit for practical use. In a brief submitted to us the counsel for the government refers to G. A. 6,312 (T. D. 27,207), and on that ruling asks this Board to hold that the provision in paragraph 157 for "rifles and parts thereof" includes only such parts of rifles as are in a finished condition when imported, complete and ready for adjustment. We are of the opinion that the provision of the tariff referred to should not be narrowed to the extent indicated by counsel. We believe, when the article as imported affords evidence as to the use to which it is to be applied and has reached a form and stage wherein it is fit for no other useful purpose than as a part of a rifle, that

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

then, for tariff purposes, it may safely be regarded as within the provision for parts of rifles. It is unreasonable to assume that only finished parts are within the terms of paragraph 157.

A rough-bored barrel, when approaching nearly the finished condition, affords sufficient evidence as to its special adaptation for use as a rifle barrel, and would appear to us to be entitled to be so considered. *Worthington v. Robins*, 139 U. S. 337, 11 Sup. Ct. 581, 35 L. Ed. 181; *Magone v. Wiederer*, 159 U. S. 555, 16 Sup. Ct. 122, 40 L. Ed. 258.

The cases cited appear to support the view here taken. In the *Worthington* Case, *supra*, the court said:

"It appears, further, that the form or condition of the merchandise as imported affords no evidence or indication of the use to which it is to be applied; that in the form or condition as imported it cannot be used for any of the purposes mentioned, nor for any purposes whatever of practical use to which it is adapted or ever applied. \* \* \* In order to produce uniformity in the imposition of duties, the dutiable classification of articles must be ascertained by an examination of the imported article itself in the condition in which it is imported. In order to be dutiable as 'watch materials,' the article, when imported, must be in such form of manufacture as to show its adaptation to the making of watches."

In the case at bar the imported article upon mere inspection is found to be nothing other than a rifle barrel, made solely for use as a part of a rifle and absolutely suitable for no other purpose. The act that the barrels are not wholly finished we do not consider important, for otherwise an importer could change classification by merely omitting to put the final touch upon an article, thus rendering it impossible to assemble the parts in their imported state. In *Magone v. Wiederer*, *supra*, the Supreme Court affirmed a judgment of the lower court wherein the trial judge charged the jury as follows:

"And so I will say to you, as the law of the case as I understand it, that, if you find that these articles were chiefly used as parts of clocks, that would determine their tariff classification."

In *G. A. 4,693* (T. D. 22,143), unpainted pieces of wood, sawed and shaped into the form of necks for violins, and sold and adapted for use as violin necks, were held dutiable as parts of musical instruments. In *G. A. 5,847* (T. D. 25,766), granadilla wood, manufactured to such a degree as to fit it solely for use in the construction of clarinets, was held dutiable under the same provision of the tariff. It also appears that at the port of New York the customs practice has been to assess duty on articles of this description at the rate as claimed under the provision for "parts of rifles."

We hold that the goods here in question are entitled to classification under paragraph 157. The protest is sustained, and the decision of the collector modified accordingly.

William H. Garland, Asst. U. S. Atty.

Searle & Pillsbury (Charles P. Searle, of counsel), for importer.

LOWELL, Circuit Judge. The decision of the Board of General Appraisers is affirmed, for the reasons stated by the Board in its opinion.

## MESSINGER v. ANDERSON.

(Circuit Court of Appeals, Sixth Circuit. June 17, 1909.)

No. 1,916.

## 1. JUDGMENT (§ 714\*)—JUDGMENT AS BAR—IDENTITY OF QUESTION IN ISSUE.

Where the parties in two actions were the same, and the question in issue is identical, as the construction of a provision of a will, the judgment in the first action is a bar to the second if properly pleaded, although different property is the subject-matter of litigation in the two actions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1242; Dec. Dig. § 714.\*]

## 2. APPEAL AND ERROR (§§ 1097, 1195\*)—DECISION AS LAW OF THE CASE.

Every question of fact or law which was before a Circuit Court of Appeals upon a writ of error and decided by its opinion, whether of affirmance or reversal, is conclusively settled both for such court and the court below in further proceedings in the same action, and the effect of such decision as the law of the case is not changed by the fact that an intermediate judgment by a state court in a suit between the same parties, and based on a contrary decision of the identical question, is pleaded as a bar on a second trial in the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4661-4665; Dec. Dig. §§ 1097, 1195.\*]

## 3. COURTS (§ 365\*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.

Aside from any effect which the construction of a will may have when seasonably presented, as an adjudication in another case between the same parties when the same question is involved, there is no such duty devolving upon a court of the United States to follow a state court in its construction of a will as in case of the construction of a state statute, unless the opinion of the state court is declaratory of the settled law of the state and not merely a decision upon the particular instrument.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 960; Dec. Dig. § 365.\*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

## 4. COURTS (§ 370\*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.

Where a Circuit Court of Appeals, on a writ of error in an action between citizens of different states, has construed a provision of a will in the exercise of its independent judgment, there being at the time no settled rule of decision in the state applicable thereto, such court will not reconsider and reverse its decision on a subsequent writ of error in the same case, because in the meantime the Supreme Court of the state in a different suit has rendered a contrary decision respecting the same will.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 953; Dec. Dig. § 370.\*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

H. E. King, Clayton Everett, and O. B. Snider, for plaintiff in error.  
R. P. Cary and C. H. Trimble, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and KNAPPEN, District Judge.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
171 F.—50

LURTON, Circuit Judge. This is the third writ of error in the same case. The action was ejectment to recover real estate. The plaintiff below was Peter Anderson, a grandson of Henry Anderson, and the title turned upon the proper interpretation of the will of Henry Anderson.

Upon the first trial of the case the court below ruled that under that will the plaintiff took no title, and directed a judgment for the defendant. Upon the first writ of error we adjudged that the court below had erroneously construed the will of said Anderson, and that upon a proper interpretation thereof the plaintiff took title to the premises involved. The judgment was accordingly reversed and remanded for a new trial. The opinion of this court was by Severens, Circuit Judge, and is reported in 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094.

Upon a second trial the court again instructed a verdict for the defendant. This instruction was, however, not based upon the former erroneous interpretation of the will under which plaintiff claimed, but upon the ground that the plaintiff's action was barred by a peculiar statute of limitations operating as a forfeiture of an estate in remainder or reversion, in favor of the person next entitled, for a neglect to pay taxes.

Upon a second writ of error the judgment was reversed, and a new trial awarded. The opinion of this court by Severens, Circuit Judge, fully states the ground upon which the court proceeded. 158 Fed. 250, 254, 85 C. C. A. 468.

Upon the third trial in the court below, the defendant interposed a plea in bar to this action arising out of three judgments of the Ohio court of common pleas for Lucas county, in each of which there had been a judgment adverse to the identical title here set up under the will of Peter Anderson. In the first of these cases, Peter Anderson was sole plaintiff, and the United Realty Company and Rosewell E. Messenger, defendants; the first mentioned claiming under Messenger. In the other two cases the United States Mortgage & Trust Company was plaintiff, and Rosewell E. Messenger and Peter Anderson, defendants. In each case there was involved the title of Peter Anderson under the will of Henry Anderson, and in each action the Ohio court of common pleas adjudged that he took no interest or title under said will, and in each action the judgment, upon that ground, was adverse to Peter Anderson. The last two suits were started while the present suit was pending. They were petitions to foreclose mortgages made by Messenger upon each of the lots and parts of lots involved in this action, except lot No. 33. The judgments of foreclosure in these cases were appealed from by Anderson, and the appeals were pending in the Supreme Court of Ohio when this cause was heard in the court below. Unless there is something exceptional in the statute of Ohio providing for appeals in equity cases, it is obvious that the judgments and decrees in these cases are lacking in that finality essential to support a plea of *res adjudicata*. We need not stop to look into this matter, because, for the purposes of this case, it is enough to determine the legal effect of the judgment in *Anderson v. United Real-*

ty Company and Messinger, 79 Ohio St. 23, 86 N. E. 644, as a bar to this suit. If that was effectual, we must reverse the judgment. If it was not, the foreclosure decrees would not be, for the same reason, without going further. Recurring, then, to the judgment in *Anderson v. Messinger*, which was relied upon in bar of the suit below:

It has been insisted that that action included some of the lots involved in this case, and that, whatever the effect of the judgment in that case as a bar to other property, it is an absolute bar so far as that action sought to recover the identical property sued for in this. This point has no other footing than the fact that the original petition did include part of lot No. 19, and the whole of lot No. 21, which are included among those sued for in this action. But, in an amended reply to the answer of the defendants, Anderson averred that the lots mentioned had been included by clerical mistake; suit for them having been brought in the case then pending in the Circuit Court of the United States, and concluded by saying "that he therefore withdrew from this proceeding all questions involved as to the title or ownership of said above-named lots." In the face of this amendment of the pleadings, there could have been no recovery of any part of either lot No. 19 or lot No. 21, for this was a distinct disavowal of any suit for them. The two suits therefore were for different parcels of land; the title of the plaintiff in each case being under the same will.

The action now under review was begun December 27, 1904. In June, 1905, there was a directed verdict and judgment for the defendant, from which a writ of error was sued out from this court. Pending that writ the same plaintiff brought another suit in the Lucas court of common pleas. On March 31, 1906, there was a verdict and judgment for the defendants in this second suit. In the meantime the writ of error to this court had been argued and submitted; but the opinion of this court was not filed until June 5, 1906, a period of about two months after the decision by the common pleas court. The result in this court was that the judgment of the Circuit Court was reversed and remanded for a new trial, upon the ground that the plaintiff, Peter Anderson, took an estate in remainder upon the death of his father, James H. Anderson, under the will of his grandfather, Henry Anderson.

In December, 1906, a second trial of the case was accordingly had in the Circuit Court, resulting in a second verdict and judgment for the defendant. Although the action in the state court had been decided adversely to the title of Anderson, it was not pleaded as a bar nor offered in evidence for any purpose upon this second trial in the court below. Upon a second writ of error, the judgment of the Circuit Court was again reversed, and the cause remanded for a third trial. It was upon this third trial that the defendant for the first time sought to interpose this state court judgment as an estoppel to this action.

It has been pressed upon us that that defense was waived by the failure to plead and rely upon it upon the second trial of this case, and counsel have cited *Theological Seminary v. People*, 189 Ill. 439, 447, 59 N. E. 977, and 29 Am. & Eng. Ency. (2d Ed.) 1105.

It is undoubtedly true that, if one wishes to preclude all inquiry into the truth of the matter by the bar of a former judgment, he must

plead it, or in some way show and rely upon it in evidence. If he does not, but relies upon the merits of the case, he cannot complain that the whole matter is open without regard to the estoppel. *Union Bank v. Memphis*, 111 Fed. 561, 49 C. C. A. 455; *S. P. Rd. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; *U. S. v. Bliss*, 172 U. S. 321, 19 Sup. Ct. 216, 43 L. Ed. 463. This is so even though the former judgment was by the same court. *Jourolmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719. But whether a failure to plead such an estoppel upon one trial when the defense was available should operate to prevent reliance upon it upon a subsequent trial is a matter of doubt, complicated in this case by the interposition of a second writ of error between the two trials. This question we shall pass by, particularly as the plaintiff below seems to have made no objection upon this ground to the plea and obtained no ruling from the trial court.

It has not escaped attention that the judgment relied upon as a bar to this suit was at the time it was pleaded pending upon writ of error in the Supreme Court of Ohio. The distinction between a review by writ of error of a judgment at law and an appeal in equity cases is elementary. The latter, when perfected, uproots the decree and carries the case up for rehearing upon law and facts, while the former is in the nature of a new action to annul the judgment, which remains in force until reversed. *Nashville Ry. Co. v. Bunn* (C. C. A.) 168 Fed. 862. Inasmuch as a writ of error did not vacate the former judgment, the weight of opinion seems to be that such a judgment may be received in evidence in support of a plea of *res adjudicata*. 24 Am. & Eng. Ency. 809 et seq.; *Ransom v. City of Pierre*, 101 Fed. 665, 669, 41 C. C. A. 585. There is, however, grave danger of injustice if this be the accepted rule, for, if the judgment should be reversed when too late to show the fact, the effect would be to cut off the opposite party from a hearing upon the merits. This difficulty has been met in some jurisdictions by setting aside a judgment which had been influenced by the plea in bar upon the fact of reversal being properly called to the attention of the court having the case under consideration upon writ of error or appeal, or by the court of original jurisdiction, if it had not lost control over the record. *Parkhurst v. Burdell*, 110 N. Y. 386, 392, 18 N. E. 123, 6 Am. St. Rep. 384; *Ransom v. City of Pierre*, 101 Fed. 665, 41 C. C. A. 585. Possibly, if the judgment thus influenced had become final, so as to be beyond the control of the court rendering it, relief might be had in equity, as suggested by Judge Thayer in *Ransom v. City of Pierre*. See, also, *Humphreys v. Leggett*, 9 How. 296, 311, 13 L. Ed. 145.

In the case before us it appears that after the judgment below the Supreme Court of Ohio affirmed the judgment whose finality is questioned, and that this fact was brought to the attention of the court below upon an application for a new trial. Under such circumstances we shall, for the purpose of this case, assume that this judgment was competent evidence in support of the plea of *res adjudicata*.

The title of the plaintiff in both actions depended absolutely upon the will of his ancestor, Henry Anderson. Interpreted as he contended, his title was clear and indisputable; construed as the defendant in



both actions insisted, he took nothing under that will, and his actions must inevitably fail.

That a final interpretation of that will in one suit would control in any subsequent litigation between the same parties or privies, in which the same question, under the same conditions, should arise, if presented seasonably, as a former adjudication, is not disputable. That different parcels of land were involved in the two cases would not be material, for if the parties were the same, and the subsequent case should turn upon the same question decided in the former case, under like conditions, that question could not be relitigated if relied upon as an estoppel. *Bank v. Beverly*, 1 How. 134, 149, 11 L. Ed. 75; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396, 17 Sup. Ct. 905, 42 L. Ed. 202; *S. P. Rd. Co. v. United States*, 168 U. S. 1, 48 18 Sup. Ct. 18, 42 L. Ed. 355; *Union Bank v. City of Memphis*, 111 Fed. 561, 49 C. C. A. 455.

Thus, in *New Orleans v. Citizens' Bank*, *supra*, Mr. Justice White, for the court, said:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

The rule of estoppel relied upon is therefore well settled. The trouble in this case grows out of the fact that there is an apparent conflict of prior adjudications, each of which was pressed upon the court below as governing the judgment upon the third trial of this case in that court. The one was the judgment of the Ohio state court in the case of *Anderson v. United Realty Company and Messinger*, and the other was the judgment and opinion of this court interpreting and construing the will of Henry Anderson under the first writ of error to this court. The Ohio court held that under the will of Henry Anderson the plaintiff took no interest whatever, and this view has since the trial below been affirmed by the Supreme Court of Ohio. See 79 Ohio St. 23, 86 N. E. 644. This court, in this very case, upon the first writ of error, and before any decision by the Supreme Court of Ohio, decided that the plaintiff took under that will an estate in remainder in all of the property in controversy. 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094. Which view of the will involved was the court below required to accept as the law of the case?

That every question of law or fact which was before this court upon the first writ of error and decided by its opinion was thereby conclusively settled, both for the court below and for this court upon subsequent writs of error, is not open to serious debate. That matters not decided upon the first writ are open for consideration in the lower court upon a second trial is, of course, true, and many times a new case may be made upon new questions of law or fact, where the mandate does not direct a particular judgment; but so far as questions of fact or law are specifically decided, and the cause remanded for further proceedings, the court below is not at liberty to re-examine any such decided matters, but must proceed in conformity to the mandate as interpreted by the opinion of this court. No other rule is conceiv-

able having regard to the necessity of putting an end to litigation. The cases upon this point are numerous. Among them are: *Bissell, etc., Co. v. Goshen Co.*, 72 Fed. 545, 19 C. C. A. 25, *Western Union Tel. Co. v. City of Toledo*, 121 Fed. 734, 58 C. C. A. 16, and *Stoll v. Loving*, 120 Fed. 806, 57 C. C. A. 173, all decided by this court; and *Sibbald v. United States*, 12 Pet. 488, 492, 9 L. Ed. 1167; *In re Sanford Tool Company*, 160 U. S. 247, 259, 16 Sup. Ct. 291, 40 L. Ed. 414; *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969; *Skillern v. May*, 6 Cranch, 267, 3 L. Ed. 220.

In *Skillern v. May* it was discovered after the case had been reversed and remanded for further proceedings that the cause was one not within the jurisdiction of the circuit; but, upon a certificate of division of opinion upon the right of the Circuit Court to dismiss the suit for this reason, the Supreme Court answered that, after the merits of the case had been decided, it was too late for the Circuit Court to do anything other than carry into execution that decree.

The finality of the decision of this court, so far as it did decide any question, is not affected by the fact that it was a judgment reversing the lower court and directing a new trial. The authorities are numerous. We cite a few only: *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 553, 24 Sup. Ct. 538, 48 L. Ed. 788; *Western Union Tel. Co. v. City of Toledo*, 121 Fed. 734, 58 C. C. A. 16; *Stoll v. Loving*, 120 Fed. 806, 808, 57 C. C. A. 173; *Tyler v. Magwire*, 17 Wall. 254, 282, 283, 21 L. Ed. 576; *Young v. Frost*, 1 Md. 394; *Haley v. Kilpatrick*, 104 Fed. 647, 44 C. C. A. 102; *Orient Ins. Co. v. Leonard*, 120 Fed. 808, 57 C. C. A. 176; *Mathews v. Columbia Bank*, 100 Fed. 393, 40 C. C. A. 444; *Theological Seminary v. People*, 189 Ill., 439, 452, 59 N. E. 977; *Leese v. Clark*, 20 Cal. 387.

In the case last cited, Mr. Justice Field, after referring to the finality of the adjudication of the Supreme Court after it had lost control by issuance of a mandate, said of the effect of a judgment of reversal upon points decided that:

"If, upon the construction of the contract supposed, this court reverses the judgment of the court below, and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the retrial. It is just as final to that extent as a decision directing a particular judgment to be entered is as to the character of such judgment. The court cannot recall the case, and reverse its decision, after the remittitur is issued. It has determined the principles of law which shall govern, and, having thus determined, its jurisdiction in that respect is gone; and, if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below."

Counsel for plaintiffs in error have insisted that a judgment of reversal remanding a case for new trial is not a judgment which can be set up as a bar to another suit on the same case, and have cited *Aurora City v. West*, 7 Wall. 82, 92, 93, 19 L. Ed. 42. The reporter's head-note is misleading. The case supports no such general proposition. The question, as may be seen from an examination of the statement and opinion, arose upon a demurrer to a rejoinder, setting up merely that a judgment in an inferior state court had been reversed and remanded. The holding was that a rejoinder was not good which merely set up a judgment of reversal and a remander for further proceed-

ings, without any comment as to what the question was which was decided by the superior court.

Undoubtedly a judgment of reversal may leave open many questions upon which an identical verdict may result upon another trial. In *Mutual Life Insurance Company v. Hill*, cited above, it appeared that upon a former writ of error a judgment in favor of the plaintiff below was reversed upon the ground that the record disclosed "an abandonment of the insurance contract." Upon the second writ of error it was insisted that the only question left open was a submission of this question of abandonment, and that the decision of the Supreme Court was "an adjudication that the plaintiff had a right to recover unless it was shown that there had been an abandonment of the insurance contract." Referring to this matter, and to its former decision, the court said:

"That decision was based upon the averments of the pleadings, and these pleadings were amended after the judgment was reversed and the case returned to the trial court. Clearly the contention of the plaintiffs is not sustainable. When a case is presented to an appellate court, it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take, or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented, and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration."

Upon the second writ of error in this very case, we were urged to reconsider the decision in the first writ of error as to the meaning and effect of Henry Anderson's will, as applicable to the title here in controversy. Judge Severens, for the court, said:

"We have been invited by counsel for defendant to reconsider the question of the construction of Henry Anderson's will. We must decline to do this. The questions there decided are matters adjudged and have become the law of the case. When the former writ of error was disposed of, the questions of law in the case were settled, and we have now no authority to re-determine them. This is the established doctrine which governs the federal courts and is quite generally accepted in other courts. This court has recognized and applied the rule in previous cases." 158 Fed. 250, 252, 85 C. C. A. 468, 470.

We have been again urged to re-examine the question of the interpretation of Henry Anderson's will, upon the theory that the question is one of local law, and that we should therefore readjust our views to conform to the construction of that will by the Supreme Court of Ohio, as announced in its opinion in *Anderson v. Messinger* since our own interpretation upon the first and second writs of error.

Aside from any effect which the construction of a will by one court may have, when seasonably presented, as an adjudication in another case between the same parties, when the same question is involved, there is no such duty devolving upon a court of the United States to follow a state court in their construction of a will, as they do in the construction of a statute. *Lane v. Vick*, 3 How. 464, 11 L. Ed. 681; *Barber v. Pittsburg, etc., Ry.*, 166 U. S. 83, 99, 100, 103, 104, 17 Sup. Ct. 488, 41 L. Ed. 925.

In *Barber v. Pittsburg Railway*, cited above, the case involved the construction of a clause in a will which had been theretofore construed by the Supreme Court of Pennsylvania in a former action of ejectment for the same land and between the same parties. The former suit was adverse to the plaintiff, but was not conclusive under the law of the state, because under the law of that state a single judgment in ejectment was not a bar to a second action. This second action was brought in the Circuit Court of the United States. There was a judgment there for the defendants; that court following the construction of the will by the Supreme Court of the state. The case was taken to the Circuit Court of Appeals upon a writ of error. The Court certified to the Supreme Court this question, and another, not necessary to set out:

"Is the decision of the Supreme Court of Pennsylvania, before referred to, conclusive?"

In reference to this question the Supreme Court said:

"The question whether the opinion of the Supreme Court of the state in the former action is conclusive evidence of the law of Pennsylvania in a court of the United States depends upon the further question whether the opinion is declaratory of the settled law of Pennsylvania as to the effect of such devises, or is a decision upon the construction of this particular devise. When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a state, that construction is to be followed by the courts of the United States in determining the title to land within the state, whether between the same or between other parties. *Jackson v. Chew*, 12 Wheat. 153, 167, 6 L. Ed. 583; *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79; *Suydam v. Williamson*, 24 How. 427, 15 L. Ed. 978; *Burgess v. Seligman*, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359. But a single decision of the highest court of a state upon the construction of the words of a particular devise is not conclusive evidence of the law of the state, in a case in a court of the United States, involving the construction of the same or like words, between other parties, or even between the same parties or their privies, unless presented under such circumstances as to be an adjudication of their rights. *Lane v. Vick*, 3 How. 464, 11 L. Ed. 681; *Vick v. Vicksburg*, 1 How. (Miss.) 379, 31 Am. Dec. 167; *Homer v. Brown*, 16 How. 354, 14 L. Ed. 970; *Brown v. Lawrence*, 3 Cush. (Mass.) 390; *Gibson v. Lyon*, 115 U. S. 439, 446, 6 Sup. Ct. 129, 29 L. Ed. 440. It becomes important therefore that the opinion of the Supreme Court of Pennsylvania in the former action of ejectment should be carefully examined and compared with the previous judgments of that court."

The court thereupon made an independent examination of the opinions of the Supreme Court of the state, for the purpose of comparing them with the opinion upon the particular clause involved with a view to seeing whether this last opinion was declaratory of the previously settled law of the state so as to amount to a rule of property. The result was that the court decided that such examination led them to the conclusion that "the decision of the Supreme Court of Pennsyl-

vania upon the construction of the will of James S. Stevenson is not conclusive, and that the first question certified must be answered in the negative."

That this court did not depart from any well-settled line of decisions by the Supreme Court of Ohio, applicable to the construction of the devise in the will of Henry Anderson which was involved, will be quite apparent upon examination of the opinion of this court, as reported in 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094, and a comparison with the opinion of the Supreme Court of Ohio construing the same clause, as reported in 79 Ohio St. 23, 86 N. E. 644.

We found in the case of *Shaw v. Hoard*, 18 Ohio St. 228, an exposition of the applicable law of Ohio, which the opinion of the Supreme Court of Ohio, by Judge Summers concedes, "supports the contention of the plaintiff." We concluded from an examination of later cases in that court that, while in some particulars not relevant to the will of Henry Anderson, *Shaw v. Hoard* had been distinguished, it had not been overruled. The Supreme Court of Ohio, in *Anderson v. Messinger*, seems to conclude that *Shaw v. Hoard* had been so far modified or distinguished as not to be conclusive evidence of the law in Ohio. Assuming for the purpose of this case that the effect of later decisions which did not expressly overrule that case was to unsettle it as a rule of decision, it clearly left the law of Ohio, considered as a local rule of property applicable to the words of the devise involved, in such an uncertain state as to compel this court to apply to the will the settled rules of the common law applicable. Upon this aspect of the matter Judge Severens said that:

"If it should be held that the rule of construction is not settled, this court would decide the question upon its own understanding of the law applicable to it."

But it has been urged that we may not look to the opinion of the Ohio court for the purpose of determining the law of the case, but only to the syllabi of the case. The Ohio court has long since adopted a rule that the law of the case by which the court is bound is that stated in the syllabi of the case. See Rule 6, 5 Ohio St. page 7 of the preface, and same rule, page 10, preface, of 73 Ohio St. (67 N. E. vii).

If we accede to this, we find no rule of property there stated which necessarily conflicts with the opinion of this court. That syllabus reads as follows:

"Where, in a will, there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease, then over, these words are not, by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants; but the son takes a fee defeasible upon his death, without lineal descendants, living at the time of his decease, and, in the event of lineal descendants living at the time of the son's death, his fee becomes absolute, and such descendants have no interest under the will as against his grantee."

This court found "assistance from other parts of the will," in reaching the conclusion we did, as will be seen by consulting the opinion. It will also be noticed that the opinion of the Ohio court, as exhibited by that of Judge Summers, does not deal with circumstances to which we attached importance.

But, if we confine ourselves to this syllabus, it is impossible to say that from it alone we should be able to treat the decision as a declaration of the settled law of Ohio, constituting a rule of property, which this court ought to follow. It is apparently no more than an interpretation of a particular will, and as such, under the cases cited above, is not such a decision as we are under obligation to follow as a local rule of property.

There is, however, another reason why we should not now, if we had the power, retract our own opinion and adopt the subsequent view of the Ohio Supreme Court. This is found in the fact that there was then no settled line of decisions by the Ohio court applicable to the devise we were called upon to construe. This was a controversy between citizens of different states, and when, as was our duty, we reached a conclusion upon common-law principles in the exercise of our independent judgment, we are now under no obligation to recede from that opinion merely because in another case the Supreme Court of Ohio has since reached a different result. *Burgess v. Seligman*, 107 U. S. 20, 33, 35, 2 Sup. Ct. 10, 27 L. Ed. 359.

A situation in principle much like this was presented in *Burgess v. Seligman*, cited above. A question arose as to the liability of shareholders of a corporation for its debts, under a Missouri statute. In an action in the Circuit Court of the United States at the suit of a creditor, the court held that under this statute persons holding shares as collateral security for a debt due from the corporation were not liable. In another case upon the suit of a different plaintiff, the Supreme Court of Missouri, after the decision of the Circuit Court of the United States, made a contrary decision against the same stockholders. It was held that upon the writ of error to the Circuit Court the Supreme Court was not bound to reverse the Circuit Court and follow this subsequent decision of the Supreme Court of Missouri. Among other things, the court said:

"The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state Constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is; but where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued; but, even in such cases, for the sake of harmony, and to avoid confusion, the federal courts will lean toward an agreement of views with the state courts if the question seems

to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between the citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. \* \* \*

"In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy and then simply register their decision, or that the judgment of the Circuit Court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but, in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion. *Pease v. Peck*, 18 How. 595, 15 L. Ed. 518, and *Morgan v. Curtenius*, 20 How. 1, 15 L. Ed. 823, in which the opinions of the court were delivered by Mr. Justice Grier, are previously in point."

In *Great Southern Fire Proof Hotel Co. v. Jones*, 116 Fed. 793, 54 C. C. A. 165, affirmed in 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778, this court declined to follow the decision of the Supreme Court of Ohio holding a mechanic lien statute invalid in a suit involving rights of citizens of another state under contracts made before such decision was rendered. See, also, *Louisville Trust Co. v. City of Cincinnati*, 76 Fed. 296, 22 C. C. A. 334.

We do not wish to appear as passing over without notice the cases of *Western Union Tel. Co. v. Poe* (C. C.) 64 Fed. 9, *Sanford v. Poe*, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641, and *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747. It is enough to say of the two *Poe* Cases that they involved the construction of a statute of Ohio, relating to the taxation of corporations. Upon a demurrer, Taft, Circuit Judge, sitting on the circuit, overruled the demurrer and held the statute void as in conflict with the Ohio Constitution. Afterwards, and before a final decree, the Supreme Court of Ohio held the act valid. Thereupon Judge Taft withdrew his former judgment and followed that of the Ohio court. This we affirmed in 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641. There is no parallel between this and the *Poe* Cases. Judge Taft retracted his own and adopted the opinion of the Supreme Court of Ohio before a final judgment was entered, and he merely recognized before his own final conclusion the controlling effect of the decision of the Supreme Court of Ohio.

In *Roberts v. Lewis*, cited above, the Supreme Court reversed a former construction of the will involved in *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745. The meaning of the will turned upon the bearing of a Nebraska statute. After *Giles v. Little*, the Supreme Court of

Nebraska, in another case between other parties, but involving the same will, put a different construction upon the will. In *Roberts v. Lewis*, a third suit involving still other property dependent on the same will, but between still other parties, the court overruled *Giles v. Little*, and followed the decision of the Nebraska court, not because of any expressed obligation to abandon its own view, first taken, in deference to the later construction of the Nebraska court, but because it was convinced of error in its own opinion concerning the effect of the applicable Nebraska statute—an error due to the omission of a word in the copy of the statute before the Supreme Court. To that omitted word the Nebraska court gave weight in the meaning of the statute, and its bearing upon the meaning of the testator. This the Supreme Court of the United States thought required the overruling of its former opinion. There was no question of *res adjudicata* or law of the case involved.

But, aside from what we have said touching the insistence that we should reverse ourselves and follow the later decision of the Ohio Supreme Court, we have upon a second writ of error no power to modify or re-examine the former judgment as to the will of Henry Anderson. It is not, as respects this case, a question of *stare decisis*, but one of *res adjudicata*. When our mandate went down and the term ended, that adjudication was beyond recall. Whatever of fact or law was then adjudged is beyond re-examination under any subsequent writ of error in the same case. The cases cited above determine this. To these we add: *Loeser v. Savings Bank*, 163 Fed. 212, 89 C. C. A. 642; *Clark v. Keith*, 106 U. S. 464, 1 Sup. Ct. 568, 27 L. Ed. 302; *Illinois v. I. C. R. Co.*, 184 U. S. 77, 91, 22 Sup. Ct. 300, 46 L. Ed. 440; *Ellis v. Northern Pac. R. Co.*, 80 Wis. 459, 50 N. W. 397, 27 Am. St. Rep. 44; *Haley v. Kilpatrick*, 104 Fed. 647, 44 C. C. A. 102.

That the question arose in the court below under a plea of *res adjudicata* does not alter the principle involved. To give effect to that defense required that court to disregard the mandate and adjudication of this court. If this court is to regard that defense, it will require us to reverse our own former decision. The way the matter came up is peculiar; but the rule which applies is not thereby abrogated. "The law of the case" did not cease to be the law of the case because of the decision of some other court, in another suit between the same parties, involving other land under the same title.

There are cases in which the question of *res adjudicata* arose in the same way. *Ellis v. Northern Pac. R. Co.*, 80 Wis. 459, 50 N. W. 397, 27 Am. St. Rep. 44; *Haley v. Kilpatrick*, 104 Fed. 647, 44 C. C. A. 102; *Theological Seminary v. People*, 189 Ill. 439, 446, 447, 59 N. E. 977.

*Ellis v. Northern Pac. R. Co.* was an action to quiet title to land. The bill was by *Ellis* against the railroad company, and set out that the railroad company claimed title under a deed of donation from Douglas county, which deed was attacked as made without authority. A demurrer was filed by the railroad company, and this, upon a writ of error, was overruled; the court holding that the deed was



without authority of law and invalid. The case was remanded for further proceedings. After the commencement of the suit mentioned in the state court, Ellis brought another suit, to quiet his title to other lands held by the railroad company under the same instrument of donation, in the Circuit Court of the United States. In this latter case the judgment of the Supreme Court of Wisconsin, in the first case between the same parties, was not pleaded as an estoppel. The case was therefore tried out upon its merits, and the deed of donation held valid and the title of the railroad company good. Thereupon the railroad company asked leave to amend its answer in the first case for the purpose of setting up this judgment of the Circuit Court of the United States as an estoppel to that action. Leave to amend for this purpose was denied. Upon the trial upon pleadings and evidence the record in this adjudication of the Circuit Court of the United States was offered in evidence, which offer was denied. It then appearing that the only title of the railroad company was under the agreement of donation, its title was held void; the court holding that the decision of the Supreme Court upon the writ of error was *res adjudicata* in the action. Thereupon a second writ of error was sued out, under which the Supreme Court of Wisconsin held that its decision upon the former writ was conclusive upon the question of the validity of the donation upon which the title of this railroad company alone depended. The Wisconsin Supreme Court said:

"The decision of this court upon a demurrer upon the questions properly involved cannot be reviewed by the Circuit Court, nor, indeed, by this court, save upon motion for rehearing. Such questions are finally decided and settled for that case, and, as between the parties to that litigation, for all time. This view of the law decides this case. The complaint charged the appellant's alleged title to be just what the proofs now before us show it to be, and this court, prior to the judgment in the United States court, finally decided that such alleged title was worthless. The question was no longer an open one, and the Circuit Court was right in ruling out the record of the action in the United States court and rendering judgment for the plaintiff."

A writ of error was sued out from the Supreme Court of the United States, upon the theory that the denial of the plea of *res adjudicata* involved the validity and effect of the decision of the federal courts when pleaded in bar of an action in a state court between the same parties, in respect to other property held under the same claim and title as that adjudged valid by the federal court. The writ was dismissed as not involving any federal question; the Supreme Court of Wisconsin having rested its decision upon the proposition that the rights of the parties had been adjudged upon the first writ of error, "and that it was itself, as the parties were, bound by its former judgment." Referring to the ground upon which the Supreme Court of Wisconsin had decided the case, the court said:

"The judgment before us was rendered in accordance with well-settled principles of general law, not involving any federal question, and did not deny to the decree of the Circuit Court the effect which would be accorded under similar circumstances to the judgments and decrees of the state court." *Northern Pac. R. Co. v. Ellis*, 144 U. S. 458, 465, 12 Sup. Ct. 724, 36 L. Ed. 504.

In *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339, 343, 16 Sup. Ct. 850, 852, 40 L. Ed. 991, Mr. Justice Gray, referring to *Northern Pacific R. Co. v. Ellis*, cited above, said of the decision of the Supreme Court of Wisconsin in holding itself and the parties concluded by the point decided upon a former writ:

"In so doing that court has done no more than this court has always done, or than is necessary to enable an appellate court to perform its duties satisfactorily and efficiently, which would be impossible if a question once considered and decided by it were to be litigated anew in the same case upon any new and subsequent appeal. *Washington Bridge v. Stewart*, 3 How. 413, 425, 11 L. Ed. 658; *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969; *Clark v. Keith*, 106 U. S. 464, 1 Sup. Ct. 568, 27 L. Ed. 302; *Chaffin v. Taylor*, 116 U. S. 567, 6 Sup. Ct. 518, 29 L. Ed. 727; *Sanford Co., Petitioner*, 160 U. S. 247, 259, 16 Sup. Ct. 291, 40 L. Ed. 414."

In *Haley v. Kilpatrick*, 104 Fed. 647, 44 C. C. A. 102, the court said:

"This is the second appearance of this case in this court. \* \* \* The law of the case was settled in the opinion of the court when the case was first here. It remains the law of the case in this court, the decree of the state court in another and different case to the contrary notwithstanding."

The other assignments of error are overruled. Some of them relate to other questions of fact or law decided upon one or the other of the former writs of error and are not now open for re-examination. The others have no merit and need no special consideration.

The judgment of the court below is without error, and must be affirmed.

### ERIE R. CO. v. SCHOMER.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1909.)

No. 1,935.

#### 1. TRIAL (§ 256\*)—INSTRUCTIONS.

Plaintiff, a switchman, having been injured because of an alleged negligent defect in a coal car, the court charged that Rev. St. Ohio, § 3365-21, made proof of an injury to an employé by reason of a defective car, or attachment thereto, prima facie evidence of negligence; there being a statutory presumption, from an injury to an employé due to such defect, that the company had knowledge thereof before and at the time of the injury. The court had previously explained that the statute raised a presumption of negligence from evidence of an injury from a defect, and that it devolved on defendant to introduce proof to remove the effect of the presumption, and also that under such circumstances defendant would be bound to offer testimony to excuse the presumption of negligence which would arise from that proof to an extent sufficient to remove the effect of such presumption. *Held*, that there was no affirmative error in such charge, in the absence of a request for more specific instruction as to the degree of proof necessary to counterbalance the presumption.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

#### 2. MASTER AND SERVANT (§ 293\*)—INJURIES TO SERVANT—RAILROADS—DEFECTIVE CARS—INSPECTION—INSTRUCTIONS.

Where a switchman was injured by an alleged defect in a coal car, and there was a statutory presumption of negligence, which the railroad com-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany sought to rebut by proof of recent inspection, an instruction that defendant was not a guarantor of the safety of attachments on its cars, and that if the inspection was suitably and properly made, and the defect did not appear, and did not exist at the time, then defendant used ordinary care, but the mere fact that it had suitable inspectors and that they inspected did not of necessity establish that the car was properly inspected. It being for the jury to say whether the presumption that the car was defective at the time of the accident had been removed by evidence of the kind, extent, and time of the inspection, was a sufficient charge on that subject.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1153; Dec. Dig. § 293.\*]

**3. MASTER AND SERVANT (§ 124\*)—INJURIES TO SERVANT—RAILROADS—DUTY OF INSPECTION.**

A railroad company is bound to exercise ordinary care in inspecting its cars to ascertain the presence of defects dangerous to employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235, 237-240; Dec. Dig. § 124.\*]

**4. MASTER AND SERVANT (§ 185\*)—INJURIES TO SERVANT—RAILROADS—INSPECTION—NONDELEGABLE DUTY.**

Negligence of a railroad car inspector is the negligence of the railroad company; the duty to inspect being nondelegable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 409; Dec. Dig. § 185.\*]

**5. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—RAILROADS—INSPECTION—QUESTION FOR JURY.**

In an action for injuries to a railroad switchman by an alleged defect in a coal car, whether an inspection of the car prior to the accident, which had not disclosed the defect, had been ordinarily careful, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. § 286.\*]

**6. TRIAL (§ 253\*)—INSTRUCTIONS—LIMITATION OF EVIDENCE.**

Where, in an action for injuries to a servant by an alleged defect in a coal car, there was other evidence than the testimony of Z. bearing on the sufficiency of a prior inspection in which the defect was not discovered, a request that, if the jury believed Z.'s evidence concerning such inspection, they should return the verdict for the defendant, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

**7. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—RAILROADS—CONTRIBUTORY NEGLIGENCE.**

Where plaintiff, a switchman, was injured by an alleged defect in a coal car while attempting to cross the front end of the car, on which there was no platform or end sill, to signal the engineer to stop instantly, whether plaintiff was negligent in endeavoring to so cross, instead of adopting some other practical and safe method, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

**8. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—ACTION—EMERGENCY—INSTRUCTIONS.**

Where, in an action for injuries to a switchman by an alleged defect in a coal car, as he was crossing the front of the car, there was some evidence to show reason for quick action, and also evidence that the way he took was proper, the court properly charged that if plaintiff, apprehending threatened danger, or conceiving necessity for unusually quick action, selected one of two ways that was not as safe as the other, the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jury, in determining whether he was negligent, should consider the emergency, if any, and the kind of conduct demanded of plaintiff under the circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

9. MASTER AND SERVANT (§§ 246, 247\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

Plaintiff, a switchman, threw the wrong switch, and, seeing the train was about to back on the wrong track, attempted to signal the fireman to stop instantly. Being unable to do so, he attempted to cross the front end of a coal car to the engineer's side to signal him, and in doing so caught hold of a defective tie rod, which he mistook for a grab iron, and was precipitated to the track and injured. *Held*, that plaintiff's mistake in throwing the wrong switch was the remote and not the proximate cause of the injury, and hence such mistake did not deprive him of the right to have his act in crossing the car considered on the question of contributory negligence, with reference to the emergency then existing for immediate action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 789-800; Dec. Dig. §§ 246, 247.\*]

10. EVIDENCE (§ 471\*)—CONCLUSIONS.

A statement of a witness, referring to plaintiff at the time of the injury, "I judge he got scared when the trestle got so high as to make him think he might get side-wiped with the trestle," was properly excluded as an opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

11. APPEAL AND ERROR (§ 231\*)—RECEPTION OF EVIDENCE—OBJECTIONS.

Objections to evidence, failing to point out the ground of objection, afford no basis for an assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 194; Dec. Dig. § 231.\*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

W. E. Cushing, for plaintiff in error.

G. M. Skiles and R. B. Newcomb, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge. Action for personal injuries sustained while in the service of the Erie Railroad Company as a yard switchman. Jury, and judgment for plaintiff. There was evidence tending to show that plaintiff was one of a switching crew engaged in the switching of two loaded coal cars from the track upon a coal tipple to an adjacent surface track. It was a dark night. Plaintiff, though an experienced switchman, was not familiar with the tipple or tracks adjacent. He was directed to take two cars down the tipple track, "throw the switch, and put them on the middle rails." He gave the necessary signal for backing, and then mounted on the forward corner step or stirrup on the forward car, on the fireman's side of the engine. What happened, as told by the plaintiff, was as follows:

"(2) Describe what happened. A. As soon as I got on the car was sort of backing up, and as soon as I got on the stirrup I seen I wasn't going up the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

right incline. I was going on what they call the surface track, and tried to swing the fireman down; and the cars didn't slack up, and they didn't seem to take my signal, and I thought maybe the fireman wasn't able to see me, or wasn't there. So I swung around on the ladder end of the car and took hold of the top, or the next to the top, round with my left hand, and put my right foot over on the deadwood, and reached over with my right hand to take hold of the grab iron, and as soon as I did I let go with my left hand and I lost my balance. Something gave way with me, and I fell over backward, and that is the last I remember. Q. Do you remember what gave way? A. I suppose the handhold gave way with me. I don't know; only what I heard since. Q. Where was your lantern? A. On my left arm. Q. Where were you going? A. To the opposite side of the car to swing the engineer down. I knew the engineer would have his head out of the window. Q. Was that the proper way for you to go? (Objected to; overruled; exception.) A. Yes, sir."

Other evidence tended to show that he did not take hold of the grab iron, which was about the center of the end of the car, but of the loose end of an iron tie rod of about the size of the grab iron. This gave way, and he fell between the rails, and in front of the moving car upon which he was standing. It further appeared that inside of such coal cars there is an iron brace rod which runs across the car to support the sides of the car against pressure from the load. One end of this brace rod had broken loose, and the loose end was hanging in looped shape over the end of the car; the loop end forming something of a handle just above the handhold which the plaintiff supposed he had hold of. The negligence of the railroad company was in the presence of this looped broken tie rod, hanging over the end of the car in a situation likely to deceive a brakeman endeavoring to support himself, especially in the dark, upon the grab iron, and so the jury was instructed.

This action was predicated upon section 3365-21, Rev. St. Ohio, which makes proof of an injury to an employé by reason of any defective car or "attachment thereto" prima facie evidence of negligence; there being a statutory presumption from an injury due to such defect to an employé that the company had knowledge before and at the time of the injury. It is not plain just what is deemed the error in the instruction of the court in respect of this statutory presumption of negligence. In the brief, counsel seem to lay stress upon the fact that the court said that, if the jury was satisfied that the accident happened substantially as the plaintiff claimed it did, the defendant was negligent. But this must be taken with its context. The court had before explained that the Ohio statute raised a presumption of negligence from evidence of an injury from a defect, and that it would devolve "upon the defendant to introduce proof to remove the effect of that presumption of negligence arising out of that fact." He also followed the statement particularly complained of by saying:

"Because then we have the case where an accident happened and injury resulted in consequence of a defective attachment of a car operated by the defendant, or of a defect in a car operated by the defendant, and the result would be that the defendant would have to offer testimony to excuse that negligence; that is, that would be the prima facie status of it."

Further explaining, he added:

"A presumption of negligence would arise from that proof, and it would fall upon the defendant to introduce proof to the contrary, to an extent sufficient to remove the effect of that presumption of negligence arising out of that fact."

In *Klunk v. Hocking Valley Railway Company*, 74 Ohio St. 125, 77 N. E. 752, it is said, in reference to this Ohio statute:

"But, while the effect of this statute in the cases to which its provisions apply is to so modify the rules of evidence as to make the proof of such defect prima facie evidence of negligence on the part of the corporation, yet this statute neither changes nor affects the rule as to the quantum or degree of evidence sufficient or necessary to rebut or control the prima facie case thus raised. The general rule would seem to be well established, by an almost unbroken line of authority, that to rebut and destroy a mere prima facie case the party upon whom rests the burden of repelling its effect need only to produce such amount or degree of proof as will countervail the presumption arising therefrom. In other words, it is sufficient if the evidence offered for that purpose counterbalance the evidence by which the prima facie case is made out and established. It need not overbalance or outweigh it. *Smith v. Sac Co.*, 11 Wall. 139, 20 L. Ed. 102; *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Railroad Co. v. Brazzil*, 72 Tex. 233, 10 S. W. 403."

This court, in *Toledo, St. L. & W. R. Co. v. Star Flouring Mills Co.*, 146 Fed. 953, 77 C. C. A. 203, and *Shankweiler v. Baltimore & O. Ry. Co.*, 148 Fed. 195, 78 C. C. A. 353, accepted this as a proper interpretation of this statute. There was no affirmative error in what the court did say, and, if the plaintiff in error had desired anything more in reference to the degree of proof which would be sufficient to counterbalance the statutory presumption, there should have been a special request upon that matter. No such request was made.

2. The defendant sought to rebut the presumption of negligence by evidence of recent inspection. There was evidence tending to show that this car had been inspected on the day of the accident, and that the inspectors had not discovered this broken tie rod, and that such a condition, if it had existed when the inspection was made, was one of such obvious character that it could not have escaped observation. From this evidence it was claimed that the defective attachment originated after the inspection, and, if so, was so recent as not to constitute evidence of negligence.

The court, in substance, instructed the jury that the defendant was not a guarantor "of the safety of instrumentalities and the attachments upon its cars." "If," said the court, "that inspection was then suitably and properly made, and this defect did not appear, and did not exist at that time, then I charge you that the defendant used ordinary care. But the mere fact that it had suitable inspectors, and that its inspectors inspected, does not carry with it, of necessity, the conclusion that the car was properly inspected. It is for you to say whether or not, upon all of this testimony, the presumption that this car was defective at the time of the accident has been removed by their testimony showing the kind and extent and time of inspection." This was a full, clear, and sufficient charge upon this subject.

Plaintiff in error says that it was error to charge the jury upon the subject at all, that the evidence showed that there had been a proper

and reasonable inspection upon the very day of the accident, and that the jury should have been instructed to find that the defendant had done its duty in the matter of inspection. We shall pass by the assignments of error based upon what the court said about the duty of inspection. None of these are good, if the question of whether, under the evidence, there had been a proper and careful inspection of this car, was one for the jury.

There was a request that the court should say to the jury that if they believed the evidence of the witness Zelenak, one of the inspectors at the coal tippie track, whose duty it was to inspect this car, they should return a verdict for the defendant. This required the court to eliminate all other evidence, direct and circumstantial, which bore upon the fact of a proper inspection. If, as the court said to the jury, this broken tie bar hung over the end of this car in proximity to the handhold when this inspection was made, it was negligence not to see it. A proper inspection, as the court said in another place, would have disclosed it. One of two things was plain. Either this condition was brought about after the inspection relied upon, or the inspection was carelessly made.

Against the conclusiveness of the evidence of inspection there were these facts: First, that this witness Zelenak said that he was one of two who inspected together, he on one side of a train of cars and his associate on the other. Was the court to assume that what Zelenak saw or ought to have seen upon one side of the train was all there was to see? Second. Neither Zelenak, nor his colleague, have any recollection of the inspection of this particular car. It was in evidence that they inspected each day, between them, a great many cars. In such circumstances it was only possible for them to testify as to their practice of marking a car as in bad order, and reporting every such car in a record kept by them, and that this car was not so reported on the record book. As against the inference, from the failure of the inspectors to discover this broken rod, that the condition was a recent one which occurred after the inspection, there was evidence that the broken end of the tie rod indicated from its appearance an old break.

The rule of ordinary care is applicable to this matter of inspection. That rule does not demand an impracticable inspection, such as would unreasonably cripple or embarrass the usual and customary operation of a railroad, and an inspection such as usually made by well-regulated railroads will be ordinary care. *I. C. Rd. Co. v. Coughlin*, 132 Fed. 801, 65 C. C. A. 101; *Shankweiler v. B. & O. Rd. Co.*, 148 Fed. 195, 78 C. C. A. 353. But the negligence of an inspector is the negligence of the company, for the duty is one nondelegable. *Felton v. Bullard*, 94 Fed. 781, 37 C. C. A. 1. Having in mind the great number of cars which the inspectors were required to inspect at this point each day, the fact that the inspectors had no memory as to the inspection of this particular car and could rely only upon their usual course of business, and also the evidence of the witness who examined the brace rod, which produced the mischief that the break in the rod was an old one, it was not error to submit the question of the reasonableness of the man-

ner of inspection and carefulness with which it was done to the jury for their opinion. For even a stronger reason it was not error to refuse to put the case to the jury upon the credibility of Zelenak and the sufficiency of his evidence alone.

3. Whether the plaintiff was himself in the exercise of due care in endeavoring, as he did, to cross the front end of a coal car, upon which there was no platform or end sill, was a question for the jury. The second request for a special charge, in substance, asked the court to tell the jury that if the plaintiff had two ways of getting into a position to signal the engineer, one of which was practical and comparatively safe, "and the other to pass over the deadwood of the car to the other side, and that such method was a dangerous one, that the choice of the latter would be negligence, barring a recovery in this case." This was a right principle, but not applicable here in the narrow form stated. It ignored the effect of a situation which might leave no time for a comparison of dangers and a choice of means. It was plainly the duty of the plaintiff to stop the backing of these cars out upon a track not intended for such use. He found, after he mounted the corner step of the forward car upon which he rode down from the tippie track, that he had thrown a switch which led out to a storage track. He could not, owing to a curve, fully observe the condition of that track, and says the cars were being shoved down a track upon which "cars were being placed." Acting upon this thought, he adopted the nearest and apparently quickest way of getting over to the engineer's side to signal a stop. Upon this aspect of the case the court told the jury:

"If you find that the plaintiff, at the moment when he conceived it to be his duty to convey a signal to the engineer to instantly stop, apprehended that there was threatened danger, or conceived a necessity for unusually quick and expeditious action, selected of two ways one that was not as safe as the other, you will consider, in determining whether or not he was at that time exercising ordinary care for his own safety, what was the emergency, if any, that presented itself to him, and what kind of conduct you have to demand of him under those circumstances."

There was no error in this, for there was evidence tending to show a reason for quick action, as well as some evidence that the way he went was a proper way. But it is urged that, as the mistake made was plaintiff's mistake in throwing the wrong switch, he is not entitled to the benefit of any emergency claim. The mistake was not a culpable one. There was evidence tending to show that this was the first time he had ever done switching work at or near this coal tippie. But that mistake was the remote and not the proximate cause of the injury. The defective attachment was the immediate and proximate cause of his hurt. That was sustained in endeavoring to discharge his duty to the company under the immediate conditions, and not in an endeavor to save himself. He was at the time called upon to do something at his post of duty. The rule of care which was applicable to him at that moment was that which makes reasonable allowance for a sudden call for action, not permitting delay or time for making choice of means.

Certain assignments of error are predicated upon evidence excluded or admitted over objection. One relates to the exclusion of certain



parts of an ex parte affidavit made at the instance of an agent of the company getting up such statements shortly after plaintiff's injury. Kieley was a witness for the plaintiff in error, and had been an eye-witness. In this original affidavit it appeared that he had said, referring to the plaintiff at the time he fell:

"That he rode stirrup until he reached the trestle, and, I judge, got scared when trestle got so high as to make him think he might get side-wiped with trestle. He then made a move to corner of car, and his lantern fell, and he was under the car."

The statement, "I judge, got scared," etc., was excluded as a mere opinion. There was no error in this. It was not a statement of fact and the opinion was irrelevant.

The plaintiff was asked if going across the end of the car was the proper way to go. This was objected to. The objection was general, and no reason for the exclusion was given. If the objection had been made to the form of the question, it was good; but in that case it might have been renewed, so as to call for the knowledge of the witness as to the usage or custom. It has been many times decided that objections to evidence which fail to point out the ground of objection afford no basis for the assignment of error in this court. "The ground of the objection," said Judge Day, now Mr. Justice Day, in *Merchants' Insurance Co. v. Buckner*, 110 Fed. 345, 346, 49 C. C. A. 80, and 81, "should be disclosed, in order that the court may act understandingly and correct the error, if one has been made." See, also, *B. & O. Rd. Co. v. Hellenthal*, 88 Fed. 116, 31 C. C. A. 414.

In *Burton v. Driggs*, 20 Wall. 125, 133, 22 L. Ed. 299, it was said:

"It is a rule of law that when a party excepts to the admission of testimony he is bound to state his objections specifically, and in a proceeding for error he is confined to the objection taken. If he assigns no ground of exception, the mere objection cannot avail him."

This ruling applies to several of the errors assigned. The other assignments relating to evidence have been examined. Many of the matters were within the discretion of the judge, and as such show no such abuse as to constitute reversible error.

The errors assigned, and not specifically referred to, have been considered. It would be idle to deal particularly with them. They are all overruled.

The judgment is accordingly affirmed.

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ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY et al. v.  
WABASH R. CO. et al.

PIERSON et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1909.)

Nos. 1,907 and 1,908.

1. COURTS (§ 366\*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS—CONSTRUCTION OF STATE STATUTES.

The rule that a settled construction of a state statute by the highest court of the state is binding upon and will be followed by the federal

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

courts implies that the state decision must have been one based alone upon the statute construed and which did not involve extraneous conditions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 366.\*]

2. COURTS (§ 366\*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS—CONSTRUCTION OF STATE STATUTES.

The rule that federal courts will accept and follow a construction of a state statute by the highest court of the state is not obligatory, where such construction was made after rights involved had accrued, although they will lean toward an agreement with the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 366.\*]

3. COURTS (§ 370\*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS—CONSTRUCTION OF STATE STATUTES.

A subordinate federal court is bound to follow a construction placed upon a state statute by the Supreme Court of the United States in a suit involving the identical question, notwithstanding a contrary decision by the Supreme Court of the state, rendered later and after the rights in suit affected by such decision had been acquired.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 953; Dec. Dig. § 370.\*]

Conclusiveness of judgment between federal and state courts, see note to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

Appeal from the Circuit Court of the United States for the Northern District of Ohio:

The questions here involved arose under intervening petitions filed in the consolidated mortgage foreclosure suits, styled "*Jessup & Knox v. Wabash, St. Louis & Pacific Railway and Others*." The interveners are the same who prosecuted their claims in the state courts of Ohio to a decree in accordance with their insistence. Upon a writ of error from the Supreme Court of the United States, the decree was reversed for want of jurisdiction in the state court over the roads sought to be subjected; the property being within the exclusive jurisdiction of the court below. *Wabash Railway Co. et al. v. Adelbert College et al.*, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379, and *Id.*, 208 U. S. 609, 28 Sup. Ct. 425, 52 L. Ed. 642. After the decision last cited these interventions were filed.

The Toledo & Wabash Railroad Company was a consolidated road, organized under the laws of Ohio and Indiana, and included the road of a former Ohio company and the connecting road of a former Indiana company. That consolidated company, in 1862, issued a series of coupon-bearing negotiable notes which aggregated \$600,000. They were wholly unsecured and differed from the general unsecured indebtedness of that company only in the fact that under certain circumstances they were, at the option of the holder, convertible into stock. These obligations matured in 1883 and are wholly unpaid, together with interest since 1874. The appellants hold about one-half of the entire issue and now assert that a lien exists in favor of this series of notes against the original Ohio division of the Toledo & Wabash Railroad Company, which is superior to every incumbrance upon that division, by mortgage or otherwise, which is subsequent in date to August 1, 1863.

The lien asserted is claimed to have originated on that date in consequence of a consolidation which was then consummated with three Illinois railway companies, owning connecting lines, which, with the road of the Toledo & Wabash Company, formed a continuous line to the Mississippi river. The new company thus organized was known as the "Toledo, Wabash & Western Railway Company."

This consolidation was had under the laws of Ohio, Illinois, and Indiana. The Ohio statute then in force was the act of April 10, 1856, and is sub-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stantially that embraced in Bates' Ohio statutes, §§ 3379 to 3384, inclusive. The relevant section (3384) is in these words:

"Upon the election of the first board of directors of the company created by the agreement of consolidation, all and singular the rights, privileges and franchises of each of the companies to the agreement, and all the property, real, personal and mixed, and debts due on account of subscriptions of stock, or other things in action, shall be deemed to be transferred to and vested in such new company, without further act or deed; all property, rights of way, and other interests, shall be as effectually the property of the new company as they were of the companies parties to the agreement; the title to real estate, either by deed, gift, grant, or by appropriations under the laws of this state, shall not be deemed to revert or be impaired by reason of the consolidation; but all rights of creditors and all liens upon the property of either of such companies, shall be preserved unimpaired and the respective companies may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either of said companies, shall thenceforth attach to the new company, and be enforced against it to the same extent as if such debts, liabilities and duties had been contracted by it."

The agreement of consolidation, after reciting that the contracting parties had agreed to consolidate their roads, property, and capital stock into one company, set out that: "The Toledo & Wabash Railway Company enters into said consolidation on the following basis, viz.: That the capital should be \$10,000,000, composed as follows:

First mortgage bonds .....	\$ 3,400,000
Second mortgage bonds .....	2,500,000
Convertible equipment bonds .....	600,000
Convertible preferred stock .....	1,000,000
Common stock .....	2,500,000
	<hr/>
	\$10,000,000"

It also provided that all the rights, franchises, property, debts, and choses in action of the respective companies should vest in the consolidated company.

The important feature of this agreement was in these words:

"It is further agreed that the bonds and other debts hereinabove specified, in the manner and to the extent specified and not otherwise provided for in this agreement, shall, as to the principal and interest thereon, as the same shall respectively fall due, be protected by the said consolidated company according to the true meaning or effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced."

The convertible equipment bonds referred to in this agreement are the series of negotiable coupon-bearing notes, for which a lien is now asserted in this proceeding.

After this consolidation other consolidations, not necessary to here mention, occurred, and mortgages, securing large issues of bonds, were from time to time made by one or another of the successive consolidated corporations.

Finally, defaults occurring, foreclosure suits were filed in the Circuit Courts of Indiana, Illinois, and Ohio. On March 13, 1899, an identical decree of sale was made in the several Circuit Courts, under which the roads of the several constituent or consolidated companies were sold. The decree under which the Ohio division of the then last consolidated company, the Wabash, St. Louis & Pacific Railway Company, was sold, was made in a case styled "Jessup & Knox v. Wabash, St. Louis & Pacific Railway Company." Under that decree the consolidated roads were sold as a whole to a purchasing committee representing mortgage creditors. This purchasing committee organized the Wabash Railway Company, and turned the entire property over to it, and that company has ever since been in possession and is one of the appellees here.

The sale was free from the lien of the foreclosed mortgages, but was made subject to the debts and liabilities of the receivership and to all other claims which might be established against the property, or allowed in that cause, with the right reserved to the court to retake possession and resell it if any claim adjudicated by the court should not be paid by the purchasers.

At the time of this decree there had been asserted in that case a claim by James Compton to a lien under a decree in his favor by the Supreme Court of Ohio, as a holder of a part of the series of convertible equipment bonds issued by the Toledo & Wabash Railway Company. The opinion of the Ohio court as to Compton's lien may be seen in 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380.

His rights, not having been determined at the date of the decree of sale, were reserved in terms which were subsequently construed by the Supreme Court as imposing an obligation payable next after the two senior mortgages upon the Ohio division. The history, character, and place of this Compton judgment is set out in detail in the case of *Compton v. Jessup*, 167 U. S. 1, 17 Sup. Ct. 795, 42 L. Ed. 55, and reference is here made to that opinion. According to the mandate in that case, a decree was entered in the court below, requiring an accounting by the Wabash Railway Company of the net earnings of the Ohio division of its said railway for the purpose of ascertaining the balance, if any, due to it under the mortgages upon that division superior to the lien under Compton's decree, and the case was pending under that accounting, when, on June 9, 1908, these appellants filed intervening petitions, wherein they asserted a lien identical with that of Compton and a right to share with him in the proceeds of the sale of the Ohio division after the lien of the two mortgages had been discharged. To these petitions the purchasers, the Wabash Railway Company and Ellen Compton, as executrix of James Compton, demurred. The demurrers were sustained, and the intervening petitions dismissed.

Lawrence Maxwell and Murray Seasongood, for appellants.

J. G. Milburn and Rush Taggart, for appellees.

Before LURTON and SEVERENS, Circuit Judges, and KNAPPEN, District Judge.

LURTON, Circuit Judge (after stating the facts as above). It must be conceded that Compton's claim to a lien upon the Ohio division of the Toledo & Wabash Railway, when asserted by him in the suit of *Jessup & Knox v. Wabash, St. Louis & Pacific Railway Company*, stood upon a very different footing from that of the appellants, who now assert a lien against the same division. That the appellants are holders of some of the same class of bonds as those upon which Compton's original claim rested is true; but Compton's claim of lien was adjudicated in his individual suit by the Supreme Court of Ohio. See *Compton v. Railway Company*, 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380. That court adjudged that he had a lien and accorded him a decree for the sale of that division, subject only to the prior divisional mortgage thereon. That was his status when brought into the general foreclosure case conducted by the very mortgagees who had been defendants to his action in the Ohio court. When so brought into that court, he, by proper pleading asserted the adjudicated lien and the right to a sale accorded him by the Ohio court. His lien was denied by the other lienors proceeding in that case. Before the issue thus made was determined, the court ordered a sale of the entire line of railway, including the Ohio division against which Compton was endeavoring to enforce the Ohio decree. To a sale in advance of the determination

of the issues made as to the lien asserted by him, Compton objected, whereupon the sale was ordered upon the condition, that:

"If it should be adjudged by this court that the decree rendered by the Supreme Court of the state of Ohio, in the suit brought by said James Compton against the Wabash, St. Louis & Pacific Railway Company and others, referred to in the pleadings herein, and the lien thereby declared and adjudicated in his favor, continues in full force and effect, then the purchaser or purchasers at any sale or sales hereunder of that portion of the property sold, covered, and affected by said lien or the successors in the title of said purchaser or purchasers, shall pay to the said James Compton or his solicitors herein within 10 days after the entry of the decree herein in favor of said James Compton, the sum of \$339,920.40, with interest from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the Supreme Court of Ohio, in his said suit; \* \* \* and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant, James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise as this court may direct."

Shortly after the sale the Circuit Court adjudged Compton's lien to be a valid one, but accorded to him the single remedy of redemption of two Ohio divisional mortgages and the two Indiana divisional mortgages. Upon appeal to this court, the judges were not agreed as to the remedy and certified certain questions to the Supreme Court. See *Compton v. Jessup*, 68 Fed. 263, 15 C. C. A. 397. The response of that court is found in its opinion. *Compton v. Jessup*, 167 U. S. 1, 28, 34, 36, 17 Sup. Ct. 795, 42 L. Ed. 55.

As exhibiting the quite exceptional character of Compton's claim and rights, this court, as ground for according Compton a remedy by redemption rather than resale, pointed out that there were outstanding many other obligations similar to those which had been the basis for the Compton judgment, and that the purchasers ought not to be subject to other proceedings and other resales if such equipment bonds should be held liens identical to that of Compton. To this the Supreme Court said, at page 34 of 167 U. S., at page 807 of 17 Sup. Ct. (42 L. Ed. 55):

"The apprehensions expressed in their brief by the learned counsel of the appellees, that because of the absence of the other holders of the equipment bonds, the purchasers or their successor, the Wabash Railroad Company, may yet be subjected to their claims, are without foundation. It would seem that their claims were disposed of by the decree of this court in the case of *Wabash, St. Louis & Pacific Railway v. Ham*, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. Ed. 235, where it was held that the property sold under the decree of foreclosure is not subject to any lien in favor of the holders of the equipment bonds. We think it quite plain that Compton is the only party having an interest in and a right to enforce the decree of the Ohio Supreme Court. The provision contained therein assessing the amount of his claim as to the amount of the bonds held by him shows that the decree was intended to operate solely for his benefit, and the direction that the proceeds of sale should be brought into court, to abide its further order on the footing of the decree, is the order usually made when a sale is made by an officer appointed by the court. Such a sale might result in a sum in excess of Compton's claim, and, in such event, there would be room for a further order of the court."

Again, that court said:

"Compton's claim, in its present status, consists of the decree of the Ohio state court in his individual favor, fixing the amount of his debt, and decreeing a sale of the Ohio property, and of the decree of sale of the Circuit Court

of the United States affirming the decree of the Ohio court as to the validity and amount of the claim, and providing that if it should not be paid by the purchasers, Compton should have a right to a sale of the Ohio road or to some equivalent remedy."

With respect to the remedy, that court answered:

"(1) That the decree of sale of March 23, 1889, confers upon Compton, in event that his claim shall not be paid by the purchaser, the right to a decree of resale of the property situated in Ohio and covered and affected by his lien.

"(2) That, in event of such sale, and in applying the proceeds thereof, Compton will be entitled to an account of the net earnings of the Ohio division over and above all operating expenses, taxes paid, and cash paid, if any, in redemption of receiver's certificates and other expenses properly chargeable against the Ohio division, which net earnings should be deducted from the amount due on the two prior mortgages on said division."

When the mandate of the Supreme Court came down, a decree for an accounting was entered as required, and this accounting had been going on for some eight years when the intervention of these appellants was filed, asserting a lien of like character to that accorded Compton, and a right to participate with him in the proceeds of any resale of the Ohio division.

In view of the exceptional character of Compton's rights under the decrees, adjudicating them, and especially under the decree upon which the pending account was being taken, it has been insisted with much force that appellants have no right to intervene under decrees intended to operate solely for his benefit.

Again, it has been urged, with quite as much earnestness, that the extraordinary delay of these complainants in coming into the foreclosure case is laches of such serious character as to require their exclusion.

These questions we shall, for the present, pass by without decision, for, if the appellants have no lien to assert these questions will be unimportant.

We come then to the question of the lien of the equipment bonds held by the appellants. Confessedly no kind of lien or security existed when these obligations were issued by the Toledo & Wabash Railway Company. The claim is that in 1865 a lien to secure them arose, under the Ohio statute regulating the consolidation of railway companies, in consequence of the consolidation at that time of the debtor railroad company with three Illinois roads, and the organization of a new corporation known as the "Toledo, Wabash & Western Railway Company."

The relevant section of this consolidating act, being section 3384, Rev. St. Ohio, has been heretofore set out.

From the consolidation, by direct effect of the section referred to there results: First, that all of the property of each of the constituent companies is vested, without deed, in the new company; second, "the rights of creditors and all liens are preserved unimpaired, and the debts and liabilities of each of the old companies thenceforth attach to the new corporation and are enforceable, to the same extent as if said debts, liabilities and duties had been contracted by it."

It is to be noticed, however, that the statute does not declare that the debts of the consolidating companies, thus attaching to the new organi-

zation constitute a lien or charge upon the property of the new company.

The effect of this statute and of the agreements between the consolidating companies for the purpose of consummating a consolidation has been twice before courts of the highest importance. The first was that of the *Wabash, St. Louis & Pacific Railway Company v. Ham*, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. Ed. 235, in which certain of the same series of equipment bonds here involved were held not to constitute a lien or charge either under the Ohio statute nor under the consolidation agreement. Three years thereafter the same question came before the Supreme Court of Ohio in *Compton v. Wabash, St. Louis & Pacific Railway Co.*, 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380, when that court refused to accept the conclusion of the *Ham Case* and held that a lien existed.

The contention now made is that the decision of the Ohio court is conclusive upon this court, as a construction and interpretation of the Ohio statute.

That the courts of the United States will accept and apply the settled construction by the highest court of the state of a state Constitution or statute is an elemental general rule. A settled and received interpretation of a state statute by its own courts becomes as much a part of the law of the state as if written into the statute itself. *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; *Fairfield v. Gallatin*, 100 U. S. 47, 25 L. Ed. 544; *Bucher v. Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; *Forsyth v. Hammond*, 166 U. S. 506, 518, 17 Sup. Ct. 665, 41 L. Ed. 1095; *Byrne v. K. C. R. Co.*, 61 Fed. 605, 614, 9 C. C. A. 666, 24 L. R. A. 693; *Great Southern Fire Proof Hotel Co. v. Jones*, 116 Fed. 793, 54 C. C. A. 165, affirmed by Supreme Court, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778.

This rule obviously implies that the state decision which is to foreclose the independent judgment of a court of the United States must have been one based alone upon the statute construed, for, if extraneous conditions were involved, the judicial mind was not applied to the precise question, and the decision, though persuasive, has not the obligatory effect of a clear case of statutory construction. *Town of Venice v. Murdock*, 92 U. S. 494, 23 L. Ed. 583; *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 11, 22 Sup. Ct. 531, 46 L. Ed. 773. See, also, *Roberts v. Bolles*, 101 U. S. 119, 128, 25 L. Ed. 880; *Byrne v. K. C. Ry. Co.*, 61 Fed. 605, 614, 9 C. C. A. 666, 24 L. R. A. 693; *Three States' Lumber Co. v. Blanks*, 133 Fed. 479, 482, 66 C. C. A. 353, 69 L. R. A. 283.

Aside from all consideration of the obligation of this court to follow the prior opinion of the Supreme Court upon the same statute in the *Ham Case*, we do not think the decision of the Ohio Court in the *Compton Case* is such a clear case of statutory construction as to make it our duty to follow it without regard to any opinion we may entertain as to the proper construction of the Ohio statute.

The fair inference from the argument of Judge Minshall is that when a statute provides for the consolidation of old corporations into a single new one, and imposes upon the new organization the debt of the old organizations, that a universal lien upon all of the property of

the consolidated company is created by operation of general principles of jurisprudence, to secure all of the debts of the old companies. If this be a correct construction of so much of the opinion as deals with such a lien, independently of the consolidating agreement that the new company shall protect the debts of the merged corporations, it cannot be regarded as a clear decision that the lien was a purely statutory one.

But under the well-settled rule of the Ohio Supreme Court, the syllabus of the case alone constitutes the law of the case, as agreed to by the majority of the members of the court. Rule 6, Ohio Supreme Court, preface 5 Ohio St. vii, and x, preface 73 Ohio St., 67 N. E. vii. If the syllabus is ambiguous, it may be read in the light of the facts stated in the report of the case, *Witte v. Lockwood*, 39 Ohio St. 141, 145.

Turning, then, from an ambiguous opinion to the syllabus of that case, we find that following a statement of the facts, including the stipulations of the agreement forming the basis of consolidation, the syllabus reads as follows:

"That under the statute of this state in force at the time the Toledo, Wabash & Western Railway Company was formed by consolidation (1 Swan & C. St. 327), and the stipulation in the agreement that these equipment bonds should be protected by the new company, the holders of these bonds acquired the right to require the property of the company that issued them to be applied to their payment; and the consolidation and the agreement being matter of public record, the right is available against all persons deriving title from the consolidated company."

This official statement of this point decided, upon which the court agreed, makes it clear that the lien declared was the combined result of the consolidation under the statute and of the stipulations which were the basis of the agreement for the consolidation.

Whether Judge Minshall was of opinion that the statute created the lien independently of the stipulations of the consolidating companies is of little importance, for the court concurred only in a decision which declared a lien in consequence of the statute and of the terms of the stipulation. It is therefore illogical to say that the Ohio court has construed this statute as creating a lien purely in consequence of the terms of the statute.

Certain observations of Judges Taft and Lurton, in the separate opinions of those judges found in *Compton v. Jessup*, 68 Fed. 263, 15 C. C. A. 397, referring to the lien of Compton as a lien arising under the Ohio statute, have been cited. No question was then before the court, which called for the consideration of the opinion of the Ohio court as a case of pure statutory construction. The references were in connection with the argument that Compton should redeem, rather than have a resale, in consequence of the fact that there were outstanding other bonds of the same series of equipment obligations as those upon which Compton's judgment was based, and that, as Compton had not brought in such other holders, the purchaser might be subjected to other demands for a resale of the Ohio division to enforce their liens. This fear, the Supreme Court said, was without foundation, in view of the fact that Compton was proceeding not upon his bonds, but upon the



decree of the Supreme Court of Ohio, according him a lien, and because any such claim of liens by such other holders were disposed of by the Ham Case. That the court in that part of its opinion referred to did not refer to the "decree" in the Ham Case, but to the opinion, is evident from the context, for they proceed by saying:

"Where it was held that the property sold under the decree of foreclosure is not subject to any lien in favor of the holders of the equipment bonds."

Reference has also been made to like characterization of the Ohio decision in *Columbus R. Co. Appeals*, 109 Fed. 177, 195, 48 C. C. A. 275, and in *Rice v. N. & W. R. Co.*, 153 Fed. 497, 82 C. C. A. 447. Neither case called for any determination of the question as to whether the decision in *Compton v. Ry. Co.*, 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380, was based wholly upon the statute involved, or the statute in connection with the agreement and stipulations of the consolidating companies.

The observations of Chief Justice Marshall, in *Cohen v. Virginia*, 6 Wheat. 264, 298, 5 L. Ed. 257, concerning dicta, are relevant, where he said:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used; If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided; but their possible bearing on all other cases is seldom completely investigated."

But the rule that a court of the United States will accept and follow a construction of a statute by the highest court of a state is not one of universal application. There are many notable and well-settled exceptions. One of these is that a court of the United States is not absolutely constrained to accept and follow a construction of a statute of the state by the courts of the state, if such construction was made after rights had accrued before such decisions were announced, though it will lean toward an agreement with the state court. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 301, 22 C. C. A. 334; *Carroll County v. Smith*, 111 U. S. 556, 562, 4 Sup. Ct. 539, 28 L. Ed. 517; *Jones v. Great Southern Fire Proof Hotel Co.*, 86 Fed. 370, 30 C. C. A. 108; *Id.*, 116 Fed. 793, 54 C. C. A. 165, affirmed by the Supreme Court, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778; *Julian v. Central Trust Company*, 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629.

In *Louisville Trust Company v. Cincinnati*, cited above, this court thus stated this exception:

"A well-grounded exception exists where contracts and obligations have been entered upon before there has been any judicial construction of the statutes upon which the contract or obligation depends by the highest court of the state whose statute is involved. In such a case, if a court of the United States obtains jurisdiction of a question touching the validity, effect, or obligation of such a contract, it will, while leaning to an agreement with the state court, exercise an independent judgment as to the validity and meaning of such contract, although the meaning and validity of state statutes may be

an element in the case, and will not be bound to follow opinions of the state court construing such statute, if such decisions were rendered after the rights involved in the controversy originated."

The leading case upon the subject is that of *Burgess v. Seligman*, cited above. The action was one in which the rights in issue depended upon a statute of Missouri which had not been construed. Pending a writ of error to the Supreme Court, the Supreme Court of the state, in another suit dependent upon the same statute, construed the statute contrary to the opinion of the United States Circuit Court. It was urged in the United States Supreme Court that it was the duty of that court to follow this construction of the statute involved. Upon this subject the Court said:

"So, when, contracts and transactions have been entered into, and rights have accrued thereon under a particular state of decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued; but even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean toward an agreement of view with the state courts if the question seems to them balanced with doubt."

In *Carroll County v. Smith*, cited above, there was involved the interpretation of a clause in the Constitution of Mississippi, forbidding a county to lend its aid to a corporation, unless two-thirds of the qualified voters should assent thereto at an election. Carroll county had issued bonds in aid of a railroad company, which contained no recitals estopping the county in respect to the legality of the vote by which the bonds had been issued. In a suit between other parties upon some of the same bonds, in a court of Mississippi, it was held that the Constitution and laws of the state required the assent of two-thirds of the qualified voters of the county to authorize the issuance of the bonds in question, and that, as less than that number had voted for them, the election was invalid and the bonds void. *Hawkins v. Carroll County*, 50 Miss. 735. Subsequently another holder of bonds, a citizen of another state, brought an action in a Circuit Court of the United States upon other bonds of the same series. The decision of the Supreme Court of the state construing the Constitution and statute of the state was urged as a decision which it was the duty of the courts of the United States to follow. To this the Supreme Court, by Mr. Justice Matthews, said:

"The decision in *Hawkins v. Carroll County*, above, referred to, is not a judgment of the Supreme Court of Mississippi, construing the Constitution and laws of the state, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a decision upon the very bonds here in suit, pronounced after the controversy arose, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When therefore it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the state, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one state, suing in another,

the choice of resorting to a federal tribunal. *Burgess v. Seligman*, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359.

"We have, however, considered the reasoning of the Supreme Court of Mississippi, in its opinion in the case of *Hawkins v. Carroll County*, with the respect which is due to the highest judicial tribunal of a state speaking upon a topic as to which it is presumed to have peculiar fitness for correct decision, and while we are bound to admit the carefulness and fullness of its examination of the question, we are not able to adopt its conclusions. On the contrary, we are constrained to follow the decision in *St. Joseph Township v. Rogers*, 16 Wall. 644, 21 L. Ed. 328, and adhere to the views expressed by this court in *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416, in deciding the same question upon the construction of a provision of the Constitution of Missouri, which is identical with that of the Constitution of Mississippi under consideration. It was there declared and decided that: 'All qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed.' 95 U. S. 369, 24 L. Ed. 416. In Missouri, as in Mississippi, there was a constitutional provision requiring a registration of all qualified voters. *State v. Sutterfield*, 54 Mo. 391."

In *Great Southern Fire Proof Hotel Co. v. Jones*, cited above, the question arose as to whether the courts of the United States were obliged to follow a decision of the Supreme Court of Ohio, holding a mechanic's lien statute obnoxious to the Constitution of Ohio. This decision had been made after the rights of the complainants under the statute had accrued. The decision of this court was that it was the duty of this court, under the circumstances, to exercise an independent judgment as to the validity of the act in question, upon which the rights of the complainants depended. This judgment was appealed. The Supreme Court, speaking by Mr. Justice Harlan, said:

"In our opinion neither the decisions of *Palmer v. Tingle*, *Young v. Lion Hardware Co.*, 55 Ohio St. 423, 45 N. E. 313, nor any other case in the Supreme Court of Ohio precluded the Circuit Court from exercising its independent judgment as to the constitutionality of the statute of Ohio here in question. If, prior to the making of the contracts between the plaintiffs and McClain, the state court had adjudged that the statute in question was in violation of the state Constitution, it would have been the duty of the Circuit Court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties accruing thereafter; but the decision of the state court, as to the constitutionality of the statute in question, having been rendered after the rights of the parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question. In making this declaration we must not be understood as at all qualifying the principle that, in all cases, it is the duty of the federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the Constitution or laws of the state."

The application of this exception to the general rule in the present case lies, not in the fact that the title of the purchasers at the foreclosure sale, the Wabash Railway Company, was acquired before the decision of the Ohio court in the *Compton Case*, for in fact the foreclosure decree of sale of March, 1898, was after both the *Compton* and *Ham* decisions, but in the fact that, by virtue of that sale and pur-

chase, that company has succeeded to all of the rights of the mortgagees, whose liens were enforced by that decree. The purchaser stands as the equitable assignee of the rights and liens of the mortgagee whose liens were enforced. Whatever defense they could have made against this claim of a superior lien the purchaser, who stands in their shoes, can make. If this Ohio construction, made long after their rights were acquired, would not have been such a decision as to conclude the Circuit Court if this lien had been asserted before the decree of sale, it is for the same reason equally nonconclusive against the purchaser under this foreclosure decree of sale. That these mortgagees took with constructive notice of the Ohio consolidation act and of the recorded agreement for consolidation must be conceded; but the legal consequence of that consolidation in creating a lien upon all of the property of the consolidated company to secure the unsecured debts of the consolidating companies, superior to all subsequent mortgages, was a question upon which they were entitled to be heard. The judgment in the Compton Case has no consequence as a prior adjudication, for the parties are not the same. Neither are the appellants estopped by the prior decision in the Ham Case for the same reason.

Assuming, then, for the purpose of this case, that the decision of the Ohio court in the Compton suit is a clear statutory construction, we are still of opinion that it is not such a decision, coming as it did after the rights of the mortgagees had accrued to which the Wabash Railway Company has succeeded, as to preclude that defendant from the benefit of the independent opinion of this court upon the same question.

We have not heretofore at all considered the duty of this court as a subordinate court of the United States to accept and follow the prior decision of the Supreme Court of the United States in *Wabash, St. Louis & Pacific Railway Co. v. Ham and Others*, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. Ed. 235. That case involved some of the same series of equipment bonds here in issue. The questions and the facts were identical with those in the later Compton Case. The court, in a clear and convincing opinion by Mr. Justice Gray, decided that neither under the Ohio consolidation statute, nor the consolidation agreement, was any lien created in behalf of the unsecured equipment note holders. If we are under no obligation to follow a later state construction of the Ohio statute, we clearly are obligated to accept this Ham opinion as covering the precise question which we are called upon to decide.

That opinion, if we may venture to say so, stands upon sound principles of statutory exposition, so far as the Ohio statute was involved, and as a declaration of general jurisprudence meets with our approval; but, were it otherwise, the question of whether it is to be adhered to in the exercise of an independent judgment, is a question for the Supreme Court. Until that opinion is overruled, the decision of the Supreme Court of Ohio in the Compton Case out of the way, it is obviously the duty of this court to follow it.

The result is that the decree of the Circuit Court must be affirmed.

## HEBRON MFG. CO. v. POWELL KNITTING CO.

(Circuit Court of Appeals, Third Circuit. July 1, 1909.)

## No. 12.

## 1. SALES (§ 420\*)—REMEDIES OF BUYER—ACTION FOR BREACH OF CONTRACT—QUESTIONS FOR JURY.

Where, under a contract for a sale of yarn to a knitting mill to be delivered in weekly shipments of a stated amount, the purchaser made payments semimonthly, instead of 10 days after each bill of lading, as required by the contract, and such payments were accepted by the seller and shipments continued, the seller could not cancel the contract because of such deviation from its terms without reasonable notice to the purchaser, giving an opportunity to comply strictly with such terms in the future, and, where the seller did cease shipments and cancel the contract, it was a question for the jury, in an action for its breach, whether such cancellation was justified.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1202; Dec. Dig. § 420.\*]

## 2. APPEAL AND ERROR (§ 1033\*)—REVIEW—HARMLESS ERROR.

The adoption by the court in its instructions of an erroneous measure of damages for breach of a contract is not ground for reversal by defendant, where the result was that the judgment against it was smaller than it would have been had the correct rule been stated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. § 1033.\*]

## 3. APPEAL AND ERROR (§ 263\*)—NECESSITY FOR EXCEPTIONS—INSTRUCTIONS.

It was not reversible error to assume the correctness of the testimony of witnesses as to the price of an article, without submitting the same to the jury, where such testimony was uncontradicted, and no exception was taken to the charge containing such assumption.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.\*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Joseph H. Taulane and White, White & Taulane, for plaintiff in error.

W. Clarke Mason, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the lower court the Powell Knitting Company, herein called "plaintiff," recovered a verdict against the Hebron Manufacturing Company, herein called "defendant," for damages for alleged breach by the latter company of two contracts between them. Judgment was entered on the verdict, and defendant sued out this writ. The assignments of error raise three questions: First, was defendant justified in canceling the contracts? Second, did the court lay down the correct rule of damages? And, third, should not the credibility of witnesses as to prices have been submitted to the jury?

The plaintiff operated knitting mills at Philadelphia, and defendant manufactured hosiery yarn at Hebron, Mass. Plaintiff had pre-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

viously bought yarn from defendant, when on June 6, 1906, and September 29, 1906, it entered into the two contracts involved in this writ. By the June contract defendant sold plaintiff 20,000 pounds of hosiery yarn at 28½ cents per pound, deliveries 2,000 pounds weekly following completion of contract of April 24, 1906, f. o. b. Hebronsville, Mass.; seller paying freight to Philadelphia; terms 10 days from each delivery. The contract of September 30th was of like tenor, amount 30,000 pounds, price 28 cents, deliveries 4,000 pounds weekly following completion of contract of June 6th. Shipments under the June contract began August 25, 1906, and ended October 26th, up to which time defendant delivered 14,000 pounds, and at which "latter date, for some reason, the deliveries," as stated in defendant's brief, "had been suspended." On November 28th defendant notified plaintiff it had canceled the contracts. It never delivered the remaining 36,000 pounds called for by the two contracts. From December to the middle of February, 1907, the period covered by the stipulated weekly deliveries, the price ranged from 33 to 35½ cents per pound. The plaintiff, as its needs required, bought 36,000 pounds during the contract term.

The underlying question in the case was whether the defendant was justified in canceling the contracts. That question was submitted to the jury, and no objection was taken to the language of submission. Unless the court was in error in denying defendant's point, which requested binding instructions, the verdict must therefore be accepted to establish the fact that defendant unwarrantably rescinded the contract. We turn then to the question whether the court should have given binding instructions.

Now the facts established by the plaintiff's proofs, for no witnesses were called by defendant, tended to prove: That plaintiff, instead of paying in 10 days after each weekly delivery at Hebronsville, as the contract provided, had paid semimonthly; that, while defendant objected to the variations from the contract, it had nevertheless received such semimonthly payments and continued shipments; that the market was a rising one, and on October 26, 1906, as noted, defendant suspended shipments, and then (having made complaint of plaintiff's noncompliance with the times of payment provided in the contract) wrote:

"Now in regard to further shipping, when we advised you we were to stop shipping, we made another disposition of our yarn, but we can probably commence shipping again in two or three days. Our Mr. Knight insists, however, that we have an understanding that bills are to be paid within ten days of date of B-L, and in the event that you do not care to do this (which is according to contract), he prefers to cancel the contract. We await your advice in this matter, and in the event that you will agree to remit promptly according to our terms, and that of contract, we will commence shipping as soon as possible."

The purchase of the yarn in question was made by Snyder, a broker in Philadelphia, on behalf of the plaintiff, and the sale by Childs, a broker in Boston, on behalf of the defendant. It appears Snyder communicated his desire to buy to Prendergast, a broker at Providence, R. I., with a representative at Boston, and the latter brought Childs and Snyder into communication. Prendergast's commissions

were paid by Childs. Evidence had been admitted on the trial for the purpose of showing Prendergast was the agent of defendant. On October 31st plaintiff replied to defendant's letter of October 26th:

"Referring to your remarks regarding payment of bills, we would state that so far as we are able we will remit for these bills within the ten days, provided of course that the yarn is in our mill. If your representatives handle the stuff promptly at this end we see no reason at all why it should not be in our mill before the expiration of the ten days. We could not, however, agree to pay for the yarn before it is received. This we would consider altogether unjust. We believe Messrs. Prendergast & Co. have communicated with you and understand from them that you are to resume the shipment of our yarns."

On November 1st defendant, making no allusion to Prendergast, replied as follows:

"Referring to yours 31st will say, we propose to live strictly up to terms of contract, namely, cash in 10 days from date of shipment. Unless this condition is fully recognized by you we will cancel the contract. We note there are several bills now due, for which kindly remit with interest, and oblige."

There was evidence that on November 5th Childs, defendant's broker, informed defendant of the receipt by him through Prendergast of a telegram from Snyder, plaintiff's broker, dated November 1st, saying the plaintiff guaranteed to pay Hebron Company 10 days from date of shipment, and that defendant objected to confirmation by a broker and wanted it over plaintiff's own signature. Prendergast was so informed by Childs, but did not communicate this to plaintiff. Learning on November 31st that defendant would not ship, plaintiff wrote saying it had agreed to make settlement 10 days after shipment from mill, and was about writing, when Snyder had called and shown them a letter from Prendergast stating:

"The matter had been settled, and that there was no need of answer as you had agreed to continue shipments."

To this defendant replied:

"In ours of November 1st, we wrote you unless you complied with our terms we would cancel the trade. After waiting a suitable time and getting no reply, we sold the product of these spindles to another party, and our whole mill is sold for some months to come. We have wasted all the time and postage on this matter that we care to and consider the incident closed."

In view of this situation under the proofs, the question of cancellation was one for the jury. Not only were there facts to be ascertained and settled, but, as to the inferences to be drawn from such facts when ascertained, men might well differ. For example, a careful perusal of all the testimony leaves our mind in doubt as to when defendant actually rescinded this contract. On the one hand, we have the fact that on October 26th it stopped shipment of the weekly deliveries provided for by the contract. Did this indicate a rescission on that date, or a mere suspension of shipments until the question of payment was settled? If the latter, to what then did the statement then made, "We made another disposition of our yarn," refer, and how is it reconcilable with the statement made November

28th, when, in speaking of their letter of November 1st, defendant says:

"After waiting a suitable time and getting no reply, we sold the product of those spindles to another party."

In view of these statements, and of the fact that the weekly shipments were stopped October 26th, when did defendant rescind? In their letter of November 28th, they speak of waiting to hear in reference to terms of payment for a "suitable time"; but just when that suitable time expired, or precisely when the contract was rescinded, is nowhere shown. If defendant rescinded on October 26th, when they stopped shipments, or if, on receiving notice by the Snyder-Prendergast telegram on November 5th, they at once rescinded without waiting a reasonable time to get confirmation direct from the plaintiff, a jury might find such rescission was premature and unwarranted, for one could not thus abruptly change a course of payment the parties had been following, but must act reasonably in the way of notice and time in demanding a rigid adherence to the terms of the contract, for, as was said in *Portland Ice Co. v. Conner*, 32 Pa. Super. Ct. 428:

"The contract itself, as to the times of payment, was never either modified or abrogated. It was simply ignored; neither party choosing to stand upon his strict contractual rights. It was therefore in the power of either to determine, at any time, that the relations created by the contract should be resumed; and that thereafter a strict and literal compliance with the contractual obligations would be accorded and accepted; but, for manifest reasons, such a determination, arrived at by one party, could not be operated until after such fair and reasonable notice as would afford to the other party an opportunity to adapt himself to the new situation."

So, also, in *Forsyth v. Oil Co.*, 53 Pa. 168, the Supreme Court say:

"Under these circumstances, we discover no error in leaving it to the jury to determine the facts as to the mode of performance adopted by the parties, including the want of promptness in payment, alleged as the ground of rescission; and, instructing them that after a liberal indulgence allowed on both sides, the defendant cannot suddenly rescind without a fair warning of their intention to insist upon a literal compliance with the contract in future."

For these and numerous other reasons, which an analysis of the testimony discloses, it will be seen that the question of rescission was for the jury. Its verdict therefore must be taken as settling that defendant was not warranted in rescinding when it did.

Such being the case, what was the proper measure of damages? Now, whatever may have been the date defendant attempted to rescind, it is clear the plaintiff was not bound to take any steps until after it learned of the rescission, which was the last of November, and the next weekly shipments due were December 5th, 12th, and 19th on the June contract, and December 26th, January 2d, 9th, 16th, 23d, 30th, and February, 6th on the September one. In the settlement of these damages, two courses would seem open, both of which have the support of authority, namely, the difference between the contract price and the market price at the time when the several deliveries were to be made under the contracts. In support of this view, *Shreve v. Brereton*, 51 Pa. 175, *Emory v. Salomon*, 178 Mass.



582, 60 N. E. 377, and *Missouri Co. v. Cochran* (C. C.) 8 Fed. 463, may be referred to. On this basis the damages, with interest, were \$2,583.35. The other view is the difference between the contract price and the market price at the time all deliveries were completed. In support of this view *Duff v. Sugar Co.*, 178 Pa. 471, 35 Atl. 1134, and *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, may be cited. Under this view the damages, with interest, were \$2,690.10.

But the plaintiff actually went into the market as its needs required, and within the time limit of the contract bought so advantageously that its actual damages were, with interest, but \$2,452.59. It follows therefore that defendant fared better than if the court had followed either of the courses indicated.

The assignment that the court should have submitted to the jury whether they believed the witnesses as to the price of the yarn is without merit. No exception was taken to the judge's charge in that regard to warrant such assignment. Moreover, there was no contradiction on that point, or is any allegation now made that any contradictory evidence could have been produced.

Finding no reversible error in this record, the judgment must be affirmed.

#### DELAWARE & HUDSON CO. v. BEEMER.

(Circuit Court of Appeals, Third Circuit. July 22, 1909.)

No. 22.

#### 1. MASTER AND SERVANT (§ 284\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—SCOPE OF EMPLOYMENT.

Whether a servant was acting within the scope of his duty when injured is usually for the jury, in an action for the injury, especially where, by reason of the installation of new machinery shortly before his injury, his duties had been changed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1005; Dec. Dig. § 284.\*]

#### 2. MASTER AND SERVANT (§§ 286, 289\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

Plaintiff was a car loader at the coal breakers of defendant railroad company and was injured by having his feet caught in a cog gearing while executing the orders of the boss loader directing him to clear a screen which had become clogged. The gearing was part of the machinery for operating a new conveyor for the screenings which had just been put in. Before that the screenings which passed through the screens in the loading chutes fell into small cars, and the employé operating such cars had attended to the clearing of the screens, and plaintiff had never before been inside the breaker, where he was required to go. The place was filled with coal dust and dark, and no lights could be used. The cogs were not covered, and the noise prevented their being heard. Plaintiff did not know their position and was given no warning or instructions. *Held*, that the questions of defendant's negligence and plaintiff's contributory negligence were both properly submitted to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050, 1089-1132; Dec. Dig. §§ 286, 289.\*]

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

Everett Warren, Welles & Torrey, and John P. Kelly, for plaintiff in error.

R. L. Levy and Margan Kaufman, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

BUFFINGTON, Circuit Judge. In the court below, Beemer, herein called "plaintiff," recovered a verdict for personal injuries against the Delaware & Hudson Company, herein called "defendant." On entry of judgment defendant sued out this writ assigning for error: First, that there was no evidence of negligence on the part of defendant to submit to the jury; and, secondly, that plaintiff was guilty of contributory negligence.

The record in this case, as originally sent up from the court below, failed to disclose the entry of judgment upon the verdict. Since the hearing, however, a certificate of the entry of such judgment has been sent up by the clerk as a supplement to the transcript of record on file. This supplementary record we direct to be filed, and we call the attention of the clerks and the profession to the necessity of having hereafter such judgments appear in proper form in the record.

At the time of the accident, Beemer was one of defendant's loader gang, which, under the directions of Kronie, its boss loader, worked at railroad cars at defendant's breaker. The duties of the gang were to move cars opposite the mouth of the proper chute, open the chute gate, and allow coal to run from the breaker bins into the cars. Just before the accident a car was being filled from a grate-coal chute. In front of this chute gate, and in the bottom of the pathway that led therefrom to the car, was a lip screen. The meshes of this screen were such that coal below grate size, together with all culm and rubbish, fell through the lip screen into an inclined runway. This runway led to a transverse trough, through which an endless scraper conveyor pushed the screenings to an elevator. By the latter they were carried to the top of the breaker and there subjected to further assorting. This conveyor was a new installation. Prior to its use small cars received the droppage through the lip screens and carried it to the elevator. The lip screens and runway clogged frequently. The obstruction had to be removed at once, otherwise the contents of the railroad car might be rejected by reason of the nonuniformity of its coal or unscreened rubbish. Under the old system, as soon as a stoppage occurred, the driver of the small car dislodged it and relieved the lip screen. When the conveyor system supplanted the small car system, it was expected to automatically prevent cloggings; but such did not prove the case. As a natural result, and because no other provision was made to remove these obstructions, it became part of the car loader's work to remove them. To do this it was necessary for him to enter the breaker where hitherto he had no occasion to go.

It was contended by defendant that it was no part of Beemer's work as a car loader to enter the breaker, and that in doing so and

undertaking to clear the screen he was a mere volunteer and outside the line of duty. We cannot so regard him. Scope of duty is generally a question for a jury (*Labatt on Master & Servant*, § 634), and in view of the changed situation caused by the substitution of the conveyor for the small car system, the question of the broadened scope of a car loader's duty with relation to freeing the lip screen was peculiarly one for the jury. That question was properly, and without objection or exception to the language used, submitted, and for the purpose of this case we must regard the act of Beemer in entering the breaker and trying to free the screen as in the line of duty. When the stoppage in question occurred all Kronit said to Beemer was:

"You go in and shove that culm down. I am going in there every time."

Kronit had full charge of this branch of the work, and the plaintiff was working under his immediate and sole direction. The plaintiff was not told how he was to remove the clog, nor was any warning given him of any danger he would, in doing so, encounter.

Now, in view of the obligation of the master to warn an employé of latent danger known to him (*Wagner v. Jayne Chemical Co.*, 147 Pa. 479, 23 Atl. 772, 30 Am. St. Rep. 745; *Rilston v. Mather* [C. C.] 44 Fed. 743; *Labatt on Master & Servant*, § 408; *Felton v. Girardy*, 104 Fed. 130, 43 C. C. A. 439), we think Beemer was justified in assuming the master would so warn him, and, while he could not shut his eyes to obvious dangers, still he had a right to assume the master had performed his duty of notification of known latent dangers (*Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 67, 24 Sup. Ct. 24, 48 L. Ed. 96; *Norfolk v. Beckett* [C. C. A.] 163 Fed. 479), and, because the master had not warned him, Beemer was justified in assuming the master had placed none there. This was a double breaker. It contained 24 chutes and extended approximately 80 feet along the railroad. It had 2 separate conveyor systems; each extending from either breaker end to the center. On the side of the conveyor systems nearest the railroad were the lip screen runways, through which the screenings ran to the conveyor trough. On the other side of the conveyors, and about 2 feet lower, was a walk extending from the south to the north breaker door. Near the center of the breaker this walk turned at right angles away from the conveyor and led up a cleated incline for 6 feet. It then turned back at right angles for 6 feet, then turned again at right angles, and led down a cleated incline for 6 feet to its original line. From there the walk extended parallel to the duplicate conveyor to the north door. Around the walk, where it debouched into the three-sided square, and for about 6 feet on each side of such square, was a guard rail some 3 feet high. This rail thus faced all turns in the pathway. The gearings and cogs which brought motive power to the two conveyor systems were located in this three-sided square and in that portion of the breaker opposite the guard rail. The cogs were not covered in any way. Coal dust practically obscured all light inside the breaker, and its liability to explode forbade the use of lights. The noise caused by

the scrapers and the rattling of the coal in the chutes prevented one from hearing any cog noise. Both sight and sound were unavailing to detect their presence. Indeed, the testimony of the oilers is that when they straddled the railings and moving conveyors, as they did several times a day, or went beyond them to oil the bearings of these cogs, they could see nothing of the latter, but they felt carefully with their hands for their bearings, and thus oiled them.

The clogged grate-coal chute in question was near the center of the breaker. Beemer had previously started a clog in a pea-coal chute, but it was over near the entrance. There were no cogs near it, and he did not know cogs were used in the new conveyor system. On that occasion he stood on the walk and used a scraper to loosen the clog. Not finding a scraper on the walk on the morning in question, he says he supposed it was hanging near the grate-coal chute and started in for it. He straddled the railing and conveyor, held to an overhead timber, walked on a beam which he found with his foot, and started to feel his way over to the screen. He reached it safely, but, not finding the scraper there, turned to come out. While doing so one foot was caught in the cogs, which he had not seen or heard. He was whirled around, and his other foot also caught. Both were subsequently amputated.

Under these facts we are asked to say there was no evidence of negligence on the part of the defendant to submit to the jury, and that as a matter of law the plaintiff was guilty of contributory negligence. We cannot so do. Under the verdict, we must, as noted above, regard Beemer as acting in the line of duty in trying to free this screen. He was sent to do this and was given no directions or warnings. He had no knowledge of the presence of the cogs and could neither see nor hear them. While the guard rail was notice of danger, yet such danger as warranted the presence of a guard rail he saw in the conveyor. This he carefully avoided, and it had nothing to do with the accident. Such being the case, we cannot say the rail impliedly supplied the place of further notice which the defendant company was bound to give of an additional latent danger of which it knew. The duty of the master was to give notice of every, not of one, danger. Under the circumstances we think there was evidence from which the jury might infer negligence on the master's part.

So, also, we cannot, as a matter of law, say the plaintiff was guilty of contributory negligence. He was told to start the obstruction. He was given no directions. All work about a coal breaker is to a degree dangerous, and such ordinary, recognized risks Beemer assumed; but if, in addition to the ordinary ones, there were, in the pathway of what he was told to do, hidden dangers occasioned by this new construction the master had installed, the law required he should be told of them, and, in the absence of such warning, he was justified in assuming they did not exist. He knew from his statement Kronick had safely done this work before, and he was justified in supposing he also could do the same thing. When he could not find a scraper, he started to get it back by the screen, where he thought it was hanging. As a pathway he selected a large beam, which the photographs

show started inward from where he stood on the walk. He could well assume this beam extended across and made a pathway for him to the screen, and such, indeed, proved to be the case. Steadying himself by holding to an overhead timber, and feeling his way on the underfoot beam with his feet, he reached the screen in safety; but in coming out he evidently missed the beam and stepped into the clutch of the unprotected, unseen clogs. As stated above, all work about a breaker is in a measure dangerous, and the most careful man has to run risks. Where, as here, explosion forbade light, and darkness and noise prevented the use of any sense save touch, it was clearly a case where the province of 12 men, with their varied and wider experiences, rather than 1 man, with more limited observation, to say whether Beemer did or failed to do what a careful man, called to do what he was by his employer, might, under the circumstances, reasonably have done. We think the facts were such that, in the diverse inferences different men draw, reasonable ones might conclude that Beemer tried to do the work he was directed to do in the only way that seemed open to him in view of the means and facilities available, and that in doing it he was guilty of no lack of care the circumstances required.

The judgment is therefore affirmed.

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STENFJELD et al. v. ESPE et al.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1909.)

No. 1,631.

MINES AND MINERALS (§ 27\*)—LOCATION OF MINING CLAIMS—ASSOCIATION PLACER CLAIMS—MANNER OF LOCATION.

An association placer mining claim cannot be located over other prior claims, so as to include within its boundaries and appropriate a number of unlocated and noncontiguous fractions lying between such prior claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 64; Dec. Dig. § 27.\*]

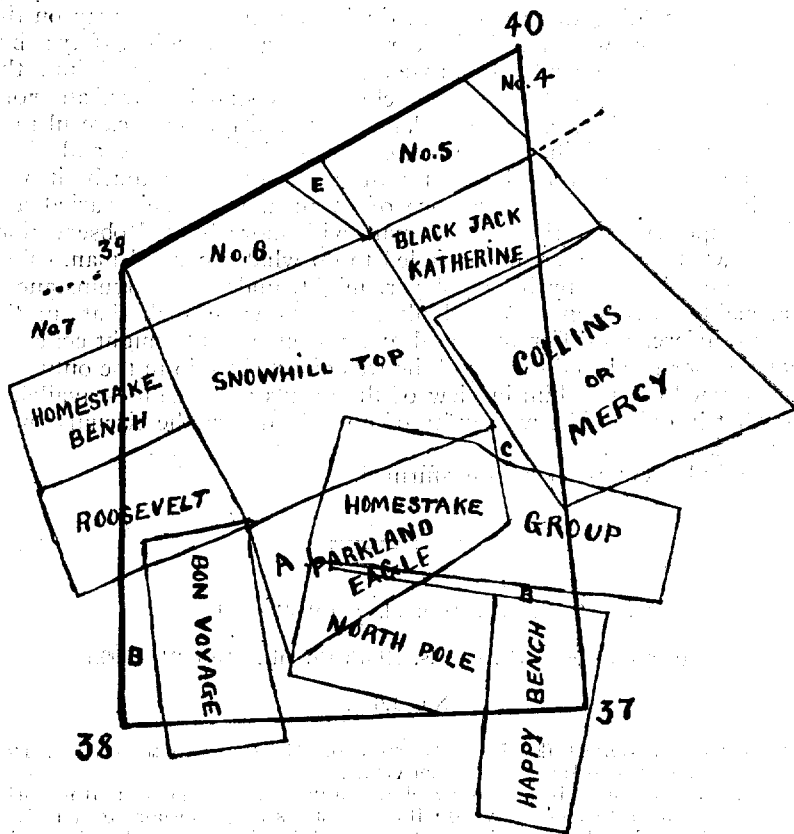
In Error to the District Court of the United States for the Second Division of the District of Alaska.

The defendants in error brought an action in ejectment to recover possession of a certain portion of the land included within an association placer mining claim located by eight locators and named the "Hercules No. 1 Association Claim," covering in its total area 179 acres. The eight locators originally located on January 1, 1904, several association claims, one of which was known as the "Hercules No. 1," of 160 acres, adjoining which was the Hercules No. 6, both of which covered in part the land subsequently embraced in the amended location which the locators made on March 14, 1906. The plaintiffs in error in their answer to the complaint of the Hercules No. 1 association claim alleged that they were in the possession under a valid prior location of a small fraction consisting of 4.797 acres situated within but not contiguous to

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

the boundaries of said Hercules No. 1 association claim. The said fraction is marked "A," and the boundaries of the association claim are indicated by the figures 37, 38, 39, and 40 on the plat which follows.



In the location notice of the Hercules No. 1 as amended, Newton No. 6 and the Snowhill Top claim were expressly admitted to be prior locations and were excluded. On the trial of the case, No. 7 on Newton, the Roosevelt, the Bon Voyage, the North Pole, and the Happy Bench were admitted to be prior valid locations, and it was proven without dispute that the Homestake group and the Collins or Mercy group were also prior locations. There remained subject to appropriation within the boundaries of the Hercules No. 1, aside from the ground which is in controversy in this suit, claim No. 5, a small fraction below the North Pole claim, a small fraction between the Homestake and the Collins group, a small fraction between the Homestake and the North Pole, the two claims northwest of the Collins, and the Sue fraction. The plaintiffs in error on the trial of the case raised the question of the right of the eight locators of the Hercules No. 1 claim to surround a number of noncontiguous fractions in an association location, and requested of the trial court an instruction that the law does not permit one mining location to cover two or more noncontiguous tracts, and that, if the location of the Hercules No. 1 was made to embrace two or more noncontiguous tracts, the whole location was void, and each separate or noncontiguous tract remained open for location and appropriation. The refusal of the court to so instruct is assigned as error.

T. M. Reed, John Rustgard, and C. M. Thuland, for plaintiffs in error.

Chas. E. Naylor and G. J. Lomen (Campbell, Metson, Drew, Oatman & Mackenzie and E. H. Ryan, of counsel), for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). Rev. St. § 2330 (U. S. Comp. St. 1901, p. 1432), provides that:

"Two or more persons or associations of persons having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim made after the ninth day of July eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons."

The language of this statute is plain. It authorizes an association location of contiguous claims only. The clear implication is that claims not contiguous may not be joined in a single location. That this is so is indicated not only by section 2330 but by other provisions of the mining laws. Thus, it is provided that the location must be "distinctly marked on the ground so that its boundaries can be readily traced." It is admitted that the fraction in controversy was not marked upon the ground as a distinct parcel, but it is claimed that, by virtue of an association location made to include 179 acres, that parcel, although segregated from other claims and surrounded by valid locations, was brought within the location.

The statute contemplates the location of real claims, not fictitious claims. In the theory of the law the association placer claim of 160 acres consists of eight contiguous placer claims of not more than 20 acres each. It is impossible in this case that the claims shall be contiguous unless some, if not the majority thereof, are located wholly upon valid subsisting placer claims previously located and in the lawful possession of other persons. "Because," said Judge Hawley, "mining claims are not open to relocation until the rights of a former locator have come to an end, two locations cannot legally occupy the same space at the same time." *Porter v. Tonopah & North Star Tunnel & Development Co.* (C. C.) 133 Fed. 756. In *Del Monte Min. Co. v. Last Chance Min. Co.*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72, the court, in answering the question whether any of the lines of a junior lode location may be laid within or across the surface of a valid senior location, alluded to the fact that it will often happen that lode locations which do not overlap are so placed as to leave between them irregular parcels of ground, and that a discoverer of mineral on such a parcel is unable to locate the same without making his end lines parallel, and unless he is permitted to place his end lines on territory already claimed by prior locators, and sustained the right to so invade land already located for the mere purpose of location. In so holding the court was controlled by the consideration that the location on the surface is not made with a view of getting benefits from the use of the surface, the purpose being to reach the vein hidden in the depths of the earth, and the purpose of the location being to measure rights beneath the surface. Said the court:

"The area of surface is not the matter of moment; the thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced, vein as is possible"

—and the court ruled that in order to comply with the statute, which requires that the end lines of the claim shall be parallel, and in order to secure all the unoccupied surface to which it is entitled, with all the underground rights which attach to possession and ownership of the surface, a junior locator may place an end line within the limits of a prior location. This ruling is based upon considerations which have no application whatever to placer locations. In the placer mine the surface is the thing located, and the possession of the surface is absolutely essential to the mining operations. In order to obtain the surface that is open to location, there is no necessity to invade the surface of other claims, or to place boundary lines thereon.

We find no decision of any court bearing directly upon the question. In the Land Department the rulings have not been harmonious. In Grassy Gulch Placer Claim, 30 Land Dec. Dep. Int. 191, it was held that there is no authority under the mining laws and regulations for the location of a placer claim in two or more noncontiguous tracts, and that the Land Office could not consider the placer location there in question as a single location, but must regard it as seven separate locations. Although that decision has not been expressly overruled, its doctrine was modified in Mary Darling Placer Claim, 31 Land Dec. Dep. Int. 64, in which the Secretary approved for patent a mineral entry of an association placer claim which was cut in twain by a patented lode claim, and in Rialto No. 2 Placer Mining Claim, 34 Land Dec. Dep. Int. 44, it was held that a mineral location is not of itself such an appropriation of land as to prevent the inclusion of the same land in another location, and that such prior locations have not the effect to separate the land into noncontiguous tracts as the term is understood and used in the administration of the public land laws. To this proposition we are unable to assent. A valid mining location, although unpatented, is a grant, and the estate enjoyed is in the nature of an estate in fee. It is an appropriation of land by the locator to the exclusion of all others. No reason can be suggested for permitting a junior locator of a placer claim to lay his lines across a claim already located. "Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator." *St. Louis Min. Co. v. Montana Min. Co.*, 171 U. S. 650-655, 19 Sup. Ct. 61, 43 L. Ed. 320. There is no reason why the locators of the Hercules association claim could not have made separate locations of the separate parcels which remained open to location within the exterior boundaries which they established. The plaintiffs in error found the land in controversy unmarked and unoccupied. Surrounding it they found other valid claims. They had the right to assume that the land was vacant and unappropriated. It would be an intolerable burden if the prospector who finds an unoccupied parcel of land thus surrounded by other locations were required to search the surrounding country to ascertain whether the locators of an association claim had not placed four posts, one-half



a mile distant from each other, with the intention of appropriating segregated fractions of land lying between the boundaries of subsisting claims.

The judgment is reversed, and the case remanded for a new trial.

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McCONKEY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 19, 1909.)

No. 3,013.

1. CONSPIRACY (§ 43\*)—FEDERAL STATUTE—INDICTMENT.

An indictment, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to commit an offense under section 5480, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873 (U. S. Comp. St. 1901, p. 3696), by devising a scheme to defraud intended to be carried out by the use of the mails, must charge a conspiracy to commit acts which, if committed, would constitute an offense under the latter section; but it need not charge separately that defendants specifically conspired to commit each element of the offense.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 91; Dec. Dig. § 43.\*]

2. POST OFFICE (§ 35\*)—"SCHEME TO DEFRAUD"—ELEMENTS OF OFFENSE.

To constitute a "scheme to defraud" to be carried out by the use of the mails, in violation of Rev. St. § 5480, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873 (U. S. Comp. St. 1901, p. 3696), it is not necessary that the scheme should be fraudulent on its face; but, although it is apparently a legitimate business, it is within the statute if there was an intention not to conduct such business honestly, but to use it to defraud.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6342.]

3. CONSPIRACY (§ 43\*)—FEDERAL STATUTE—INDICTMENT.

An indictment, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to use the mails to defraud, in violation of section 5480, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873 (U. S. Comp. St. 1901, p. 3696), considered, and held to sufficiently describe the offense which defendants conspired to commit.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 96; Dec. Dig. § 43.\*]

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

In Error to the District Court of the United States for the District of Minnesota.

Arnold L. Guesmer (Rome G. Brown and Charles S. Albert, on the brief), for plaintiff in error.

Charles C. Haupt, U. S. Atty., and E. S. Oakley, Asst. U. S. Atty.

Before SANBORN, Circuit Judge, and CARLAND and POLLOCK, District Judges.

CARLAND, District Judge. McConkey was convicted in the trial court for having violated the provisions of section 5440, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3676), in conspiring to commit the offense

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and for the purpose of effecting the object of said conspiracy to defraud in the manner aforesaid, did, at said city of Minneapolis, Minnesota, on the 13th day of October, 1907, wrongfully, unlawfully, knowingly, and feloniously deposit and cause to be deposited in the post office of the United States, at the said city of Minneapolis, Minnesota, for mailing and delivery through and by means of the post office establishment of the United States, a certain circular letter or writing, which said letter or writing was then and there inclosed in a sealed envelope, postage paid thereon, and addressed to 'Mr. C. A. Albert, Banner, Ch. Fact, New Richmond, Wis.,' which said circular cannot be and is not fully set forth in this indictment by reason of its great length, but was a certain circular or price list entitled: 'Minneapolis Fruit and Produce Market. Official quotations of the Minneapolis Produce Exchange, Published Daily'—and being of and for the date of Saturday, October 12, 1907."

The indictment then proceeds to set forth other overt acts, consisting of the deposit of other circular letters and advertisements in the United States post office at Minneapolis, Minn., inviting the persons to whom said advertisements were addressed to send to the Nicollet Creamery Company butter, eggs, and live poultry, and promising in said advertisements to pay therefor the top market price on day of arrival.

In *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667, it is said that under section 5480, Rev. St. U. S., three matters of fact must be charged in the indictment and established by the evidence: (1) That the persons charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme by opening or intending to open correspondence with some other persons through the post office establishment, or by inciting such other person to open communication with them. (3) That in carrying out such scheme such person must have either deposited a letter or packet in the post office or taken or received one therefrom. It is also said in the same case that a conspiracy to commit such offense must state a combination between the defendants to do the three things requisite to constitute the offense.

In *United States v. Britton*, 108 U. S. 204, 2 Sup. Ct. 534, 27 L. Ed. 698, it is said:

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus poenitentiae*, so that, before the act done, either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that, in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *Reg. v. King*, 7 Q. B. 782; *Commonwealth v. Shedd*, 7 Cush. (Mass.) 514."

The language quoted from the *Stokes Case* as to the necessary averments in an indictment under section 5440 for a conspiracy to commit an offense under section 5480 simply means that the acts which the indictment charges the defendants with having conspired to commit must, if committed, have constituted an offense under said section 5480. It does not mean that it must be distinctly and separately charged in the indictment that the defendants conspired to commit each element of the offense; such elements being separately stated.

In view of the principles above stated, we take up the objections made by counsel to the indictment:

It is first objected that the scheme described therein represents an actual business, and therefore not a scheme to defraud. It may be true that the scheme described in the indictment represents an actual business; but if, as alleged, it was the intention of the defendants to convert the property of others which should be sent them in pursuance of their invitation to their own use and benefit, and to defraud the owners thereof out of the same, then the scheme was no less a scheme to defraud merely because the means used to obtain the property of others were honest and fair on their face. Indeed, it was necessary, in order to deceive, that the scheme upon its face should appear to be honest. It would make little difference with the person defrauded whether the means used to defraud him were criminal or whether they were apparently lawful. It has been held in the following cases that, no matter how seemingly fair and honest a scheme may be, if the purpose of the scheme is to defraud, it is within the statute: *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; *United States v. Loring* (D. C.), 91 Fed. 881; *Lemon v. United States*, 164 Fed. 953, 90 C. C. A. 617; *Miller v. United States*, 133 Fed. 341, 66 C. C. A. 399.

The point most seriously urged against the indictment is that it nowhere alleges that the defendants conspired to commit the third element of the offense denounced by section 5480; that is, the indictment does not allege, as is claimed, that the defendants conspired, combined, confederated, and agreed together that, in carrying out the scheme to defraud described in the indictment, they would deposit a letter or packet in the post office or take or receive one therefrom. In considering this objection we will lay aside the allegations of the indictment in relation to the overt acts, as being sources from which we cannot obtain assistance to aid the charge of conspiracy. There then remains the direct charge that the defendants conspired, combined, confederated, and agreed to devise a scheme to defraud, which scheme is described and shown to be one that would defraud. It is then alleged that said scheme to defraud was as a part thereof at the time that it was so devised, intended by the defendants to be effected by opening correspondence and communication with divers persons through and by means of the post office establishment of the United States, and by inciting divers persons to open communication with them through the post office establishment of the United States. This language is beyond all question broad enough, not only to charge that the scheme was to be effected by opening correspondence through the post office establishment of the United States, but also to charge that defendants intended, in carrying out or executing such scheme, to deposit or cause to be deposited a letter or packet in the post office of the United States, or to receive or take one therefrom.

It must be borne in mind that the defendants are not charged with actually committing the offense described in section 5480, but that they conspired, combined, confederated, and agreed to commit it. Hence it follows that it was unnecessary to charge that defendants actually

committed an offense under said section, but only to charge that they conspired, combined, and confederated and agreed to commit certain acts, which, if committed, would be an offense under the same. It also happens in this case that the overt acts set out in the indictment, and which must exist to render the conspiracy punishable under section 5440, constitute the real offense punishable under section 5480; but any act of any one or more of the conspirators done in execution of the conspiracy would have been just as competent to plead, whether connected with the post office or not. Whether the Supreme Court in the Stokes Case intended in any way to modify the general rule of criminal pleading that the charge of conspiracy cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy it is not necessary to determine, as we are clearly of the opinion that either under the rule stated in *United States v. Britton*, *supra*, or under what seems to be the holding in *Stokes v. United States*, *supra*, the defendant in the indictment under consideration was sufficiently informed of the charge made against him, and that, therefore, the indictment is not subject to the objections made by counsel for plaintiff in error.

In *Thomas v. United States*, 156 Fed. 906, 84 C. C. A. 486, 17 L. R. A. (N. S.) 720, this court, in speaking in reference to the particularity required in an indictment charging a conspiracy to commit an offense against the United States, used the following language:

"All facts necessary to constitute the conspiracy, including the overt act, must be averred with all the particularity required in criminal pleadings, because the conspiracy is the crime with which the defendants stand charged, and with the nature and character of which they, under constitutional safeguards, are entitled to be advised. But when the conspiracy charged is one to commit an offense, and that offense (as in the case of all offenses against the United States) is clearly defined by statute, no high degree of particularity is required in describing it. If enough is shown to make it appear that an offense against the United States has been committed, it is sufficient."

In *Williamson v. United States*, 207 U. S. 447, 28 Sup. Ct. 171, 52 L. Ed. 278, it is said:

"But, in a charge of conspiracy, the conspiracy is the gist of the crime, and certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy."

To the same effect is *Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. —.

We think there was no error committed by the court below in overruling the demurrer or refusing to arrest the judgment.

The judgment therefore is affirmed.

## In re STARKS-ULLMAN SADDLERY CO.

(Circuit Court of Appeals, Sixth Circuit. July 19, 1909.)

No. 1,914.

## BANKRUPTCY (§ 191\*)—MATERIALMEN—LIEN—STATE LAW—"MATERIALS AND SUPPLIES."

Ky. St. § 2487 (Russell's St. § 2399), provides that, when the property of the operator of a manufacturing establishment shall be assigned for the benefit of creditors, persons who shall furnish material and supplies to carry on the business shall have a lien on the assets therefor. The bankrupt was a leather manufacturer, and also conducted a jobbing business in the same line as another department, in which it bought and sold leather goods. *Held*, that manufactured goods so purchased for resale were not "materials and supplies" for carrying on the bankrupt's manufacturing business, and hence the creditors furnishing the same were not entitled to a lien therefor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 191.\*]

Petition to Review Order of the District Court of the United States for the Western District of Kentucky.

W. V. Eaton, for petitioners.

W. F. Bradshaw, for respondents.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge. The petitioners are creditors of the bankrupt, a corporation, engaged in business at Paducah, Ky. The creditors filed claims, which they asserted were liens upon the property of the bankrupt, which have been disallowed. The claim of lien is based upon section 2487, Ky. St. (Russell's St. § 2399), which reads as follows:

"2487. (Lien of Employés and Materialmen on Property Assigned for Benefit of Creditors.) When the property or effects of any (mine) railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator, the employés of such company, owner or operator, in such business, and the persons who shall have furnished materials or supplies for the carrying on of such business, shall have a lien upon so much of such property and effects as may have been involved in such business, and all accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business."

The bankrupt, while engaged in the business of manufacturing harness, bridles, and other horse leather goods, was also doing business as a jobber in the same line of goods; that is, bought harness, saddles, and other horse leather goods, in a manufactured condition, and sold such goods in the condition they were bought. The claim of the petitioning creditors is exclusively for such manufactured articles, and the petitions aver that the goods so sold to the bankrupt by them were used

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the jobbing branch of the business. Judge Evans was of opinion that the petitioners had not furnished "materials and supplies," within the plain and obvious meaning of the Kentucky Statute, and were therefore not entitled to have their claims allowed as liens. To this conclusion we agree. The statute is plain enough. The purpose is to give a lien under certain circumstances to persons furnishing materials and supplies for the carrying on of the manufacturing business in which the debtor was engaged. Such a debtor might well be engaged in other lines, as well as that of manufacturer. But the statute is limited in its application to "materials and supplies for the carrying on of such business"; that is, the business of the debtor as a manufacturer.

The statute was before us in the case styled *In re Bennett*, 153 Fed. 673, 82 C. C. A. 531; but the claims then involved were indisputably for materials and supplies furnished for the "carrying on" of an indisputable manufacturing business, and the case turned upon other points. It has received little construction by the courts of Kentucky; but in the cases reported the Kentucky courts have plainly recognized that claims not originating in the carrying on of the manufacturing side of a debtor's business were not preferred under the statute. In *Winter v. Howell's Assignee*, 109 Ky. 163, 58 S. W. 591, it appeared that the debtor did a manufacturing business and also conducted a retail store. The claim involved was for the salary of an employé who served as book-keeper for the manufacturing side of the business and as a salesman in the retail store and general utility man. The court said:

"Appellant was not entitled to a lien for services rendered his employer outside of the business of the manufacturing establishment. For his services in running the store, acting as salesman therein, collecting rents, or in attendance to any other business, he stood in the same plane as other creditors. The lien is created by section 2487, Ky. St., in favor of the employes 'of any rolling mill, foundry or other manufacturing establishment,' and was certainly not intended to include services rendered in a store."

In *American Woodworking Co. v. Agelasto*, 136 Fed. 399, 69 C. C. A. 243, the lien of a Virginia statute in favor of persons furnishing materials and supplies to a manufacturing concern was held not to extend to machinery.

There was no error in the order, and the petition will be dismissed, with costs.

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CUNNINGHAM v. RODGERS, Consul General.

(Circuit Court of Appeals, Ninth Circuit. August 2, 1909.)

No. 1,603.

1. EXECUTORS AND ADMINISTRATORS (§ 443\*)—ACTION BY ADMINISTRATOR—PLEADING—NUL TIEL ADMINISTRATOR.

In an action by plaintiff as an administrator, an objection that plaintiff was not and never had been administrator of the effects of deceased, may be taken by a special plea in bar or by plea in abatement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1838; Dec. Dig. § 443.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. APPEAL AND ERROR (§ 102\*)—JUDGMENTS APPEALABLE—OVERRULING DEMURRER.**

A judgment overruling a demurrer to a plea in abatement without further order or judgment, in the cause, is not subject to review under Rev. St. § 1011 (U. S. Comp. St. 1901, p. 715), declaring that there shall be no reversal on a writ of error for error in ruling on a plea in abatement, other than a plea to the jurisdiction of the court or for an error in fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 688; Dec. Dig. § 102.\*]

**3. COURTS (§ 405\*)—JUDGMENTS APPEALABLE—PLEA IN ABATEMENT.**

A judgment of the United States Court for China, overruling a demurrer to a plea in abatement, was not a final judgment, and therefore not reviewable by the Circuit Court of Appeals under Act Cong. June 30, 1906, c. 3934, § 3, 34 Stat. 815 (U. S. Comp. St. Supp. 1907, p. 798), creating such court and declaring that appeals shall lie from its final judgments or decrees to the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1100; Dec. Dig. § 405.\*]

**4. APPEAL AND ERROR (§ 4\*)—ACTION AT LAW—MOTIVE—REVIEW.**

An action on the bond of a United States Consul General for alleged neglect of office is an action at law reviewable on writ of error and not by appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 10; Dec. Dig. § 4.\*]

Appeal from the United States Court for China.

George F. Curtis, for appellant.

A. Bassett, U. S. Atty. for Shanghai, China, Robert T. Devlin, U. S. Atty. for Northern District of California, and George Clark, Asst. U. S. Atty., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The appellant, alleging himself to be of Rockland, county of Knox, in the state of Maine, administrator of the estate of Henry H. Cunningham, of Belfast, Me., brought suit in the United States Court for China at Shanghai against the appellee as Consul General at Shanghai, China, to recover the sum of \$8,000 on the official bond of appellee as Consul General, and the further sum of \$50,165.85 from the appellee personally.

For cause of action the appellant alleged: That Henry H. Cunningham died intestate at Shanghai, China, on the 10th day of June, 1905, possessed of a valuable estate, but leaving no relatives or legal representatives within the consular district of Shanghai, China; that the appellee had not faithfully discharged the duties of Consul General according to law, but had neglected and omitted to perform the duties imposed upon him by law, and the orders and instructions made and given in pursuance of law; that he had been guilty of neglect in his office, and the condition of the bond was broken, and the penalty thereof became due and payable in accordance with the tenor thereof; that in violation of sections 1709, 1710, and 1711 of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1179, 1180), and the Consular Regulations of the United States, the appellee did not

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

take possession of the estate left by the said Henry H. Cunningham, but permitted one Edward H. Dunning, a citizen of the state of Delaware then residing at Shanghai, China, to take possession of the estate under the guise of an executor of the estate of said Henry H. Cunningham, and did without authority of law, and in violation of the Revised Statutes of the United States, hold an alleged probate court proceedings, and under the guise of said alleged probate court proceedings did go through the form of admitting to probate an alleged paper writing purporting to be the last will and testament of said Henry H. Cunningham. The petition alleges, in substance, that the appellee made an unauthorized and illegal distribution of the estate of Henry H. Cunningham, deceased.

To this complaint the appellee interposed a plea in abatement denying that the appellant was then or ever had been administrator of the effects in China of the said Henry H. Cunningham, and prayed that the petition be dismissed. To an action by a plaintiff as an administrator, an objection that the plaintiff was not and never had been administrator of the effects of the deceased may be taken by a special plea in bar. The objection may also be taken by a plea in abatement, as was done in this case. *Noonan v. Bradley*, 9 Wall. 394, 401, 19 L. Ed. 757. To the plea in abatement appellant demurred, and upon the issue thus joined the court rendered an opinion entitled in the record a "judgment" sustaining the plea in abatement, but making no further order or judgment in the case. The action of the court upon the plea is not subject to review. Section 1011, Rev. St. (U. S. Comp. St. 1901, p. 715); *Piquignot v. Pennsylvania Railroad Co.*, 57 U. S. 104, 14 L. Ed. 863; *Stephens v. Monongahela Bank*, 111 U. S. 197, 4 Sup. Ct. 336, 28 L. Ed. 399.

Furthermore, section 3 of the act of June 30, 1906, c. 3934, 34 Stat. 815 (U. S. Comp. St. Supp. 1907, p. 798), creating the United States Court for China, provides as follows:

"That appeals shall lie from all final judgments or decrees from said court, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit."

As the appeal in this case was not from the final judgment, it cannot be entertained. If the plea be treated as a demurrer to the petition and the decision of the court as an order sustaining the demurrer, the same result follows. There was no final judgment in the case.

There is the further objection to the appeal that the action was at law, and the case could only have been brought to this court upon writ of error. *Toeg v. Suffert* (C. C. A.) 167 Fed. 125.

The appeal is, accordingly, dismissed.



## GREER v. CATLIN &amp; CO.

(Circuit Court of Appeals, Third Circuit. July 23, 1909.)

No. 24.

## APPEAL AND ERROR (§ 215\*)—REVIEW—INSTRUCTIONS.

A judgment will not be reversed because of a statement of the issues by the court in its charge, expressly made subject to correction by counsel if erroneous, and to which no objection was made or exception taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1309; Dec. Dig. § 215.\*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

George Douglas Hay, B. Gordon Bromley, and Abraham M. Beitler, for plaintiff in error.

R. Stuart Smith and Charles E. Morgan, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

BUFFINGTON, Circuit Judge. In the court below Catlin & Co., herein styled "plaintiffs," recovered a verdict against Greer, herein called "defendant," for breach of contracts between them. Judgment having been entered on the verdict, defendant sued out this writ and assigned for error that portion of the charge to the jury which reads:

"If the contract was canceled as the defendant avers, he would still be liable for the yarn that he agreed to take afterwards by new agreement made in November, namely 60 warps, of which he has paid for 24, leaving unpaid for the balance of the 60."

The case involves the simple question whether the court fairly left to the jury the question whether the contract of November, 1906, as modified by agreement of June, 1907, was canceled. The verdict established that it was not canceled. Hence whether the court's instructions as to the rights of the parties, in case it was canceled, involved error, becomes immaterial. The complaint made is that the charge wrongfully limited the jury on the question of cancellation to what happened on August 27, 1907. In that connection we remark that, if the court did so, it simply followed the contention the defendant had himself made in the case, for, while the affidavit of defense is not in evidence, it serves to show the theory on which the defendant presented the case. Under oath the defendant therein averred:

"That on or about August 27, 1907, defendant, by reason of plaintiffs' breach of agreement, was compelled to and did notify plaintiffs, through Corvin, who was the authorized agent or representative of plaintiffs, and with whom the said contract or agreement was made, that defendant rescinded his said agreement, and that said Corvin and defendant then and there canceled the same, and it was and thereby became annulled."

It is now contended there was further proof from which another and later cancellation than August could have been found. In its charge the court said:

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The controversy is entirely with regard to the larger contract. Now, as I understand the defendant's position with regard to that, he concedes—I so understand the opening of defendant's counsel—that he is responsible for failing to comply with this contract of taking and paying for the yarn which is involved in the modification of June 29th, unless the jury should find from the evidence that the contract was canceled at the time that is referred to by one of the defendant's witnesses. That I understand to be his position. If not, I should be very glad to be corrected now."

If, as contended, this language referred to the August cancellation and limited the jury to that time, the court's attention should have been called thereto; but no exception was taken to this language or response made to the invitation of the court. Indeed, the proofs disclose no other cancellation, and if they did it would be unjust for this court to now reverse as error on review language which was acquiesced in on the trial.

Finding no error, the judgment is affirmed.

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WEBER et al. v. GRAND LODGE OF KENTUCKY, F. & A. M.

(Circuit Court of Appeals, Sixth Circuit. June 24, 1909.)

No. 1,901.

On Rehearing.

For former opinion, see 169 Fed. 522. See, also, *infra*.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

PER CURIAM. The petition to rehear and certify the question upon the jurisdiction of the court below is denied upon the authority of *Coler v. Grainger County*, 74 Fed. 16, 20 C. C. A. 267, *Ayres v. Polsdorfer*, 187 U. S. 585, 23 Sup. Ct. 196, 47 L. Ed. 314, and *Boston, etc., R. Co. v. Gokey*, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002.

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WEBER BROS. v. GRAND LODGE OF KENTUCKY, F. & A. M.

(Circuit Court of Appeals, Sixth Circuit. June 25, 1909.)

No. 1,901.

COURTS (§ 382\*) — FEDERAL COURTS — JURISDICTION OF SUPREME COURT—ELECTION.

Where, in a case removed on the ground of diversity of citizenship, the defendant subsequently raises a question of jurisdiction, and, being defeated both on that question and on the merits, takes the case for review by writ of error to the Circuit Court of Appeals, and is again defeated, the decision of such court is final, and he cannot take another writ of error to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 382.\*]

On Application for Writ of Error and Supersedeas.

For former opinion, see 169 Fed. 522. See, also, *supra*.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge. This cause comes on now to be heard upon application for a writ of error and supersedeas. The judgment of this court is final. The jurisdiction of the Circuit Court was originally invoked solely upon diversity of citizenship. That the defendant subsequently claimed that there was no jurisdiction over their persons, because the Kentucky statute allowing constructive service was in contravention of the Constitution of the United States, presented, in one aspect, a question as to the jurisdiction of the court below. When that was decided against them, they went to trial upon the merits. They lost the case upon this line of defense. They then had to elect whether they would abandon the merits and go to the Supreme Court upon the jurisdiction, or to the Court of Appeals upon both questions. They elected to come to this court, and this court has decided for itself the question of jurisdiction, as well as the questions upon the merits. It was under no obligation to certify the question of jurisdiction, being clear in the opinion that the court below had jurisdiction. No right to a writ of error from the judgment of the Circuit Court of Appeals now exists. See *United States v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; *Ayres v. Polsdorfer*, 187 U. S. 585, 23 Sup. Ct. 196, 47 L. Ed. 314; *Boston & Maine Ry. Co. v. Gokey*, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002.

But if the case be not one under the first clause of the fifth section of the jurisdiction act (Act March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549]), but was a case in which the validity of constructive service depended upon a statute of Kentucky which the defendants "claimed to be in contravention of the Constitution of the United States," how will the matter stand? Under *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280, the defendants making such claim, if unsuccessful, might have carried the case to the Supreme Court from the Circuit Court. This would seem to be so, although the ground upon which the defendants removed the case from the state court into the court below was that of diversity of citizenship. The right to a writ of error from the Supreme Court was, in the case referred to, held to extend to "any case" in which it was "claimed" that a law of the state was repugnant to the Constitution, although the question was raised by the defendant only. That this defense would have been unavailable as ground for removal is of no moment in determining whether upon a final judgment, after removal, the case might have been carried to the Supreme Court.

Assuming, therefore, that the defendants might have carried their case to the Supreme Court from the Circuit Court, they did not, but brought it to this court as a case in which federal jurisdiction was dependent upon diversity of citizenship. It is too late to now invoke the jurisdiction of the Supreme Court; for, as said in more than one case, a party who might have carried his case to the Supreme Court, and does not choose to do so, cannot, after a final judgment in the Circuit Court of Appeals, have a second determination upon another writ of

error. *Robinson v. Caldwell*, 165 U. S. 359, 17 Sup. Ct. 343, 41 L. Ed. 745; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 478, 479, 21 Sup. Ct. 174, 45 L. Ed. 280; *Ayres v. Polsdorfer*, 187 U. S. 585, 590, 591, 23 Sup. Ct. 196, 47 L. Ed. 314; *McFadden v. United States*, 213 U. S. 288, 29 Sup. Ct. 490, 54 L. Ed. —.

The writ of error must be denied.

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UNITED STATES v. INTERNATIONAL MERCANTILE MARINE CO.

(Circuit Court of Appeals, Second Circuit. June 15, 1909.)

No. 261.

**ALIENS (§ 57\*)—IMMIGRATION STATUTE—HEAD TAX—LIABILITY OF SHIPOWNER.**

Immigration Act Feb. 20, 1907, c. 1134, § 1, 34 Stat. 898 (U. S. Comp. St. Supp. 1907, p. 389), imposing a head tax on immigrants, which shall be a debt against the owner of the vessel bringing such alien into the United States, does not render such owner liable for the tax upon an alien seaman who deserted after reaching this country, in the absence of any evidence that the officers of the vessel had reason to suppose that the seaman made the voyage with the intention of so gaining admission, or that such intention in fact existed.

[Ed. Note.—For other cases, see *Aliens*, Dec. Dig. § 57.\*]

In Error to the District Court of the United States for the Southern District of New York.

Henry A. Wise, U. S. Atty., and Henry L. Stimson, U. S. Atty. (Francis W. Bird, Sp. Asst. U. S. Atty., of counsel).

Robinson, Biddle & Benedict (H. S. Hertwig and Wm. S. Montgomery, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

**PER CURIAM.** The complaint expressly avers that the alien whose head tax is sought to be charged against the defendant's steamship, was a member of the said ship's crew, being signed upon the articles of said ship, and that upon arrival he deserted and entered the United States. The decision in *Taylor v. U. S.*, 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130, seems controlling authority for the proposition that section 1 of the act of February 20, 1907 (chapter 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1907, p. 389]), "does not apply to sailors carried to an American port with a bona fide intent to take them out again when the ship goes on, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert and get in, but there is no evidence that they were doing so in fact." There is nothing in the complaint to suggest that his shipment was such a pretext, or that this is other than the "ordinary case of a sailor deserting while on shore leave."

The judgment sustaining demurrer is affirmed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## POOLE BROS. v. MARSHALL-JACKSON CO.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909.)

No. 1,523.

## PATENTS (§ 328\*)—INFRINGEMENT—DESK CALENDAR.

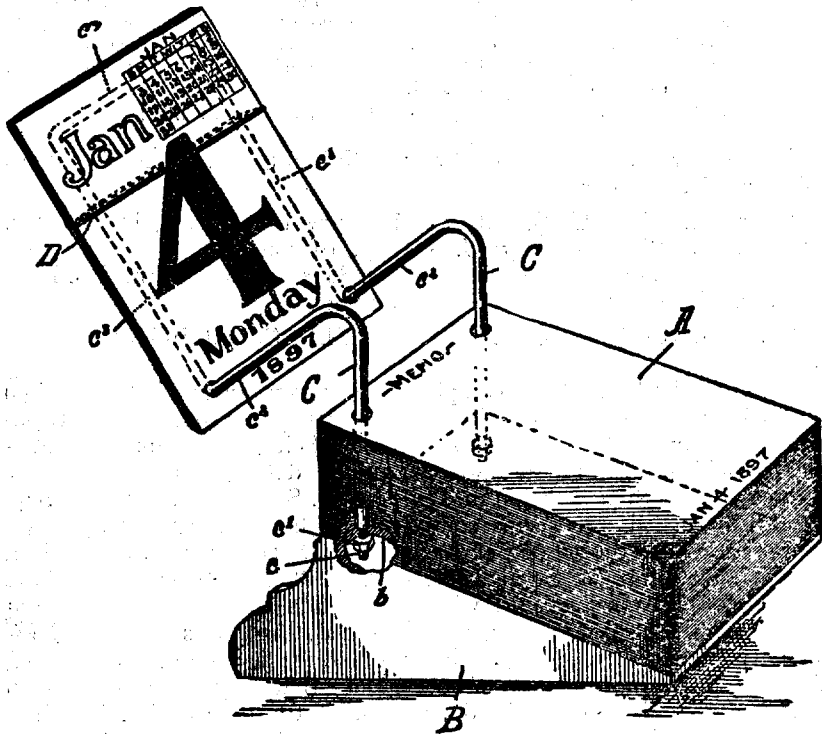
The Wilson patent, No. 585,944, claim 1, for a holder for desk calendars, construed, and held not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The appeal is from a decree dismissing the bill for want of equity. The bill was to restrain infringement of Letters Patent No. 585,944, issued July 6th, 1897, to James R. Wilson, for certain new and useful improvements in Memorandum-Calendars.

Figure 1 of the patent is as follows:



The following is the descriptive portion of the patent relating to the seat upon which the leaves are finally turned up:

The filing-wires C are bent in their upper portions in such a manner as to afford an elevated support upon which the leaves of the pad may be accumulated by separating them from the pad and removing them upward and forward on the support in consecutive order as their dates are successively reached.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

As herein shown, said elevated support is conveniently formed by bending the wires C to afford downwardly and forwardly projecting portions  $c^2$ , and then reversely bending the wires to afford upwardly and forwardly projecting portions  $c^3$ .

Claim 1 of the patent is as follows:

1. A holder for desk-calendars, comprising a base for resting on the desk, and two seats for the calendar-leaves, one seat being upon the base and upwardly facing, and the other being carried by and elevated above the base and rearwardly facing, and means for guiding the leaves when moved between their two seats.

It was admitted at argument that unless claim 1 is infringed by appellee's device the patent is not infringed. Appellee's device is accurately described in counsel's brief as follows:

Appellee's device comprises a base-plate, the forward end of which rests directly upon the desk and the upper end of which is supported by feet so that the base-plate is inclined upwardly, and this plate is so formed that its rearward portion is at greater inclination from the horizontal than its lower portion. The plate itself is somewhat more than double the length of the sheets, and constitutes, therefore, both the lower and the upper seats. The filing wires are simply U-shaped staples having their ends fixed in the base plate. The sheets are pierced to receive and run upon these wires, and are transferred from the lower to the upper seat by being turned over the bow uniting the two legs of the filing wires.

The upper seat is elevated above the lower seat only in the sense that it is the upper end of an inclined plate, and is then tilted upward slightly relatively as to the lower seat. This difference in plane of the lower and upper seats cannot of itself be aptly defined as an elevation of one above the other.

The patents exhibited are as follows:

No. 170,585, Nov. 30, 1875, F. B. Perkins and W. S. Dodds.

No. 188,915, March 27, 1877, C. Jensen.

No. 196,776, Nov. 6, 1877, B. J. Beck.

No. 276,643, May 1, 1883, L. M. Switzler.

No. 286,736, Oct. 16, 1883, E. Shepard.

No. 337,470, March 9, 1886, A. Zumpe.

No. 375,545, Dec. 27, 1887, N. C. Fowler, Jr., & E. W. Pope.

No. 396,929, Jan. 29, 1889, C. H. Hammann.

No. 417,106, Dec. 10, 1889, H. P. Smith.

No. 454,559, June 23, 1891, J. R. Meadowcroft.

No. 458,474, Aug. 25, 1891, G. W. MacKenzie.

No. 489,599, Jan. 10, 1893, S. F. Baker.

No. 588,631, Aug. 24, 1897, H. Brown.

The further facts are stated in the opinion of the court.

For opinion below, see 161 Fed. 752.

Albert H. Graves, for appellant.

Louis K. Gillson, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above). The claim is for a holder for desk calendars comprising a base for resting on the desk, and two seats for the calendar leaves, one seat being upon the base, and upwardly facing, and the other (the seat to which the leaf is lifted) being carried by and elevated above the base, and rearwardly facing. Whether appellee's device infringes the claim or not, depends upon the meaning to be given to the phrase "elevated above the base" as applied to the seat not resting on the base; for if that phrase means the particular structure shown in figure 1, wherein the seat is not integral with the base except as it is attached thereto by the filing wires, appellee's calendar holder does

not infringe, for in its holder the corresponding seat rests upon the base.

We are of the opinion that the phrase "elevated above the base" as used by the patentee in his application, and as granted by the patent office, was meant as the construction of a seat not resting upon the base, or integral therewith, except as connected by the filing wires. The previous art, it seems to us, makes this interpretation imperative, for in that art there are memorandum calendars in every essential respect like the appellee's calendar, except that the second seat is not raised quite so high as appellee's calendar—the only difference being a slight change of angle—a thing that could not exist consistently with the granting of a patent to Wilson broad enough to cover the appellee's device, unless the patent office held that there was patentability in this slight change of angle, an assumption that we do not think warranted.

The descriptive portion of the patent, set out in the statement of facts, shows, also, that this must have been the mind of the patentee, for making no mention of the "elevated support" as resting upon, or being integral with, the base, he describes it as "formed," by bending the wires downwardly and forwardly, and then upwardly and forwardly; "formed" being meant evidently not only to describe the form the seat should take, but also the character of its construction.

Upon this interpretation of claim 1, the decree of the Circuit Court finding that there was no infringement, is without error.

Affirmed.

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HOLCOMB et al. v. SCHUTTE & KOERTING CO.

(Circuit Court of Appeals, First Circuit. June 3, 1909.)

No. 816.

PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—CHECK VALVE.

The Schutte patent No. 524,048, for a check valve, having a supplementary mechanism on the delivery side to cause the valve to close slowly and prevent hammering, was not anticipated, and discloses invention. Also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

James L. Gillingham, for appellants.

Francis T. Chambers (John E. Hubbell, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

COLT, Circuit Judge. This suit was brought for infringement of letters patent No. 524,048, granted to Louis Schutte, August 7, 1894, for improvements in check valves. The Circuit Court held the patent valid, and that the defendants' valve infringed.

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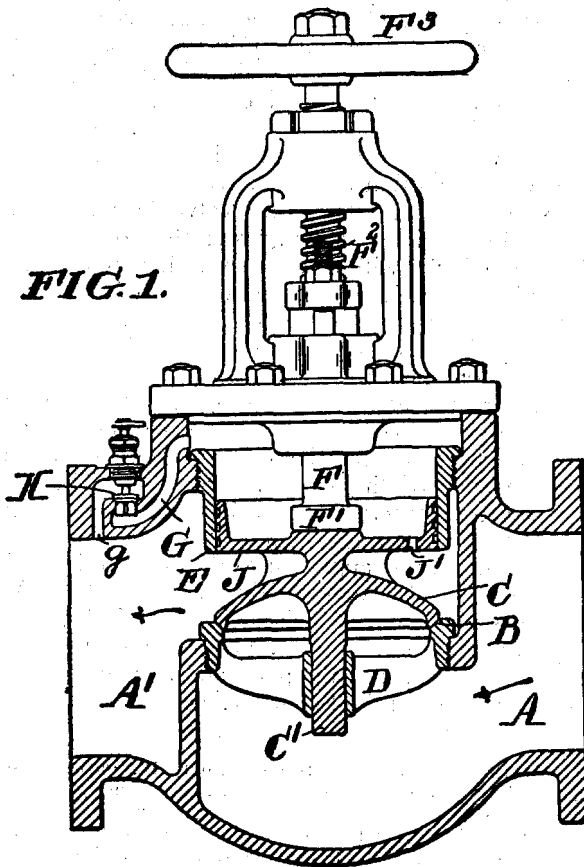
\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Schutte invention relates simply to the closing movement of the valve, where there is a back pressure or flow of steam, and its purpose is to overcome the tendency of the valve to hammer under these conditions, by causing it to close slowly. This result is accomplished by the addition of supplementary mechanism on the delivery side of the valve, comprising a cylinder, piston, and a passage or passages through the piston. By these means the immediate action of the increased delivery pressure upon the valve is prevented, and the valve closes with a comparatively slow movement.

In stating the object of the Schutte invention, the specification says:

"My invention relates to check valves, and has for its object to overcome the tendency of such valves to hammer in cases where the fluid passing through them has a pulsating flow, such, for instance, as has the steam when passing from a boiler to an engine, particularly where the engine works with a cut-off, or a pump working with air vessels of insufficient capacity."

The invention is shown in Fig. 1 of the drawings:





In this drawing, A represents the receiving or supply side of the valve, and A' the discharge or delivery side; C represents the valve, and B the valve seat; E represents the cylinder, and J the piston which works in the cylinder and is attached to the valve; J' represents the restricted orifice or passage leading from the cylinder to the delivery side of the valve. The fit between the piston and cylinder is loose, to permit a free movement, and also because a leak in the joint is rather advantageous than detrimental. For the purposes of this case it is unnecessary to refer to the other parts.

Only the first claim is in issue:

"(1) The combination of a main conduit, a check valve situated therein, a cylinder and piston, the moving member of which is attached to the check valve and is exposed externally to the pressure in the conduit on the delivery side of the check valve, a passage or passages leading from the inside of the cylinder to the main conduit also on the delivery side of the check valve."

This claim includes as elements the cylinder, the movable piston attached to the valve, and the passage leading from the inside of the cylinder to the delivery side of the valve. The essence of the invention covered by this claim resides largely in the passage leading from the cylinder to the delivery chamber, which prevents any momentary increase of pressure on the delivery side from closing the valve immediately and suddenly.

In a check valve, when the valve is open, the pressure of steam on the supply side is greater than that on the delivery side. If now, for any reason, the pressure on both sides of the valve becomes equal, or the pressure on the delivery side become greater than on the supply side, the valve will close quickly, with a tendency to hammer. The Schutte valve is so organized that the closing movement of the valve will be governed by the pressure in the cylinder on the upper side of the piston, and any momentary increase of pressure in the delivery chamber will not immediately act on the valve, but such pressure must pass from the delivery chamber through the narrow orifice into the cylinder and above the piston before it becomes effective in closing the valve. By this arrangement Schutte causes the valve to close slowly, and thus overcomes the tendency of the valve to hammer. The Schutte invention has proved to be practical, and it has continued in commercial use since the time the patent was issued.

In the prior art the nearest approach to the Schutte invention is the Eynon patent, No. 515,578, dated February 27, 1894. While the Eynon patent shows a cylinder, which is called a "dash pot," a piston, and a passage leading from the delivery side into the cylinder, the construction and arrangement of the parts and their mode of operation are essentially different from the Schutte valve.

The Eynon patent says:

"It will be seen that steam from the chamber, B, enters the stem, D, through the port, G, and escapes therefrom through the port, H, into the dash pot below the piston, F, by which provision the valve, C, may be lifted from its seat and is held balanced, and owing to the steam that may remain in the dash pot below the piston, acting as a cushion, the valve, C, when

lowering, is prevented from forcibly striking its seat, it being noticed that the steam in the dash pot returns through the ports, H, passage, D, and port, G, into the chamber, B."

In the Eynon organization the steam from the supply side of the valve enters the cylinder on the under side of the piston through ports in the valve stem, and it is the cushioning of this steam on the under side of the piston which prevents the sudden closing of the valve. No such arrangement or mode of operation is found in the Schutte patent.

On the question of infringement we have no doubt. The defendants' valve is shown in the Collins patent, No. 688,830. While this valve differs in the form of the piston, and in the relative size of the cylinder and piston, it embodies substantially the same structural features, and its mode of operation is substantially the same, as the Schutte valve. The defendants' valve has on its delivery side a cylinder and a piston of the plunger form, which is connected with the valve, and which works in the open end of the cylinder. It has also a small passage leading from the inside of the cylinder to the delivery chamber, which admits of a relatively slow flow of steam, with the result that the pressure in the cylinder will not respond immediately to any increase of pressure on the delivery side, but only gradually, and hence the valve will close slowly. It is manifest, therefore, that the defendants' valve contains the invention shown and described in claim 1 of the Schutte patent in suit.

The decree of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

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NATIONAL MALLEABLE CASTINGS CO. v. BUCKEYE MALLEABLE  
IRON & COUPLER CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 7, 1909.)

No. 1,910.

1. PATENTS (§ 157\*)—CONSTRUCTION—PAPER PATENTS.

While the fact that a patented device has never gone into use does not defeat the patent, it warrants an inference against utility, the converse of that which arises from successful commercial use, and may justify a narrow construction of the patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 157.\*]

2. PATENTS (§ 328\*)—INFRINGEMENT—CAR COUPLER.

The Deitz patent, No. 576,094, for a car coupler, involves invention and is valid, but is an improvement patent in a crowded art and must be narrowly construed. As so construed, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This is a bill to restrain infringement of the Henry Deitz patent, No. 576,094, issued February 2, 1897, for an improvement in car couplers. The alleged infringing device is known as the "Major coupler," and is made under three patents to J. Timms, being Nos. 679,145, 685,802, and 734,999.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Deitz patent cannot be well explained without the drawings and their descriptions, as shown in the patent. We therefore set out same below.

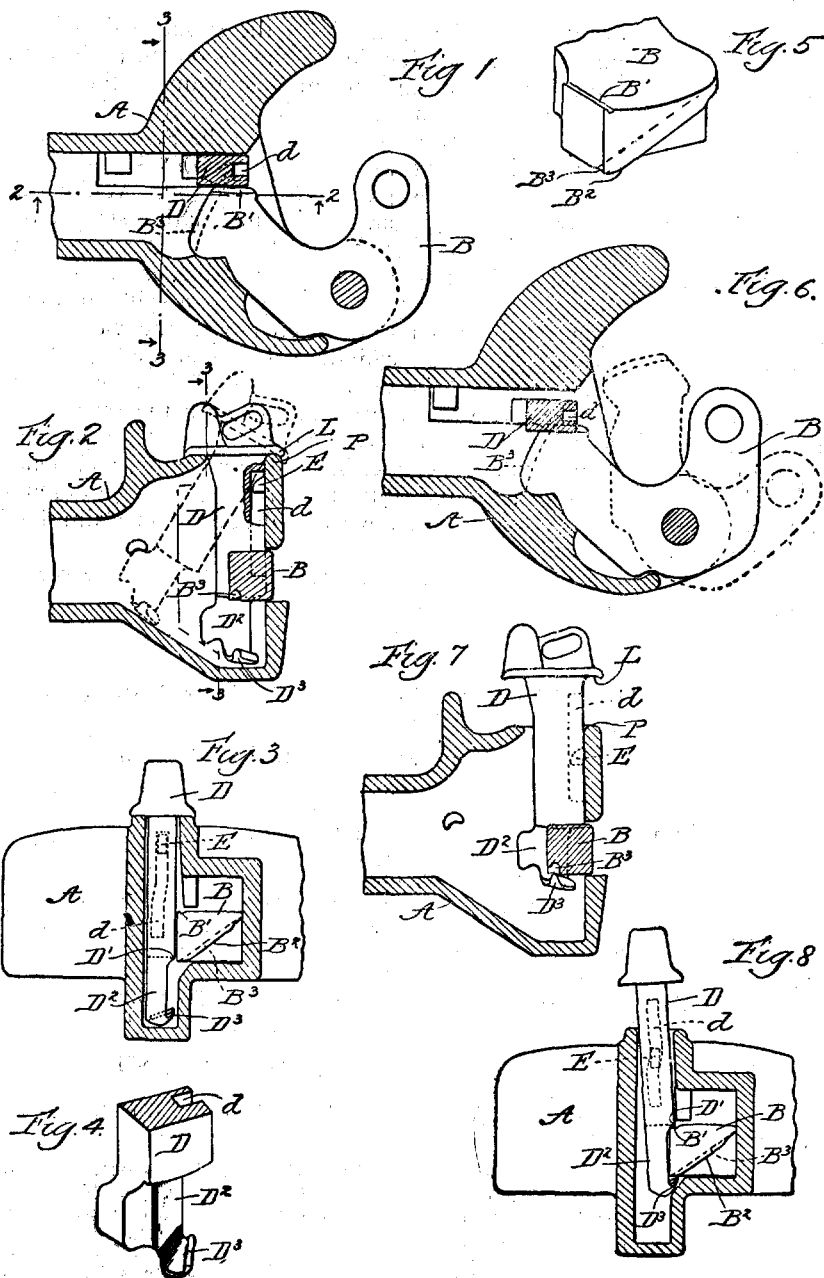


Figure 1 is plan sectional view through the coupler. Fig. 2 is a vertical sectional view on line 2-2 of Fig. 1. Fig. 3 is an end vertical sectional view on line 3-3 of Figs. 1 and 2. Fig. 4 is a perspective view of the lower end of the locking-pin. Fig. 5 is a perspective view of the end of the knuckle which comes into engagement with the locking-pin. Fig. 6 is a similar plan view to that of Fig. 1, showing the locking-pin in a different position. Fig. 7 is a similar view to that of Fig. 2, showing the locking-pin in a different position. Fig. 8 is a similar view to that of Fig. 3 with the locking-pin in the position shown in Figs. 6 and 7.

In the drawings, A designates the ordinary main cast piece of car couplers of this class, and B designates the knuckle thereof.

D is the locking-pin, which is made in a manner to serve the purpose of automatically locking the knuckle and also to throw open the knuckle when the pin is lifted, as will be described. This pin, D, has a slot, d, in its forward edge (shown by the dotted lines in Figs. 3, 7, and 8), which engages a projection, E, in the front wall of the main casting. This slot, d, is inclined and offset at its lower end, as is shown in Figs. 3 and 8, for the purpose of throwing the lower end of the pin at an incline when the pin is lifted, whereby the shoulder D' of the pin engages a lip B' of the knuckle end, as is shown in Figs. 6, 7, and 8. The purpose of this is to provide that when the locking-pin is lifted and let fall back again before the cars are pulled apart, permitting the knuckle to be opened, the pin will fall back and rest upon the end of the knuckle and ride thereon until the knuckle is pulled open, whereby the pin rides off the knuckle end and drops in its normal position ready to couple automatically. The pin when down in its normal position, locking the knuckle, is shown in Fig. 2, and when in this position and the knuckle is open and a coupling is made, the pin swings back, to free the end of the knuckle, to the position of the dotted lines in Fig. 2, the lip L of the pin engaging the projection P of the main casting, and thereby acting as a center about which the pin revolves when automatically coupling, and when the knuckle is home the pin swings back to its normal vertical position between the end of the knuckle and the side wall of the casting, thereby locking the knuckle.

On the lower end of the pin D, there is a projection, D<sup>2</sup>, having a lip, D<sup>3</sup>, and the outer end of the knuckle is cut away on an incline, as is shown at B<sup>2</sup>, which leaves an inclined way, B<sup>3</sup>, and upon the lifting of the pin forcibly the inclined slot, d, throws the lip, D<sup>3</sup>, into engagement with the inclined way, B<sup>3</sup> (see Figs. 7 and 8), whereby the further upward movement of the pin, the lip, D<sup>3</sup>, engaging the way B<sup>3</sup> by virtue of the incline, forces the knuckle end outward and open in the position of the dotted lines in Fig. 6, provided, however, the knuckle is free to open, not being in contact with any other coupler. The purpose of this means of throwing open the knuckle is to avoid the necessity of the brakeman entering between the cars at any time for any purpose when coupling, and, should he find the knuckle closed when he desires to couple, all that he is required to do is to lift the cutting-out lever, thereby lifting the locking-pin, which unlocks the knuckle and throws it open by the vertical movement, as above described, and this means of throwing open the knuckle is secured by the simple addition of the end-projection locking-pin and by the cutting away of a portion of the end of the knuckle, making no new part to the coupler nor adding any additional expense in its construction, which is a great desideratum.

The court below dismissed the bill upon the ground of noninfringement. Complainants have appealed.

T. W. Bakewell and T. B. Kerr, for appellant.

H. A. Seymour and R. S. Taylor, for appellees.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge (after stating the facts as above). The Deitz coupler is one of a large class of patents for improvements upon the automatic car coupler of the type known as the Master Car

Builders' Standard. The patentee, in his specifications, says that his invention "has for its object to provide means to throw open the knuckle simultaneously with the movement which unlocks the knuckle, and to do this with the locking-pin in the simplest and most efficient manner."

The first claim, the only one in issue, reads as follows:

"1. The combination with a draw-head, and a horizontally-swinging knuckle pivoted thereto, of a vertically-moving locking-pin normally obstructing the path of said knuckle, but not when partially raised, while the knuckle is closed, is prevented from automatically descending until the knuckle opens, and means whereby completing the raising of the pin throws the knuckle open."

The court below, after a careful review of the history of the whole art and a consideration of this claim, in connection with the specifications and drawings of the patent, reached the conclusion that, while the Deitz patent embodied a patentable improvement, it was a narrow patent, and must be limited to substantially the device shown by the specifications and drawings; and that, thus limited, the Major coupler did not infringe.

After a most careful consideration of the whole matter, we find ourselves in unanimous agreement with this result. The opinion of Judge Sater, who heard the case below, goes so fully into the history of the art, and makes such a satisfactory comparison of the two devices in conflict, that we only deem it necessary to summarize the points upon which we assent to an affirmance of the decree.

The older forms of such coupler stopped with an unlocking device by which the locking-pin might be raised out of the locking position and mechanism by which, when the engagement with the opposing coupler was complete the locking-pin dropped in front of the swinging knuckle to couple the cars together.

Thus, it was old and the subject of hundreds of patents to mechanically lock and unlock by means of a single device operated by a lever and chain from one side of the car; but, before this operation of mechanically coupling could take place, one of the couplers had to be in a wide open position, so that the coupler of the other car could enter the coupling head and become engaged therewith. This required an opening by hand; the brakeman being then, in some conditions, exposed to danger. The next step in the art was therefore to add to the locking and lock-opening mechanism some device by which the pin might be left in a lock-set position before the cars were drawn apart and the knuckle thrown wide open with the operation of pulling the cars apart. What Deitz has done was to incorporate in the old Janney type of automatic couplers devices for lock-setting and knuckle-opening, whereby, he claims, that, without multiplying devices, he has devised a coupler which locks, lock-sets and lock-opens.

By "lock-setting" is meant setting the locking-pin in such position, before the cars are pulled apart, as that it is not in the path of the knuckle and keeping it in that position until they are drawn apart, when it drops into its normal vertical position in the path of the coupling knuckle, ready for another engagement.

The peculiar form of his locking-pin is shown in the drawings and described in that part of his specifications already set out, and need

not be repeated. The operation of lock-opening—that is, opening the knuckles when the cars are pulled apart so as to admit of another engagement—is fully described in the specifications set out. The parts of the locking-pin and knuckle are so formed as to coact, resulting in a peculiarly constructed kicking cam, which throws the knuckle into its wide-open position.

1. It must be conceded that the device of Deitz has three functions: That of locking or coupling automatically; that of setting the locking-pin in an unlocked position; and that of kicking the knuckle into its wide-open position, when the cars are drawn apart, ready for another coupling.

2. But it was not new to set the locking-pin in a lock-set position. This is shown in many of the prior patents, some of which are referred to in the opinion of Judge Sater. This lock-setting was done in some of them by supporting the pin upon the tail of the knuckle, and, in others, upon some part of the draw-head. The fourth element of the claim is for “devices whereby the pin, if partially raised while the knuckle is closed, is prevented from automatically descending until the knuckle opens.” The specifications and drawings show that, when the pin is partially raised, it will fall back and rest upon the end of the knuckle, and ride thereon until the knuckle is pulled open. There was nothing new in so lock-setting, nor in the manner of doing it.

3. Neither was it new in this art to provide some form of cam, or spring action, for throwing the knuckle into its wide-open position, when the cars were pulled apart. A number of patents for improved car couplers, including lock-opening devices, are in evidence, and some of them are referred to in the opinion of the court below. The novelty, if any, is in the particular construction of the kicker which is shown in the Deitz device; but it certainly did not, when Deitz made his invention, require any exercise of inventive faculty to put a kicking cam upon any kind of coupling knuckle.

4. Neither was Deitz the first to combine the function of lock-setting and knuckle-opening in the same coupler. The Buhoup patent of January 26, 1892, is an illustration of such a combination. That patent shows a horizontally sliding lock pressed forward either by a weight or by a spring which locks the knuckle. When the lock is moved back enough to clear the tail of the knuckle, it is in set position. To automatically open the knuckle, a further movement of the pin or lock in its opening direction sets in operation a kicking lever and throws the knuckle open. The knuckle opener of Deitz's patent is a cam, and in Buhoup, a lever, and both methods for knuckle opening were well known. The Buhoup locking-pin moves horizontally, and not vertically, as in Deitz's, and Buhoup employed a separate lever for throwing his knuckle open; but vertically-moving locking-pins were well known in the old art. Deitz, himself, in his earlier patent, shows vertically-movable locking-pins, and means for lock-setting on the knuckle tail. So did those devices show an outside lever for throwing open the knuckle. That Deitz, in the patent in suit, dispenses with any separate outside mechanism for throwing the knuckle open, by arranging a cam kick by the coaction of his pin

and knuckle, is the primary reason for conceding to him a patentable improvement in the particular method by which he has done this; but the old art taught him how to provide for knuckle opening by placing a kicking incline, or cam, upon any kind of lock.

Quite a number of instances in which lock-setting and knuckle-opening were combined in the same coupler might be referred to. Among them are the patents to Buhoup, No. 573,961; to Ludlow, No. 488,769; to Whipple, No. 562,871; to Washburn, No. 556,036. Deitz's earlier patents, already referred to, show couplers in which devices for lock-setting and lock-opening are combined.

The patent to Aabel was upon an application made after that of Deitz. It is a closer anticipation than anything in the art. We lay it upon one side. The question of whether the invention of Aabel or Deitz was first in point of time is too doubtful, upon the evidence, to justify resting our judgment upon that patent. For much the same reason, we shall not consider the value of the second Buhoup patent, as a limitation upon the field of invention open to Deitz.

6. Among other reasons which tend to confirm us in regarding the Deitz patent somewhat narrowly is the fact that, although his invention was made in 1896, it has never gone into commercial use. The complainants own the patent, and they make couplers; but they do not make the device of the Deitz patent. This may be due to a number of causes. One, which the expert evidence seems to establish, is the fact that the structure described by Deitz, and which seems essential to the proper operation of his arrangement for lock-setting and knuckle-opening, is that there must be a cavity behind the knuckle in which his locking block or pin is required to swing fore and aft to accomplish the operation. The evidence tends strongly to show that couplers are frequently brought together with great force, producing a shock and a rebound of the knuckle after being closed. This, it is testified, is likely to result in at least occasional failure in locking and lead to separation of the cars by jarring the pin into its unlocked position. But whatever the causes—and they do not seem to involve any financial inability to put the device in use—the fact remains that this case involves the interposition of this long unused patent to suppress the actual use of the defendant's coupler, a coupler which appears to us to have been a valuable improvement over any other shown in this transcript, and one which has gone into large practical use.

The Climax coupler, the coupler made by the complainant company, is made under patents to Clinton Tower, issued in 1903, numbered 728,049 and 728,182. That it embodies some of the principal features of Deitz is obvious, and, if the Deitz patent was one of primary character, the anticipation might be serious. There are plain differences, however, between the two inventions—quite enough to make the claim now made that the Climax is an embodiment of the Deitz quite unsatisfactory in view of the limitations which we must impose on Deitz to support his patent at all.

The whole ground, for the purpose for which we use the fact of no commercial use, is covered by the admission of Mr. Deitz that no couplers like the patent in suit have ever been put into actual serv-

ice. The mere fact that a patent has not gone into practical use does not defeat it, nor deprive the patentee of relief in equity against an infringer. The patentee may, if he will, reserve the invention for his exclusive use, or he may suppress it if he elect. It is his private property for the time of the monopoly. *Heaton Peninsular Company v. Eureka Specialty Co.*, 77 Fed. 294, 25 C. C. A. 267, 35 L. R. A. 728; *Paper Bag Cases*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122. The use we make of the fact that the device has never gone into actual service is in the construction or interpretation of the patent. We are justified, in view of the facts of this case, in exercising much caution in attributing to this patent anything more than is plainly shown and distinctly claimed. *Bradford v. Belknap Motor Company (C. C.)* 105 Fed. 63; *Crown Cork & Seal Co. v. Aluminum Co.*, 108 Fed. 845, 48 C. C. A. 72. This inference from nonuse, under the circumstances, is the converse of the inference drawn in respect of a doubtful patent when a showing is made that it has gone into large use and has displaced other devices. It is an inference against utility from the fact of long nonuse, unexplained by want of means or opportunity.

Concluding, as we must, that the state of the art requires that the claim in issue shall not be construed broadly as for a primary invention, we come to the claim itself to see what limitations must be put upon it to save the patent for any purpose, and what limitations the patentee has himself imposed upon his claim by his manner of drawing it.

The claim to begin with is for a combination. The first element is a draw-head. Now this, by reference to the specifications and drawings, means a draw-head of the M. C. B. type. It means also a draw-head with a cavity in the rear of the knuckle to permit of the fore and aft swinging movement of its locking-pin. Unless there is such a cavity neither his lock-setting nor knuckle-opening device will operate. The Major coupler draw-head has no such cavity, but is provided with a vertical wall behind its knuckle to prevent any possible fore and aft swinging of the locking-pin. Neither device could operate in the draw-head of the other.

The second element of the claim is "a horizontally-swinging knuckle, pivoted therein." Broadly, this covers the swinging knuckle of the whole class of M. C. B. Standard couplers; but, if we turn to the specifications, we find that this swinging knuckle differs from that found in all other couplers, as well as from that used by defendant. To operate, as Deitz intended his device to operate, he must differentiate it from all others, or there can be no coercion with his vertically-operating locking-pin. Thus, he must provide the upper surface of its tail with a raised rib to retain the locking-pin in its lock-set position. Its tail must be narrow, to permit the locking-pin to drop off in the rear of the knuckle when the knuckle is open. The under side of the tail is provided with an inclined groove, with which an upwardly inclined lip on the locking-pin must interlock as a key in order to throw the knuckle open. These features are not found in the knuckle of the defendant.



The third element is "a vertically movable locking-pin normally obstructing the path of the knuckle, but not when partially raised." This pin differs most substantially from the locking-pin or block of the Major device, and also from the locking-pin of the devices of the old art. It is a pin pivotally supported on the top of the draw-head, and is adapted to swing freely backward and forward within the cavity of the draw-head. The very law of its operation is defined by the requirement that it shall not obstruct the path of the knuckle "when partially raised," and that it shall do so both when the knuckle is locked and when in wide-open position. That it shall not obstruct the path of the knuckle when in its lock-set position is because when in that position it is resting on top of the tail of the knuckle.

This claim is so drawn as to define the precise characteristic which distinguishes the Deitz invention from all others. The pin does not obstruct the path of the knuckle when partially raised, because the effect of partially raising it, and thereby unlocking the knuckle, is that the pin falls back and rests upon the tail of the knuckle, where it remains until the cars are drawn apart. When the cars are pulled apart, the pin rides off the knuckle end, "and drops," as the patentee states, "down in its normal position, ready to couple automatically." When so in its normal position, it obstructs the path of the knuckle by being across the path of its inward movement. To accomplish a coupling, it must be removed, and this is done by the knuckle tail striking it, and swinging it backwardly and upwardly out of the way, when the pin falls back after the knuckle has made its inward sweep, it falls again across its path and locks it in position. From this position in front of the path of the knuckle it can only be removed by lifting it up by means of a lever and chain upon the side of the car.

That we do not too narrowly interpret the Deitz patent in respect to what is meant in this element by "normally obstructing the path of the knuckle," we refer again to his specifications, where he says:

"The purpose of this (the engagement of the shoulder, D', with the lip, B') is to provide that when the locking-pin is lifted and let fall back again before the cars are pulled apart, permitting the knuckle to be opened, the pin will fall back and rest upon the end of the knuckle and ride thereon until the knuckle is pulled open, whereby the pin rides off the knuckle end and drops in its normal position ready to couple automatically. The pin, when down in its normal position, locking the knuckle, is shown in Fig. 2, and when in this position and the knuckle is open and a coupling is made, the pin swings back, to free the end of the knuckle, to the position of the dotted lines in Fig. 2, the lip L of the pin engaging the projection P of the main casting, and thereby acting as a center about which the pin revolves when automatically coupling, and when the knuckle is home the pin swings back to its normal vertical position between the end of the knuckle and the side wall of the casting, thereby locking the knuckle."

Upon his examination as a witness for the complainants, Deitz said:

"XQ. 306. In the coupler of your patent, No. 561,541, and also of your patent in suit, No. 576,094, the locking-pin normally obstructs the path of the knuckle at all times, does it not, excepting when the locking-pin is partially raised, and is lock-set on the tail of the knuckle? A. It does."

"XQ. 308. In both of the couplers in question, when the knuckle is in its open position and the locking-pin is in its lowest and normal position in rear of the tail of the knuckle, the knuckle, when rotated to its closed position, will

strike the locking-pin and swing it rearwardly until the tail has passed or moved laterally to one side of the locking-pin, and thereupon the latter will swing by gravity into its normal position again, and thereby automatically lock the knuckle. Is this correct? A. It is."

This element of the Deitz claim cannot be read upon the device of the defendants without discarding the limitations which the patentee has imposed upon himself, as well as the limitations which are required by the state of the art.

Upon this subject we quite agree with the court below, who, in differentiating the device of the defendants from that of Deitz, said:

"In both the Deitz and the Major coupling the locking-pin obstructs the path of the knuckle when the knuckle is closed. This feature is common to other couplers having vertically-movable locking pins. Were it not present the coupler would be inoperative and worthless. As the knuckle on the Deitz coupler opens, the locking pin rides off of the knuckle and falls in the rear of its vertical wall in its normal position ready to couple automatically and hangs vertically in the path to be traveled by the knuckle in closing. In closing, the knuckle is driven back against the locking-pin, knocking it rearward out of its vertical position into the recess in the draw-head, from which recess, by the force of gravity, it then swings back to its vertical normal position, where it is caught between the shoulder of the knuckle tail and the opposite side of the draw-head, thus locking the knuckle. Complainant's position is that, when the locking-pin is dropped from its lock-setting position, it is wholly immaterial as to the location of the pin, provided it is in position to lock the knuckle when it closes; but interpreting the first claim of Deitz patent in the light of the specifications renders this position untenable. Its contention is that, by the language of the specifications and of the claim, the locking-pin obstructs the knuckle only when it is closed and locked."

In conclusion: The art to which the patent in question belongs is so crowded with devices intended to accomplish the same purpose as to leave little room for the inventor. That there has been a slow step by step, advance in the direction of the ultimate automatic coupler and a final result is as much as can be said. That the combination of Deitz involves some advance we fully concede; but that he has made such an improvement as to entitle him to any considerable range of equivalents we cannot concede. Each improver, of which Deitz's and Timms' and Tower's are the last to which our attention has been directed, has done something; but when we concede to each his own particular form of device, so long as it differs substantially from those which have gone before, and does not include them, we shall have protected each as far as they are entitled to protection in a field already filled with the efforts of thousands struggling for the same result.

The case is therefore distinguishable from the long line of opinions by this and other courts where the meritoriousness of the advance has justified more latitude of construction and a considerable range of equivalents.

The result is that the decree dismissing the bill because no infringement has been shown is affirmed.

NOTE.—The following is the opinion of Sater, District Judge, in the court below:

SATER, District Judge. The defendants are manufacturing the Major coupler under the Timms patents, numbered 678,145, 685,802, and 734,999. The complainant, the manufacturer of the Climax coupler and the owner of the

Dietz patent No. 576,094, issued on the application therefor filed September 2, 1896, alleges that the defendants infringe the first claim of such patent. The claim is made on a combination of five elements, which for convenience are designated numerically, and is as follows: "The combination, with (1) a draw-head and (2) a horizontally swinging knuckle pivoted therein, of (3) a vertically-movable locking-pin normally obstructing the path of said knuckle, but not when partially raised, (4) devices whereby the pin, if partially raised while the knuckle is closed, is prevented from automatically descending until the knuckle opens, and (5) means whereby completing the raising of the pin throws the knuckle open."

Since the adoption of the Janney type of coupler as a standard by the Master Car Builders' Association, in 1887, the form of the outer or hook end of the knuckle has been substantially fixed; but the other end, sometimes called the "tail end," utilized as it is in locking, lock-setting, and knuckle opening, has been made to assume by inventors many forms and variations. The claim under consideration imposes no limitation as to the form of construction of such end, but, standing alone, is broad enough to cover every form of knuckle tail. The form and construction of the vertically-moving locking-pin which normally obstructs the path of the knuckle, except when partially raised, its mode of operation, the devices for lock-setting, and the means which, completing the raising of the pin, throw the knuckle open, are not indicated; but the language employed indicates a claim comprehensive enough to cover any kind of vertically-moving locking-pin, any device for automatically lock-setting which involves the partial raising of the pin while the knuckle is closed, and any means of knuckle throwing caused by completing the raising of the pin. The complainant insists that the claim, which is of a sweeping nature, should be broadly construed. The defendants contend that it must be read in the light of, and limited by, the specifications and the prior state of the art. The patent must be construed as a whole, and due effect be given to all its parts, and if the claim be wanting, as charged, in particularity, the patent may be interpreted with reference to the other parts of it, such, for instance as the drawings and specifications. In determining the scope of the Dietz patent, therefore, the specifications and prior state of the art will be considered.

From Dietz specifications and drawings it appears that A designates a draw-head of the Janney type; B the knuckle thereof pivotally secured by a pivot pin to the draw-head and extending into a recess therein. The outward arm of the knuckle constitutes its nose; the inward, the tail of the knuckle. On the knuckle tail projecting upward is a lip, B<sup>1</sup>. The end of the knuckle tail is cut away on an incline, B<sup>2</sup>, leaving an inclined way, B<sup>3</sup>. The locking-pin, D, is so made as to serve the purpose of automatically locking the knuckle, and also to throw the knuckle open when the end of the car to which it is attached is not coupled to another car. The locking-pin extends upward beyond the upper wall of the draw-head, and has at its upper end a cap with a forward projecting lip, L, which rests, when the pin is in its normal position, on the top of the casting, but on P, a projection of the main casting or draw-head, when the pin is swung back to free the end of the knuckle. In the pin's forward edge is a slot, *d*, consisting of two vertical slots located in different planes and connected by a diagonal slot. At the lower end of the main body of the locking-pin is a shoulder with a projecting lip, D<sup>1</sup>, designed to engage the lip, B<sup>1</sup>, on the knuckle tail. On the lower end of the locking-pin is a projection, D<sup>2</sup>, with an upward projecting lip, D<sup>3</sup>, designed to engage B<sup>3</sup>. The locking-pin, when in its normal position (which is vertical) locking the knuckle, is as shown in Figure 2, between the end of the knuckle tail and side wall of the casting or draw-head; i. e., the vertical shoulder at the rear edge of the knuckle is engaged by one side of the pin and the inner wall of the guard arm of the draw-head is engaged by the other side. If, when the knuckle is locked, the locking-pin be raised, it will, on account of its engagement of the projection, E, on the front wall of the casting with the upper portion of the slot, *d*, move vertically until the shoulder at the lower end of the main body of the locking-pin has been raised slightly above the upper face of the knuckle tail, or to its unlocked position. The pin being still further raised, the diagonal portion of slot *d* engages the

projection, E, causing the locking-pin to tilt laterally, and, if the knuckle is in contact with another coupler, the pin being permitted to fall back, the lip, D<sup>1</sup>, engages the lip, B<sup>1</sup>, on the knuckle tail. The locking-pin is thus supported and lockset in its partially raised and unlocked position, and as the adjoining car draws away from the one on which the pin is lockset the knuckle is pulled open. As this occurs, the pin rides off of the end of the knuckle tail and drops into its normally vertical position, ready to couple automatically. If the car on which the locking-pin is being raised, or is lockset, is not coupled to another, and it be desired to open the coupler, a further raising of the pin, causing the lip, D<sup>3</sup>, to engage the inclined way, B<sup>3</sup>, by cam action forces the knuckle end outward and open. When the knuckle is open, D<sup>3</sup> having cleared B<sup>3</sup>, the locking-pin drops back into its normally vertical position in the rear of the knuckle tail and is ready to couple automatically. When the knuckle closes, its rear or tail end strikes the locking-pin, which hangs in the course of the knuckle while closing, and pushes or drives it backward, whereby the lip, L, is caused to engage the projection, P, of the main casting, and acts as a center about which the pin revolves, and from which it swings back and forth when automatically coupling. When the knuckle is home or closed, the pin, by the action of gravity, swings forward to its normally vertical position between the end of the knuckle and the side wall of the casting, and, being caught between the two, the knuckle is locked.

The opening of the knuckle by cam action was not novel when Dietz made application for his patent, as appears from Winternight's patent, No. 441,624, Browning's, No. 254,106, Barnes & Barnes', No. 337,650, Parsons', No. 395,492, Burden's, No. 388,396, and Flohr's, No. 445,245. In the Barnes & Barnes device the knuckle, when unlocked, slides down the incline or cam by the force of gravity into an open position. In the Flohr and Parsons devices the knuckle is kicked open by an arm of a lever, which serves to lock the knuckle in position when closed. In Winternight's the knuckle is swung open by the chain, which first unlocks it. In Burden's the incline or wedge on the locking-pin, coming in contact with the tail of the knuckle, rotates it into an open position and is the equivalent of a kicking lever. In none of the foregoing patents, however, is there a cam or lip attached to the locking-pin to co-operate with a cam or incline on the knuckle to open it; but in the following patents each of the several patentees affix to their respective locking keys and a single-arm or tailless knuckle a given shaped cam to throw the knuckle open: Barnes & Barnes, No. 448,852; Wells, No. 471,702; Clark, No. 484,997; Tower, No. 487,649; Dickey, No. 509,208; White, No. 514,296; and McCord, No. 543,158. In the Kirwan & Kirwan patent, No. 470,579, March 8, 1892, an incline on the locking-pin engages an incline on the under side of the knuckle tail and kicks or throws the knuckle open. In each of the eight devices last named, when the incline or cam on the locking-pin is operated to open the knuckle, it engages the incline on the knuckle, as does that of the defendants, but, not being lip-shaped, does not interlock with the knuckle incline. The locking-pin in all of them is vertical, but has no swinging motion. In the Dietz patent the pin differs in form and in extent of motion, is vertical, swings back into a recess in the draw-head and thence forward to its normal vertical position, and has a lipped cam which interlocks with a groove on the incline or cam on the knuckle head; but the normal position of his pin and the office to be performed thereby are not unlike those of each of the others.

Locksetting of the locking-pin also antedates Dietz's patent. In the Wine-man patent, No. 292,724, January 29, 1884, the locking block is made to lockset on the draw-head, and as the knuckle opens the block seats itself on the knuckle, where it remains until the knuckle closes, when it falls in front and locks it. In Thurmond's patent, No. 420,709, June 24, 1890, the locking block, when partially raised, is tilted by gravity on account of being hung on one side of the vertical center and locksets on the draw bar, and, as the knuckle opens, it takes its place on the tail of the knuckle and remains there until the knuckle closes, when it falls and locks it. In McKeen's patent, No. 430,743, June 24, 1890, the pin locksets on the draw bar. As the knuckle opens, the pin adjusts itself thereon and falls into its locking position when the knuckle rotates to its closed position. Substantially the same operation occurs in Mc-

Keen's patent No. 430,744, June 24, 1890. The lockset in the above devices resembles that of the defendants, which complainant alleges infringes its own.

In the Hinton patent, No. 534,284, March 26, 1895, the locking-pin is made to lockset on a shoulder of the draw-head. When the knuckle opens the pin drops to the rear in the path of the knuckle's movement, and when the knuckle closes the incline or cam on it engages the incline on the pin and raises it, and after the knuckle has passed beneath it the pin drops into its locked position. The dropping of the pin in the rear of the opening knuckle, and its consequent obstruction of the knuckle's path and inward movement, are features embodied in the Dietz patent. Similar locksets are found in Dietz's two former patents, No. 561,541, June 2, 1896, and No. 561,542, June 2, 1896.

Locksets and knuckle openers in the same device preceded Dietz's patent. In the Buhoup patent, No. 467,680, the locking device is horizontal and different in many respects from that of Dietz's; but it is so far similar in operation that if the cars are pulled apart when the locking bar is set it returns to its normal position, and as the knuckle closes it obstructs the inclined surface of the bar, forcing it backward horizontally until the knuckle passes it, when the bar automatically resumes its normal position and locks the knuckle. In the Whipple patent, No. 562,871, issued on his application of January 28, 1895, there is shown in a single piece both a lockset and a knuckle opener. Other patents are referred to in the briefs for devices in which both the knuckle opener and the lockset are found.

Considering the specifications, the details of construction of defendant's device, and the state of the prior art, it appears that the knuckle tail, essential to the operation of the Deitz device, must be in the particular form specified by him, that his is but one of the methods whereby a horizontally swinging pivoted knuckle can be made to perform the functions necessary to make an automatic coupler operative, that there were methods other than his whereby a vertically-movable locking-pin, normally obstructing the path of the knuckle, is used to lock and unlock such knuckle, and the lock-setting may be effected by means other than those adopted by him. The claim in question must be limited by what is shown in the specifications and drawings.

Much of the language of Judge Taft in *St. Louis Car Coupler Co. v. National Malleable Castings Co.* (C. C.) 81 Fed. 706, a car coupler case, is appropriate. He said: "We must begin the consideration of the questions in this case, therefore, with the full understanding that couplers of the general contour of the patent in suit were old before it was applied for; that the forked draw-head, with one arm to act as a buffer, and the other for the purpose of pivoting a coupling head or knuckle, having two arms, one to hook and the other with a tail, which should lock the latch in the interior of the hollow draw-head was old; and therefore that the only possible patentable novelty of a coupler of the Master Car Builders' type must be found in the shape of the tail of the coupling head, in the relation of the tail to the hook of the outer arm, and in the locking device. \* \* \* It is possible that the adjustment of the parts in the complainant's patent, their contour, and their varying shape, lead to a better general result, including all the benefits stated by the complainant's expert. But the parts are so clearly a reproduction of similar parts used in other couplers of the same kind for the same purpose, and with the same functions, that no patentable novelty can be successfully asserted to exist in the complainant's combination, except in the exact form in which it appears in the specifications and drawings. It is a patent which, if valid at all, is entitled only to the narrowest construction, and any variation in any of the parts of the combination will prevent infringement. It is only one in a series of improvements, all having the same general object and purpose; and in construing the claims of the patent, they must be restricted to the precise form and arrangement of parts described in the specification and to the purpose indicated therein."

That the Deitz device proved to be of such slight commercial or practical use, if it has any at all, is another reason for denying a broad construction to his patent. Granting the ease with which experts, who undertake to prove their adversary's process a failure, may score a success, it is nevertheless true that it is not shown that any couplers constructed under the Deitz patent have gone into commercial use, notwithstanding the great de-

mand for life and limb saving coupler devices and the requirements of statutes, state and federal, exacting the use by railway companies of automatic couplers and impelling a quick detection and use of a successful coupler of that character. Even if the nonuser of the Deitz coupler were attributable to his failure to introduce it, such fact would be entitled to some weight as reflecting on its want of utility. *Crown Cork & Seal Co. v. Aluminum Stopper Co.*, 108 Fed. 845, 48 C. C. A. 72. Some obvious defects in the coupler are pointed out in the evidence. Its locking-pin, when locked, is not held against any fore and aft swinging movement. When pulling strains are released from any cause, it is not unusual for locks having such movement to swing backward and thereby cause a separation of the train. In switching services cars are frequently brought together with such great impact as to cause the knuckle, when closed, to rebound so quickly as not to catch the locking-pin or block and lock the coupler. To lock the coupler, the rebound of the pin, after it is struck by the inward moving knuckle, must precede that of the coupler. To give a broad construction to the Deitz patent, in view of its doubtful utility and its never having gone into practical use, would operate rather to the discouragement than the promotion of inventive talent. *Deering v. Winona Harvester Works*, 155 U. S. 286, 295, 15 Sup. Ct. 118, 39 L. Ed. 153; *Electric Smelting & Aluminum Co. v. Pittsburg Reduction Co.* (C. C.) 111 Fed. 742, 757. In *Walker on Patents*, § 376, it is said: "An invention which was never useful enough to be used in any productive business cannot be dragged across the road which leads towards success, and thus be made to prevent the progress of a useful art along that road." See, also, *Bradley Pulverizer Co. v. Bowker Fertilizer Co.* (C. C.) 111 Fed. 537.

For the purpose of comparison, a consideration of the Timms patent, No. 685,802, becomes necessary. In his device the locking block or pin, 7, is confined and operated within and mounted to move in a chamber, 8; no portion of the block extending beyond the outer wall of the draw or coupling head. There is no recess to the rear of the coupling block, because the swinging back and forth action found in the Deitz device is not present in the Timms device. Attached to the upper portion of the pin is a chain which extends upward through an opening in the coupling pin, and also through an opening in the coupler head. The opening in the coupling pin is located at one side of the center of the block, to impart to it, when raised, a lateral as well as a vertical pull, and thereby tip it to an inclined position. At 11 the block is chambered, producing the beveled shoulder, 12, to engage the beveled seat, 19, on the coupling head, so as to retain the block in its elevated position against accidental displacement. The vertical groove, 13, on the block receives a tongue, 14, on the knuckle tail, whereby the block locks the coupler. By recessing the block at 15 the shoulder, 17, is formed, and below the recess is the inclined or beveled lip, 16, through which above-named recess and between the lip, 16, and the shoulder, 17, the knuckle freely passes when in motion. If the cars are coupled together, and it be desired to unlock the knuckle without opening it, and to lockset the block, the block, by means of the chain, is raised until the tail of the knuckle and the recess in the block are in alignment, and as the chain, when pulled, exerts both a vertical and a lateral motion, the block is tilted, and its shoulder, 12, is pulled on the shoulder, 19, of the draw-head, where the block is seated. The knuckle is now unlocked and the block is lockset. The pulling apart of the cars opens the knuckle, which passes through the recessed portion of the block, and supports the latter during the opening and closing movement. If the cars are not coupled together, and it be desired to open the knuckle, an upward pull of the chain affixed to the block frees the vertically grooved portion of the block from the tongue of the knuckle, aligns the recess in the block with the knuckle tail, and by a continued pull on the chain the lip at the lower end of the block is drawn in an oblique direction against the beveled face of the knuckle tail, when the cam action of the lip against the knuckle tail throws it into an open position. When the pull of the chain ceases, the shoulder, 17, of the block, is found resting on the knuckle tail, where it remains until the knuckle tail is closed, at which time it drops in front of and locks it. In the Timms device, the knuckle tail rearward from the tongue, 14, to a point, 5a, is approximately horizontally flat, the purpose of which is

to permit a part of the turning opening movement of the knuckle without interference with or dislodgement of the block when lockset; but from the point, 5a, on the knuckle tail to its rear end the knuckle is inclined upwardly for the purpose of engaging and dislodging from its seat the lockset block and of setting it on the knuckle tail during the residue of its turning opening movement. Between the pivot pin and the outward curved edge of the knuckle tail the surface of the knuckle is inclined slightly upward, with a curved edge to the pivot pin, so as to engage the shoulder, 17, on the coupling pin, and lift it from its seat at 19, when lockset, the lip, 12, being carried outside of the seat or hook, 19, and in the closing or locking action of the knuckle, the locking block being wholly supported on the knuckle, the lip, 12, descends to a plane outside of that of the seat, 19, thereby enabling the block to fall to its locked position without again locksetting.

Does the defendants' coupler infringe the third element in Deitz's first claim of combination? In both the Deitz and the Major coupler the locking-pin obstructs the path of the knuckles when the knuckle is closed. This feature is common to other couplers having vertically-movable locking-pins. Were it not present, the coupler would be inoperative and worthless. As the knuckle on the Deitz coupler opens, the locking-pin rides off of the knuckle and falls in the rear of its vertical wall "in its normal position ready to couple automatically," and hangs vertically in the path to be traveled by the knuckle in closing. In closing, the knuckle is driven back against the locking-pin, knocking it rearward out of its vertical position into the recess in the draw-head, from which recess, by the force of gravity, it then swings back to its vertical normal position, where it is caught between the shoulder of the knuckle tail and the opposite side of the draw-head, thus locking the knuckle. Complainant's position is that, when the locking-pin is dropped from its lock-setting position, it is wholly immaterial as to the location of the pin, provided it is in position to lock the knuckle when it closes; but interpreting the first claim of Deitz's patent in the light of the specifications renders this position untenable. Its contention is that, by the language of the specifications and of the claim, the locking-pin obstructs the knuckle only when it is closed and locked.

The construction to be placed on the terms "normal position," "normal vertical position," and "normally obstructing the path of said knuckle, but not when partially raised," is readily determinable from Deitz's own language. In his specification he says: "The purpose of this [the engagement of the shoulder, D<sub>1</sub>, with the lip, B<sub>1</sub>] is to provide that when the locking-pin is lifted and let fall back again before the cars are pulled apart, permitting the knuckle to be opened, the pin will fall back and rest upon the end of the knuckle and ride thereon until the knuckle is pulled open, whereby the pin rides off the knuckle end and drops in its normal position, ready to couple automatically. The pin, when down in its normal position, locking the knuckle, is shown in Fig. 2, and when in this [i. e., its normal] position and the knuckle is open and a coupling is made the pin swings back, to free the end of the knuckle, to the position of the dotted lines in Fig. 2, the lip, L, of the pin engaging the projection, P, of the main casting, and thereby acting as a center about which the pin revolves when automatically coupling, and when the knuckle is home the pin swings back to its normal vertical position between the end of the knuckle and the side wall of the casting, thereby locking the knuckle." The third element of the combination is couched in this language: "A vertically-movable locking-pin normally obstructing the path of said knuckle, but not when partially raised."

Deitz testified on cross-examination: "XQ. 306. In the coupler of your patent, No. 561,541, and also of your patent in suit, No. 576,094, the locking-pin normally obstructs the path of the knuckle at all times, does it not, excepting when the locking-pin is partially raised and is lockset on the tail of the knuckle? A. It does." "XQ. 308. In both of the couplers in question (Deitz patent, 561,541, and the Deitz patent in suit, 576,094), when the knuckle is in its open position and the locking-pin is in its lowest and normal position in rear of the tail of the knuckle, the knuckle when rotated to its closed position will strike the locking-pin and swing it rearwardly until the tail has passed or moved laterally to one side of the locking-pin, and thereupon

the latter will swing by gravity into its normal position and thereby automatically lock the knuckle. Is that correct? A. It is." The pin, according to Deitz, is in its normal vertical position, and normally obstructs the knuckle, both when the knuckle is open and when it is closed, but does not obstruct the path of the knuckle when partially raised.

The word "obstruct" does not necessarily have so radical a meaning as that of blocking the passage or stopping it. The obstruction of the pin to the closing knuckle may be slight; but, nevertheless, with whatever of weight it has, it hangs in the path of the closing knuckle, and whatever force is required to swing it therefrom must be imparted by the closing knuckle. In *United States v. Williams*, Fed. Cas. No. 16,705, it was said: "Speaking etymologically, to obstruct ('ob-struo') is to build or set up something in the way. \* \* \* In a more critical acceptation 'obstruct' implies opposition without active force, and does not imply that the opposition was in the end effective. \* \* \* Thus it may be that an officer of the law was obstructed in his duty and hindered perhaps for a time, but not finally prevented from performing it. So, too, he may have been obstructed; but, surmounting or avoiding the obstruction, he may have been not even hindered." The locking-pin suspended in the rear of the knuckle is a something in its way. Its obstructive force is not active or effective as regards the closing knuckles, because the knuckle surmounts the obstruction and is driven home. And again, in *Chase v. City of Oshkosh*, 81 Wis. 319, 51 N. W. 562, 15 L. R. A. 553, 29 Am. St. Rep. 898: "An obstruction is a blocking up; filling with obstacles or impediments; an impeding, or embarrassing, or opposing the passage along and over the street—and, to constitute it such, it need not be such as to stop travel." See, also, *State v. Leaver*, 62 Wis. 387, 22 N. W. 576.

The term "obstruct" etymologically, is not so strong a term as "obstacle" or "impediment" or "prevent." It is frequently used in a comparative sense, as the above authorities indicate. To obstruct does not require a stoppage of travel, of which fact Deitz, in the use of the term, took cognizance. The lodgment of the locking-pin in the rear of the knuckle, and in the path to be traveled by it after the pin has ridden off of it, is essential to the successful operation of Deitz's device, because his locking-pin cannot otherwise be brought into a position ultimately to lock the coupler. His patent suggests no means of bringing the locking-pin into position between the tail of the knuckle and the wall of the draw-head, to lock the knuckle, other than knocking the pin out of its normal position, by the rear vertical wall of the knuckle tail, and the subsequent return of the pin by force of gravity thereto, and to effect this result he has given the knuckle tail the particular form shown in his specifications. To accomplish the same result with the locking-pin differently located would require a device differently constructed from that which he patented.

The defendants' device differs from that of Deitz in that its locking-pin or block never obstructs the rear wall of the tail of the knuckle. When the locking-pin of the Deitz coupler is partially raised and lockset on the knuckle, it does not obstruct the path of the knuckle. The upper surface of the tail of the knuckle is flat, and moves in a horizontal plane. As it rotates it supports, but does not move, the pin. In the defendants' coupler the lock, when in its lockset position, rests, not on the tail of the knuckle, but on a seat or lip on the wall of the draw-head. When the knuckle rotates to an open position the upward inclined surface of the knuckle tail, engaging the lock, lifts and dislodges it from its seat on the draw-head. The lock then seats itself on the tail of the knuckle and remains there, not only while the knuckle is opening, but until it rotates to its closed position. When the knuckle of the defendants' coupler is open, the locking-pin does not, like that of the Deitz coupler, obstruct the knuckle's path. The lock of defendants' coupler does, however, obstruct the knuckle tail in its outward movement to the extent, though it may be slight, of frictionally contacting with the upward inclined surface of the knuckle tail while moving outward. In this respect the defendants' device again differs from that of Deitz, in that its lock, when partially raised, obstructs the movement of the knuckle.

The third element of the Deitz claim is a vertically-moving locking-pin normally obstructing the path of the knuckle, both when locked and unlocked, but



not when the pin is partially raised. The defendants' device has a vertically-movable locking-pin normally obstructing the path of the knuckle when locked, and also when the knuckle, while the pin is partially raised, is moving outward from the draw-head. The third element of Deitz's combination is not found in the defendants' coupler, and there is consequently no infringement. In *Cimietti Unhairing Co. v. American Fur Refining Co.*, 198 U. S. 399, 410, 25 Sup. Ct. 697, 702, 49 L. Ed. 1100, Mr. Justice Day said: "In making his claim the inventor is at liberty to choose his own form of expression, and, while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that, as the inventor is required to enumerate the elements of his claim, no one is an infringer of the combination claimed unless he uses all the elements thereof."

The defendants' coupler has supplied a want, and is of commercial and practical value. Having successfully accomplished the desired end, it cannot be said to be anticipated by the Deitz device, which has failed in that respect. *Farmers' Mfg. Co. v. Spruks Mfg. Co.*, 127 Fed. 691, 62 C. C. A. 447. The fact that defendants' coupler promptly went into extensive use is insufficient to sustain its patent, if its device is clearly wanting in novelty. Novelty, in my judgment, is not wanting. But, viewing it in the most unfavorable light, it must still be said that the question of its novelty is fairly open under the law. This being so, the fact that the trade by such use has attested its superior utility and value, which use necessarily implies the exclusion from the trade, if not actual displacement therein, of couplers previously patented and used, is persuasive evidence that it involved invention and had patentable merit. *Kinloch Tel. Co. v. Western Elec. Co.*, 113 Fed. 659, 51 C. C. A. 369; *Barbed Wire Patent Case*, 143 U. S. 284, 12 Sup. Ct. 443, 36 L. Ed. 154. The Deitz device should not be employed to thwart the valuable benefits of the defendants' coupler, now in extensive use and concerning which there is no evidence that Deitz had the slightest conception. *General Elec. Co. v. Brooklyn Heights Co. (C. C.)* 118 Fed. 154.

Conceding that Deitz's combination was patentable, the fact that his coupler has not been a commercial success, has supplied no want, has excluded none other from use, has failed to meet the demand for greater protection of life and limb by means of automatic couplers, while the defendants' coupler has gone into extensive use, a radical difference in operation and mechanism between the two couplers is strongly, if not conclusively, suggested. *Campbell Printing Press Co. v. Duplex Printing-Press Co. (C. C.)* 86 Fed. 315. The defendants' devices for locking, lock-setting and knuckle opening are altogether different from those described in Deitz's first claim and specifications. The end sought to be effected is the same in both methods, but the devices are not the same. If, for instance, the cams on the knuckle tail and on the lower extremity of the Deitz locking-pin were like those on the defendants' device, the Deitz patent, on account of the pin's freedom to swing, would be fatally defective. Such an inclosure of the locking-pin would be necessary as would prevent its swinging motion and hold it in place while contacting with the knuckle tail in opening. To so inclose it would prevent its riding off and dropping in the rear of the knuckle tail, and this in turn would require a reconstruction of his entire device. To make the pin effective as a knuckle opener it was necessary to provide it with the upturned projection, D<sup>3</sup>, and the knuckle tail with the groove, B<sup>3</sup>, and also to provide for the projection, E, to contact with the pin in slot *d*, as the pin is raised. Considering the state of the art, as shown by the earlier patents in evidence, and the slight utility and the want of commercial and practical use of Deitz's device, it is not entitled to protection as a pioneer invention covering the achievement of the desired result in its widest form, unlimited by specific details. Conceding that his claim should be sustained, it should nevertheless be restricted to the particular devices described in the specifications, and under such a construction the defendants' device cannot be deemed to infringe.

Other points urged by counsel, pro and con, are not considered. The bill is dismissed, at complainant's costs, and an order may be drawn accordingly.

## DUNER CO. v. GRAND RAPIDS R. CO.

(Circuit Court of Appeals, Sixth Circuit. June 29, 1909.)

No. 1,911.

## 1. PATENTS (§ 20\*)—INVENTION—CHANGE IN MOVABILITY OF PARTS.

Making one of two coacting parts stationary and the other movable, where before the first had been movable and the second stationary, does not amount to invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 20.\*]

## 2. PATENTS (§ 328\*)—INFRINGEMENT—SAND-BOXES FOR CARS.

The Duner patent, No. 639,891, for a sand-box for cars, claim 3, given the only construction which will save it from anticipation, held not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the Western District of Michigan.

T. W. Bakewell and T. A. Banning, for appellant.

Francis Rawle, for appellee.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

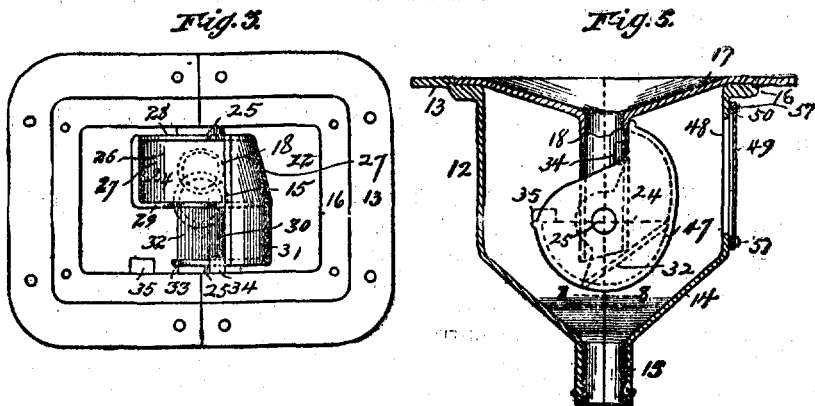
SEVERENS, Circuit Judge. The plaintiff in this case complains of the infringement of its patent No. 639,891, founded on an invention by John C. Duner, of "improvements in sand-boxes for cars," and granted December 26, 1899. In a general way the invention may be described as one relating to sand-boxes located in front of the wheels of cars for the purpose of sprinkling sand on the track to increase the friction between the wheels and the track; and the substance of his invention was the appropriation of a "choke-valve" to be used in such boxes. Choke-valves were familiar to the arts of mechanics, and consisted of a hopper or reservoir, a pipe, or conduit extending below, and a basin or container below the end of the pipe to hold the contents as they descended into it. As the basin fills to the end of the pipe, it chokes the opening and prevents the further flowing of the contents. It is obvious that its principle of operation would be applicable to use in any case where the contents have a partial quality of fluidity; that is, where the particles have a moderate size and modified capacity of flowing upon one another. To open the valve and set the contents flowing, the basin must be moved away, or the pipe must be moved to one side.

The defendant is a street railway company and uses such valves on its cars. It denies that the plaintiff's patent is valid, and it denies infringement. It denies its validity because, it says, the invention is nothing else than another use of an old device, and further that the device had already been employed for the same purpose and in the same art; that is, in sprinkling sand on railway tracks.

The complainant's sand-box consists of a hopper, a discharge pipe, or "passage," an oscillating container consisting of a cup-shaped pocket

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

under the feed-pipe, a valve chamber or casing, and a discharge spout. These are the elements of the combination of the third claim, which is the only one involved; and it is manifest that they were all found, in one form or another, in other earlier structures wherein choke-valves were used, unless it be the casing, or "valve chamber," as Duner calls it, which is nothing more than a housing and bearings for the trunnions on which the pockets are revolved. But there is a peculiarity in the complainant's patent which gives rise to some questions which should be considered. The "pocket" which the specifications describe is not merely a single pocket, but another pocket is included and is arranged alongside of the other with a partition part way between them. Thus, they are not movable upon one another. The construction is such that, when the first pocket fills, the contents flow into the side pocket, and provision is made for a discharge from the side pocket into the chamber below.



Figures 3 and 5 illustrate the construction. Figure 3 shows the main pocket, 26, into which the sand descends through the pipe, 18, from the hopper. 30 is the side pocket, and 29 is a partition which extends back only part way, so as to leave an opening between them, through which opening the sand passes from the main pocket to the side pocket as the former fills. 32 is the edge of the side pocket, over which the sand is discharged into the chamber, and thence through the discharge spout, 15. At 47 is an opening in the main pocket, and, when it is desired to pass the sand directly down, the pocket is revolved until the sand passes through the opening, 47. When the pockets are in this position, no sand will pass over the edge, 32, of the side pocket, but will flow back into the main pocket and be discharged through the opening, 47. Upon these facts counsel for the appellant contends that there are thus provided means which make only the main pocket necessary and render the side pocket inert, and he quotes the following from the specifications to show this:

"The apparatus as thus constructed is devised, as hereinbefore set forth, for the production of an intermittent feed, supplying a definite quantity of sand each time the operating pin, 45, is depressed. If it is desired, however, to produce a continuous feed, or one which will permit the continuous flow.

of the sand as long as the pin, 45, is held depressed, I provide in the bottom, 27, of the cup or pocket, 26, an aperture, 47, so located that, when the valve is in the closed position (shown in Figs. 3, 5, and 6), said aperture is above the end of the feed pipe, 18; but when the valve is moved to its other position, as shown in Fig. 7, said aperture is opposite and immediately below the end of the feed pipe, 18. When the parts are in the position shown in Fig. 7, it is obvious that a continuous flow of sand will be produced until the pressure on the operating pin is removed and the weight returns the valve to its closed position, whereupon the flow of sand will cease. When this particular form of valve having the aperture, 47, is employed, the cup or pocket, 30, may be dispensed with, although its employment is still desirable as a means for insuring a supply of sand in case the aperture, 47, becomes clogged or obstructed."

—and then reads claim 3 upon this organization as a distinct and separate invention. But we cannot agree that the patentee and his counsel are correct in this, for while, in the circumstances supposed, it might be said that in a sense the second pocket is inoperatively inert and unnecessary, it is not altogether so. The patentee nowhere suggests that the partition, 29, between the main and side pockets, shall or may extend all the way between the pockets. He expressly says it shall not, but that an opening shall be left through which the sand may pass through from one to the other. We have therefore no right to assume an entire partition. That a claim which is construed by bringing into it, by reference to the specifications, a feature there found, must be regarded as equivalent to a claim having in itself such feature seems to be a logical deduction, and is in accord with the observation of Mr. Justice Blatchford in *Fay v. Cordesman*, 109 U. S., at pages 420, 421, 3 Sup. Ct. 236, at page 244, 27 L. Ed. 979, where he said:

"The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial."

While the law permits us to read the specification into a claim upon a reference thereto in the latter, it would be an abuse of such liberality to first alter the specification and then read it, thus altered, into the claim. Such a practice is wholly inadmissible. If we were to do so for one purpose, we might do so for another, and so on, endlessly. The patent would become nebulous, and all particularity extinguished. If now, the side pocket were removed, the sand would run out of the opening into the chamber uncontrolled. Moreover, the sand collected in the side pocket would not be available; and, further, the sand in the side pocket would at no time during the operation oppose the leaking out in that direction of the sand in the main pocket and so, to some extent, relieve the entire want of a partition through the opening. If the facts supported the appellant's contention, we see no reason why the conclusion might follow. If the matter specified furnishes the data, we suppose the patentee might assemble distinct elements, less than all, in combinations, which would represent distinct inventions, and also claim them all in another combination. This is a frequent practice. He may also claim separately each element in the combinations, supposing, of course, in every such case the element or combination of

elements indicate invention; but if we cut out the side pocket and suppose the opening in the partition, 29, healed, we should have a structure differing in no respect in principle from others contained in the former art. Modifications of old structures might be found, but not modifications having the dignity of inventions. If we are right in this, we need go no farther, for the defendant's sandbox has but the one pocket and, of course, does not infringe the complainant's, which has two pockets, or, speaking with more exactness, a double pocket.

But three former patents are adduced by the defendant to prove the Duner invention to have been anticipated, and we think they are sufficient. The first in date is a patent to McPherson, granted in 1895, No. 535,260, for an automatic feed for pulverizing mills, and having for its object the provision of a mechanism to effect a uniform feed of "ore or other substances." The mechanism of the invention was a magazine of ore being pulverized having an opening at the bottom through which the contents passed out upon a plate, the accumulation on which choked back the material in the magazine. The receptacle was flat, because, the nature of the material being coarse, the sides did not need to be turned up to form a pocket. Then there were the Richard's patents, Nos. 559,210 and 615,195, in which the choke-valve was employed in weighing and delivering grain and other material. In these were the hopper, the tube or conduit from the bottom of the hopper, and the curved, oscillating pocket, in which the contents spread out around the bottom of the tube and stopped the flow. When the pocket was oscillated, the contents of the cup were discharged, either over its depressed edge, as in the Duner side pocket, or perhaps, through a hole in the cup registering with a hole below, say, the upper end of the discharge spout. Later than these was a patent granted to A. W. Ham, September, 1897, numbered 590,220, for a sand-box for car tracks. The essential feature of this was, as in the Duner patent, the choke-valve. There was a hopper with an opening at the bottom and under that a cup or circular basin, in which the sand would pile up and cease to flow. An oscillating paddle hung on trunnions turning in the casing when the valve was in operation, carried the contents over the edge of the pocket into a chamber whence they were carried to the track by a discharge spout. The most material difference between this and the Duner valve having a single pocket (for it is with such a device we are now making comparison) consists in the fact that, while in Ham's construction the pocket is stationary and the paddle oscillates over it, in Duner's the tube is stationary and the pocket is oscillated under the tube; but this makes no difference in the principle, and there is no invention in making the change.

We held, in *Campbell Printing Press Co. v. Duplex Printing P. Co.*, 101 Fed. 282, 293, 41 C. C. A. 351, that merely making the type bed stationary under traveling cylinders, instead of making the cylinder stationary and the type bed movable under it, did not amount to invention. Like decisions upon similar facts were made by Mr. Justice Curtis in *Sargent v. Larned*, 2 Curtis, 340, Fed. Cas. No. 12,364, by Judge Blodgett in *Abbott Machine Co. v. Bonn* (C. C.) 51 Fed. 223, and by the Supreme Court in *Machine Co. v. Murphy*, 97 U. S. 120,

24 L. Ed. 935, to which may be added *Devlin v. Paynter*, 64 Fed. 398, 12 C. C. A. 188.

The conclusions on which we rest our judgment are these: Conceding that the Duner patent is valid to the extent that it covers the double pocket valve, the defendant does not infringe the Duner patent so construed. Assuming that claim 3 of the Duner patent might be sustained as being one for a valve having a single pocket, about which we have much doubt, the invention, so restricted, was anticipated by earlier patents, and especially by that granted to Ham, in 1897.

The decree of the court below dismissing the bill will be affirmed, with costs.

NOTE.—The following is the opinion of Sater, District Judge, in the court below:

SATER, District Judge (sitting by designation). The defendant is using sand boxes constructed in accordance with the Haddock patent, No. 739,803, issued on an application filed January 14, 1903. The complainant is the owner of the Duner letters patent, No. 639,891, for sand boxes for cars, issued on December 26, 1899.

The complainant charges that the sand boxes used by the defendant infringe its letters patent, and has elected to stand upon the third claim therein mentioned, which is as follows: "In an apparatus of the character described, the combination with a hopper or reservoir having a discharge pipe or passage, of an oscillating valve having a cup-shaped pocket, into which the lower end of the feed-pipe extends, and a valve chamber completely inclosing said valve and provided with a discharge spout, substantially as described."

Hoppers, feed pipes leading therefrom, choke-valves, inclosing chambers, and discharge spouts were well-known structures or devices, and were all used long prior to the granting of either the Duner or the Haddock patents. Duner, in so far as the record discloses, was the first to apply the choke-valve to sand boxes for cars. Its use, however, in connection with other granular substances, was previously well known; a good illustration being found in the Richards patent, No. 559,210. I shall not, however, determine whether the new use of the choke-valve by Duner is so analogous to its former use in the manipulation of coal, sand, grain, seed, and many other granular and pulverulent products that the applicability of his device to the new use would occur to a person of ordinary mechanical skill or not.

Complainant's Exhibit "Early Model Duner Box" is constructed in accordance with the above-mentioned claim. Complainant also offered in evidence another exhibit, "Duner Single Dipper Box," alleging that it also is constructed in accordance with the patent and that the sand boxes used by the defendant infringe such device. His valve, as exemplified by that exhibit, consists of but a single pocket extending through less than 180 degrees, but has no aperture therein through which the sand may flow to the discharge pipe. Instead of a feed pipe, it has a chute, apparently not so wide as that in the Haddock device, but whose walls are more nearly perpendicular. It secures a continuous feed only, which feed is effected by so oscillating the valve as to swing it substantially beyond the wall of the chute, thereby permitting the uninterrupted flow of sand into the discharge pipe and thence to the track. Below the chute in the Haddock device is an oscillating gate, on which the sand flows from the hopper through the chute until it chokes. When the gate is swung aside, it permits a continuous flow of sand to the track. The patent does not specify, and the Haddock device does not require, a passageway from the hopper to the valve in the form of a pipe, such as is shown in the Duner patent, to conduct the sand from the hopper to the gate or valve.

In determining what the Duner patent covers, the rule must be observed that patents are to be construed in the light of all the circumstances and of the apparent purpose of the parties to them. As Duner was required to specify and point out the part, improvement, and combination which he claimed as his invention, his specifications and drawings may be considered for the pur-

pose of better understanding the meaning of his third claim, not, however, for the purpose of changing it and making it different from what it is. *Howe Machine Company v. National Needle Company*, 134 U. S. 394, 10 Sup. Ct. 570, 33 L. Ed. 963; *Walker on Patents*, § 186. The words "discharge pipe," "passage," and "feed pipe," as found in the claim, are used interchangeably, and are synonymous. In his specifications he designates this same means for conveying sand from the hopper into the valve as a "feeding tube or passageway," "feeding pipe," "feed pipe," and "feed spout." The feed pipe contemplated is a fixed, rigid, downward-projecting obstacle, the inclination of whose extremity furthers the breaking up, as the valve is moved, of any packed or clogged mass which may form at the mouth of the feed spout. The valve mentioned in the claim, into which the feed pipe extends, has a cup-shaped pocket. A "pocket," as defined by the *Standard Dictionary*, is a "small bag or pouch; \* \* \* a cavity, opening, or receptacle." The valve called for must have, therefore, a cavity or receptacle into which the sand flows until it chokes, and to render the device operative it must have such depth as will hold the sand and prevent its overflow. The pocket is cup-shaped. The term "cup-shaped," in so far as the research of counsel and of myself discloses, has not been defined by the courts or lexicographers. In *Knight's American Mechanical Dictionary* "cup" is defined as "a hollowed portion or object to hold a liquid." The cup-shaped pocket or cavity, therefore, must necessarily have vertical or substantially vertical sides. Their angle of inclination and height must in any event be considerable. Duner, recognizing this fact in his description of his device, specifies two vertical sides for his valves, and a curved bottom rising to the height of the vertical wall, 29, and thereby forming its other sides. The height of his cup-shaped pocket equals the radius of the circle, through about 270 degrees of which his curved bottom extends. To render his device operative, as described, not only is such pocket, cavity, or receptacle necessary, but it is also essential that his feed pipe should extend into and below the pocket's vertical sides; otherwise, the sand as it flows through the feed pipe would escape over such walls and flow to the track. The valve which he describes would be practically useless, if sand were conducted to it through a chute, such as is shown in the *Haddock patent*.

His peculiarly designed valve, with a feed pipe projecting therein, resulted from his desire to provide a single apparatus having both a continuous and an intermittent feed. His means of securing the latter is described at great length. He says his first thought was a dipper. If he means such a dipper as is shown in his "*Duner Single Dipper Box*," it is remarkable, in view of its effectiveness and its simplicity, as compared with the peculiarly shaped valve which he describes so minutely, that he made no mention of it and failed to use the word "dipper" at any place in his letters patent. He states that a straight discharge through a hole was his first idea, that the second pocket was an afterthought, and that he attached a second pocket to his first. How and why he proceeded to attach it to a dipper, such as is shown in his single dipper box, if that is what he first conceived and made, is not stated. The fact is that his earliest device shown is his "*Early Model Duner Box*," which shows a valve such as he specifically describes in his letters patent. If the intermittent feed was an afterthought, it became predominant, and was manifestly uppermost in his mind. Is not the explanation found in his statement that, when his first track sander was made, railroad men leaned toward the intermittent discharge, and he thought an intermittent box would be the easiest to market? At the conclusion of his lengthy description of his apparatus for securing an intermittent feed, he adds: "If it is desired, however, to produce a continuous feed, or one which will permit the continuous flow of the sand as long as the pin, 45, is held depressed, I provide in the bottom, 27, of the cup or pocket, 26, an aperture, 47, so located that, when the valve is in the closed position (shown in Figures 3, 5, and 6), said aperture is above the end of the feed pipe, 18; but when the valve is moved to its other position, as shown in Figure 7, said aperture is opposite and immediately below the end of the feed pipe, 18. When the parts are in the position shown in Figure 7, it is obvious that a continuous flow of sand will be produced until the pressure on the operating pin is removed and the weight returns the valve to its closed position, whereupon the flow of sand will cease. When this particular

form of valve, having the aperture, 47, is employed, the cup or pocket, 30, can be dispensed with, although its employment is still desirable as a means for insuring a supply of sand in case the aperture, 47, becomes clogged or obstructed." He is still speaking of the peculiarly shaped and minutely described valve. His purpose was to put forth a single mechanism, which, as occasion for its use arose, railway employes might utilize in such way as deemed expedient; i. e., for either the continuous or the intermittent flow of sand. Although he states that the second cup-shaped pocket may be dispensed with in case a single continuous feed alone be desired, he adds that its retention is desirable as a means of sanding in case the aperture in the larger pocket becomes clogged or obstructed. He still had in mind his specifically described valve, or he would not have advised its retention as a means of relief in case of the clogging of the aperture in the larger pocket.

To sustain its contention that boxes constructed like the Duner single dipper box fall within the terms of the patent, the complainant directs attention to Duner's recital in his letters patent that the details of construction may be modified without departing from the principle of his invention. He illustrates by stating that operating mechanism, for instance, other than that which he has devised and shown, may be applied, whereby a spring may be substituted for a weight to return the valves to their normal or closed positions, and adds that he does not wish to be understood as limiting his invention to the precise construction previously described and shown in the drawings. He still contemplated the use of both valves, as he has spoken of them in the plural. His statement that he does not wish to be understood to limit his invention to the "precise" construction described and shown in the drawings indicates that he did not contemplate a wide departure from such form of construction. It may be doubted whether his reservation of the right of modifying the details of construction was necessary, in view of the law of equivalents; but his language may properly be considered in construing the patent. There is no suggestion of a modification in the valves or cup-shaped pockets themselves. Evidently the double purpose of his device and the preference previously expressed for the retention of both pockets or valves, whatever the construction might be, was still present in his mind. The extent to which the use of his peculiar form of valve was riveted in his mind is evidenced by the identification of the complainant's Exhibit "Early Model Duner Box," as his first specimen of a sand box of the continuous feed type. I am satisfied from the record that his first single dipper box was not made until about June or July, 1903, and that his first conception of a box of that character then originated. He preceded his claim of both a feed pipe and a valve having a cup-shaped pocket, as elements of his combination, with the words "in an apparatus of the character described," and followed it with the words "substantially as described," and thereby effectually limited the application of his claim to the particular kind of pipe and valve described in the specifications; for, if there be a doubt as to whether the Haddock device is the mechanical equivalent of Duner's, that doubt must be resolved against Duner so long as the claim contains the words "substantially as described." *Hobbs v. Beach*, 180 U. S. 400, 21 Sup. Ct. 409, 45 L. Ed. 586. Duner and his successor in title must accept the feed pipe as an element in his combination so long as a valve having a cup-shaped pocket is claimed, into which the lower end of the feed pipe extends. The one cannot be accepted and the other rejected. Duner specified a particular form of device as the means by which the effect of his invention is produced, and there is, therefore, no infringement by the defendant, because the Haddock device has no feed pipe and no valve even remotely approaching that described in the Duner patent. *Walker on Patents*, § 363.

The bill is dismissed, at the complainant's costs.



## AMERICAN LAUNDRY MACHINERY MFG. CO. v. TROY LAUNDRY MACHINERY CO., Limited.

(Circuit Court, N. D. New York. July 21, 1909.)

No. 7,193.

## 1. PATENTS (§ 26\*)—INVENTION—COMBINATION OF OLD ELEMENTS.

If ordinary mechanical skill is adequate to make the selection of elements from machines in the prior art and their union or combination in a new machine, operating in the old way and accomplishing the same result, although it may be an improved result, and no new idea is involved in the process, there is no patentable invention, however great the improvement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.\*]

## 2. PATENTS (§ 328\*)—INVENTION—IRONING-MACHINES.

The Wendell patent, No. 466,815, for an ironing-machine, is void for lack of patentable invention in view of the prior art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. Suit to restrain alleged infringement of United States letters patent No. 466,815, dated January 12, 1892, for an ironing-machine.

See, also, 171 Fed. 878.

Church & Rich (Frederick F. Church, of counsel), for complainant.  
Edgar B. Stocking, for defendant.

RAY, District Judge. As the defense possessing merit is that complainant's device or machine, in view of the prior art, fails to disclose patentable invention, and is therefore void, I shall confine myself to a description and consideration of the device of complainant and the patent in suit and to the prior art and its effect on the patent in suit here. The letters patent in suit were granted to Fred C. Wendell, January 12, 1892, upon an application filed March 30, 1891, for an ironing-machine. The proofs show title in the complainant company and plain infringement, if the patent be valid.

The specifications say:

"My invention relates to machines for ironing bed and table linen, and has as its primary object the construction of a simple machine of great capacity adapted to deliver the fabrics with smooth-finished surfaces and in a thoroughly dry condition. Heretofore machines of this character have generally been constructed with a hollow steam-heated drum combined either with ironing-rolls acting to confine the fabrics thereon, or with an endless belt partly encircling the drum for the same purpose. My invention is directed to the full and complete utilization of the heating surface of the drum and to the delivery of the fabric in a perfectly dry condition at a convenient point. In constructing my machine I combine with the heating-drum a series of overlying co-operating rolls, which press the advancing fabric into intimate contact with the drum, and also an endless belt, which encircles the drum on the opposite side from the rollers, so that after the fabric is acted upon by the rolls it is carried around the remaining portion of the drum by the belt, being thus subjected during the secondary part of the operation to a further drying action. Inasmuch as the belt serves to carry the fabrics back to that side of

the drum on which they were introduced, and as it is inconvenient to have them delivered into and out of the machine on the same side, I propose to combine with the belt or apron above mentioned a second endless belt, or other suitable carrier, adapted to return the finished fabrics to the rear side of the machine and there deliver them.

"It will be obvious to the skilled mechanic that the details of my construction are not of the essence of my invention, and that they may be modified at will, provided only the drum is combined with the rolls and the aprons in such manner that they act successively to confine the fabrics upon the drum and carry them completely around the same, or nearly so. \* \* \* E represents a basket, table, or other support at the front of the machine, from which the fabrics are delivered between the surface of the drum and the first roll, C. As the drum revolves, the fabric is carried forward therewith under the successive rolls until it arrives at the rear side of the drum. By this time the fabric, which has been subjected to a high heat and to considerable pressure and entirely exposed to permit the escape of the vaporized moisture, is comparatively dry and presents a smooth surface. In passing the last roll at the rear, the fabric continues its downward course and is carried between the apron, D, and the surface of the drum under the latter and up to the front of the machine. In this passage under the drum the fabric is subjected to a further drying influence, so that on delivery at the front it is in a thoroughly dried condition. The delivery of the fabric over the front end of the apron is insured by the presence of a beveled doffer-bar, F, which may, however, be replaced by any suitable device. \* \* \*

"It will be observed that in my machine I utilize the heated surface of nearly the entire circumference of the drum, so that when a drum of reasonably large size is used the fabrics are quickly and thoroughly ironed and dried in passing once through the machine. It will also be observed that the belt covering the under side of the drum prevents the loss of heat which ordinarily occurs by radiation from uncovered drums. It will be observed that in my machine the ironing-rolls, instead of being geared to the drum, as usual, are driven by frictional contact with the intervening fabric. This is found in practice to be of decided advantage, as the rollers, turning somewhat slower than the drum, act with a frictional effect to retard the advance of the fabric while it is being subjected to the polishing action of the drum. I also find it advantageous to make the rolls of successively increasing diameter, preferably by giving the felt covering an increased thickness, and to adjust them so that they bear successively with increasing pressure on the drum. I find that when thus proportioned and adjusted, and when driven from the drum by the frictional effect of the intervening fabric, instead of being driven by gearing, each roll will turn at slightly higher speed than the one next in advance. The result of this is that the rolls act to draw or stretch out the fabric, keeping the same under tension, so that the drum acts to give them a smoother and better finish than when the rolls are positively driven, as usual."

Claims 1 to 4, inclusive, are in issue, and read:

"1. In an ironing-machine, the combination of a hollow drum, a series of rolls co-operating with the periphery of the drum on one side, and a traveling apron co-operating with the periphery of the drum on the opposite side and arranged to automatically receive the fabric from the last roll and return it in contact with the drum toward the side of the machine at which it entered, whereby the fabric is automatically subjected, first to the action of the successive ironing-rolls, and thereafter to the heating and drying action of the drum.

"2. In an ironing-machine, the combination of the rotary steam-heated metallic drum, the series of felt-covered rolls acting upon its upper surface, the endless apron surrounding its under surface, and means, substantially as described, for driving said apron.

"3. In combination with the steam-heated metallic drum, the series of overlying rollers covered with felt, the endless apron encircling the lower portion of the drum to return the fabric to the front of the machine, and the second apron or carrier co-operating with the first to return the fabric to and deliver it to the rear of the machine.

"4. In an ironing-machine, in combination with a rotary steam-heated drum and means, substantially as described, for maintaining the fabrics in contact with the drum throughout substantially its entire circumference that they may return to a point near the point of introduction, a secondary carrier to deliver the fabrics after leaving the drum to the rear of the machine."

The first claim calls for the combination, in an ironing-machine, of: (1) A hollow drum; (2) a series of rolls co-operating with the periphery of the drum on one side of such drum; (3) a traveling apron co-operating with the periphery of the drum on the other side thereof so arranged as to automatically receive the fabric from the last roll and return it in contact with the drum towards the side of the machine at which it entered, whereby the fabric is automatically subjected, first to the action of the successive ironing-rolls, and thereafter to the heating and drying action of the drum. This implies a heated drum, for I think it would be going far afield to surmise that the heating action of the drum is caused by friction. I think that we are to imply a drum that rotates and means for rotating it and means for moving the apron.

Claim 2 calls for: (1) The combination of a rotary steam-heated metallic drum; (2) the series of felt-covered rolls acting upon its upper surface; (3) an endless apron surrounding the under surface of the drum; and (4) means for driving the apron.

Claim 3 calls for: (1) The steam-heated metallic drum; (2) the series of overlying rollers covered with felt; (3) the endless apron encircling the lower portion of the drum to return the fabric to the front of the machine; and, (4) the second apron or carrier co-operating with the first to return the fabric to and leave or deliver it at the rear of the machine.

Claim 4 calls for: (1) The same drum as do claims 2 and 3; (2) in general terms, for both the rollers on the upper side of the drum and the endless apron on the lower side thereof; and (3) the secondary carrier or apron for taking the fabric from the front, after delivery from the metallic drum, to the rear for final discharge or delivery.

The general construction and operation of this machine is as follows: We have a frame for supporting the structure, upon which is mounted, in the usual way, a hollow drum of metal, or covered with metal so as to present a smooth exterior surface. The shaft journals of the drum are hollow so as to permit the introduction of steam into the interior of the drum and "maintain the same in a highly heated condition." On the table of the frame is mounted at each end a strong half circle of iron, which support a series of rolls or rollers of the same length as the drum, and they are so mounted as to revolve by frictional contact with the revolving drum. The mountings of each roller have pressure screws, by means of which the rolls may be pressed with more or less force against the drum. These rollers are covered with felt, or any other suitable material. Thus far this is an exceedingly simple and common device for carrying and pressing a strip of cloth, leather, or other flexible material between two presses, so to speak, and dry same, if moist. As the drum revolves, any such material fed in between the drum and the first roll of the series will

be carried forward, and every part will pass or be carried in succession between the drum and all the rollers. If moist or wet, it will be partially or wholly dried by the heated drum, and the pressure, which will extract more or less of the moisture and the heat, will convert this into steam. As the rolls are at a distance apart, this steam arises between them and passes off into the surrounding atmosphere.

The axis of the drum is a little above the table of the frame, and the rolls begin and end a short distance above the plane of the axis. On the same iron half circle, forming a part of the frame, or connected therewith, and substantially on a line with the table of the frame, and on each side of the drum, are pulleys on which, and on guide pulleys below, is mounted an endless apron of felt, canvas, or other suitable material, which, by means of said mountings and pulleys, is made to cover or come in contact with the surface of the lower half of the drum. There is a simple and suitable driving mechanism for this endless apron. It is made to move with the same speed as the drum. This is simple and is the carrying of an endless apron like a belt around a series of guiding pulleys; one part of the apron being at all times, unless something intervenes, in contact with the lower half of the hot drum. The result is that a garment, like a collar, a cuff, or a piece of cloth, fed in under one of the first-mentioned rollers on one side of the drum, will pass as the drum revolves under all the rollers on the upper side of the drum and between them and the outer surface of the drum, and then between the drum and this endless apron and be further smoothed and dried and to some extent polished. Fed in at one side, the article would be carried around with the drum, retained by the rollers and apron to near the starting point.

It is not desirable to have it discharged or unloaded at the side of the drum where fed in, and hence we have an added apron also carried and guided in part by the same guide pulleys, and wholly by the same driving mechanism. The patentee says of his invention, before speaking of this added apron:

"The foregoing parts constitute a complete and operative machine well adapted to the end in view. In order, however, to return the fabric to the rear and there deliver it, I provide a second endless apron or carrier," etc.

This second apron engages with the first at or near the front and at the point where the articles would ordinarily and naturally be discharged, the drying and ironing process being complete, and continues in engagement carrying the articles between them until the rear of the machine is reached, when at or near the table they are thrown off. The only function of this added apron is to aid in carrying the dried and ironed articles to the rear of the machine. It adds nothing to the efficiency of the machine as an ironing-machine. By properly arranging the pulleys that guide the added apron, the first apron is utilized to aid the second in carrying the articles, after being ironed, from the front of the machine to the rear. So far there is coaction between the ironing-machine proper and this added apron or carrier. I can discover no patentable invention in adding this apron for this purpose. Clearly it was not a mental conception amounting to patentable invention to conceive the idea that an article like a sheet,

a pillow case, a collar, or a cuff, taken between two aprons traveling in the same direction, would be carried to and discharged at the point where the aprons separated. The means devised and employed for doing this are devoid of any patentable merit. They are common. Ordinary mechanical skill was fully adequate to the undertaking.

#### Prior Art.

In the prior art we find the patent to J. F. Baldwin, No. 253,661, dated February 14, 1882, showing a frame with a hollow revoluble metal drum thereon, having a polished exterior surface, "adapted," says the patent, "to be heated, preferably by steam, as is usual in such machines." This is the polishing roll and cannot be differentiated from that of the large metal revoluble cylinder of the patent in suit. Baldwin there provides pressure rolls above the upper half of the polishing cylinder mounted in the same frame or extensions of same, "arranged," says Baldwin, "to bear against the periphery of the polishing roll with even pressure throughout its entire length. The rolls are preferably of metal, of the construction hereafter set forth, and covered on their exterior surface with suitable textile material of considerable thickness, so as to render them elastic under pressure." There is suitable means for turning the rolls and connections by means of cogwheels, etc. The articles to be ironed are fed in between the heated cylinder and first roll in front and carried, of course, under pressure between these rolls and the cylinder to the other side of the machine, where they drop or are discharged upon an inclined plane beneath the machine and slide back to the front of the machine. There are suitable means for increasing or diminishing the pressure between the main heated cylinder and these rolls, substantially those of the patent in suit. So far as frame, steam-heated cylinder with polished exterior surface, and rolls are concerned, Wendell is a substantial duplication of Baldwin. There is no patentable difference. There are minor changes and differences, but nothing that changes the elements or mode of operation or result, thus far; but Baldwin does not have either apron, and the articles to be ironed are not carried around the under side of the heated drum in contact therewith. The patent to Hamilton E. Smith, No. 166,648, of August 10, 1875, is in all substantial respects the same.

The patent to Hamilton E. Smith, of August 10, 1875, No. 166,647, for "improvement in ironing apparatus," shows a different arrangement of the pressure rollers; that is, they are placed on the under half of the steam-heated cylinder, and this patent also shows the apron idea for carrying the articles and keeping them in contact with the heated cylinder as they pass between the cylinder and pressure rollers. Neither of these patents utilize substantially the entire exterior surface of the heated drum for drying and polishing the articles to be ironed. They do show that the pressure rollers can be attached so as to operate on either the upper or lower half of such drum, and, of course, on both at the same time. The Smith patent, No. 166,647, also shows that an apron can be used to carry the goods and keep them in contact with the drum on its under side. Whether it shall be used in connection with the pressure rollers or not is merely a mat-

ter of choice. The prior art taught therefore that you may have a hollow metal steam-heated revoluble drum with polished exterior surface, the felt covered and adjustable rollers, all of the same size or some larger than others so as to produce a slipping and increase the polishing, or all of the same size and moving at a different rate of speed from the drum, the apron with guide pulleys for carrying the articles to be ironed to the drum and then forward in contact with the drum, and also means for moving the ironed articles from one side of the machine to the other after being ironed. Take the patent of Smith, No. 166,648, of August 10, 1875, and transfer to it the pressure rolls and apron of the Smith patent of August 10, 1875, No. 166,647, and change the direction of the revolution of one set of pressure rolls, and with slight modifications and changes we would have the patent in suit, especially by dispensing with the pressure rolls of No. 166,647, provided we add the supplementary apron for carrying away the ironed goods. In No. 166,647, Smith says:

"The polishing roller, A, is heated by means of steam, hot air, or other suitable means, which is introduced to the roller through a pipe, a, affixed to one of its gudgeons."

Also:

"The rollers, B (the pressure rollers), respectively, revolve in journal boxes, E, which are adjustable, so that the rollers can be set toward or from the polishing roller, A, in order to accommodate different thicknesses of cloth, and the said rollers, B, together with auxiliary rollers, F, carry the clothes-supporting apron, C."

Also:

"The auxiliary or apron rollers, F, are disposed in such a manner that a level portion, H, is imparted to the apron, upon which level portion the clothes to be ironed are spread, and from which the same are carried to the polishing roller. The inner one of the rollers, F, revolves in contact with a guide roller, G, and between these two rollers, F and G, the clothes are taken up from the receiving portion, H, of the apron, and conducted to the polishing roller."

Aprons and apron rollers in an ironing machine for carrying the ironed goods to any desired point after being ironed are shown in the patent to William Jones, No. 104,740, dated June 28, 1870. There the apron is below the hollow heated drum and the pressure rollers and receives the ironed goods and carries them back to the operator below the table. By locating it differently, the goods could have been carried to the back of the machine, or to one end of the table, and by making a double apron they could be carried to the basement or to the garret.

In the Wiles patent of November 11, 1890, No. 440,292, granted prior to the filing of the application for the patent in suit, we have endless aprons for carrying and guiding the goods, and also for delivering same at the desired point. The same law which enables a roller and an apron moving in the same direction to grasp and carry articles between them will enable two aprons sufficiently near together moving in the same direction to grasp between them and carry goods in any desired direction and to any desired point. Such endless aprons by means of cogwheels and guiding pulleys will take and carry the goods first in one direction and then in the opposite direction.

With the prior art before him, the skill of the mechanic was adequate to do all that was accomplished by Wendell. Concede that he has an improved machine, that he utilizes all the periphery of the heating drum, and secures a more thorough drying of the articles, it is obvious that mechanical skill was adequate to apply the apron to the lower half of the drum, as it had been done before, leaving the pressing rollers on the upper half. In the prior art, British patent to Bridson, No. 7,655, of 1838, we have a compound machine for stretching goods and also ironing and polishing them. We have the steam-heated cylinder and pressure rolls at intervals about its entire periphery. Hence we have the entire periphery utilized for drying and polishing and pressing. These rolls have "tighting screws" to give any degree of pressure. True the pressure rolls are hard, not covered with felt, or a like material, but that idea was old when Wendell applied for his patent. Bridson says:

"The pieces of goods under operation being, as before described, just introduced upon the surface of the cylinder or bowl, m, m, and tightly held in its stretched state by the two delivery rollers, l, l, it immediately proceeds around the polished periphery of the cylinder, m, m, and is operated upon by bowls or rollers, r, r, placed at suitable distances round the cylinder, and which revolve by contact of their surfaces. These rollers or bowls are set or brought to any degree of pressure by means of the tighting screws, s, s, s, s, and the piece of goods being operated upon becomes mangled, calendered, and finished during the process of drying by the operation of the successive system of bowls upon the cloth as it passes over the cylinder, m, m, until it is delivered in the finished state from the cylinder at t. It will be very evident, to practical persons conversant with these processes as at present conducted, that by passing the cloth around the bowl or cylinder, m, as just described, any degree of finish may be imparted to the goods whilst they are drying upon the surface of the heated bowl or cylinder by varying the degree of pressure of the top or pressing rollers or bowls; and also by making a corresponding variation in their number, or by gearing them so that they shall run at a greater or less degree of speed, as may be found desirable; or the goods may be taken off from the cylinder when any sufficient degree of finish has been imparted to them by this combination of mechanism or apparatus by delivering the piece from the machine by the aid of a pair of delivering rollers, which may be attached to any required part of the machinery, as shown at w, w, providing the cloth is ascertained to be sufficiently dried. It will, of course, be evident that in the construction and arrangement of such a combination of apparatus I am neither limited to the precise dimensions, order, or number of any of the before-mentioned rollers, bowls, or cylinders, nor to the materials of which they are composed; but as all such operations must be governed by the discretion of the operator, and of the particular demand of finish the goods shall require, such variations in performing the combined process must be left to the judgment of the workman, and any degree of finish hitherto produced by mangles or calenders separately may then be obtained in working the above-described combination and arrangement of apparatus for stretching, mangling, drying, and finishing woven goods and fabrics."

I regard it as immaterial in the construction of complainant's and of defendant's alleged infringing machine whether the drum is positively driven and has gears meshing with the rolls to drive them, or whether the rolls are driven by frictional contact with the drum. The drum itself might be driven by frictional contact with the rolls if they are positively driven. Infringement could not be avoided by such a change as that, and to make such a change would not disclose patentable invention. It would be a mere choice of methods.

Taken as a whole, I do not doubt that this Wendell mangle or ironing-machine is as good as any, if not the very best on the market. However, this superiority is not the result of mental conception amounting to patentable invention which found birth with Wendell, or any one man. It is an assemblage and union of different elements from various sources and a combining thereof in an ironing-machine, or mangle, to iron various articles in the old way arriving at the same result, and it may be an improved result; but this is not necessarily patentable invention. Not every improvement is invention. If ordinary mechanical skill is adequate to make the selection and union, or combination, and no new idea is involved in the process, there is no patentable invention, however great the improvement. See *Dodge Coal Storage Co. v. N. Y. C. & H. R. R. Co.*, 150 Fed. 738-741, 80 C. C. A. 404; *Dunbar v. Eastern Elevating Co.*, 81 Fed. 201, 26 C. C. A. 330; *Atlantic Works v. Brady*, 107 U. S. 192, 199, 200, 2 Sup. Ct. 225, 27 L. Ed. 438. In this last-cited case Mr. Justice Bradley, giving the opinion of the court, said:

"The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle, and injurious in its consequences."

But it is said that the defendant has made a machine, an ironing-machine, or mangle, which in all essentials is a duplication, a Chinese copy of complainant's. This is some evidence of utility and even novelty. If I had doubt, I should allow commercial success, adoption by the trade and users, and by defendant to turn the scale; but I have none. I can discover no mental conception amounting to patentable conception. Defendant urges as a reason, or reasons, for copying so closely, that it was found ready to hand, and that, as there is no patentable invention disclosed, it had the absolute right to use or copy, and that in putting the various well-known devices together in one machine it was impossible to avoid close imitation; also, that the complainant itself, or the prior owners of the patent, have for years substantially conceded that this Wendell patent, now expired, is void for want of patentable invention in view of the prior art. It is contended that the owners of the patent have commenced suits for alleged infringement, and that they have never pressed one to a final hearing and determination, although challenged so to do, etc., and that such owner at such times is now a constituent member of defendant company. I find no evidence that estops defendant from now asserting and proving, if it can, the validity of the patent in suit; but it is somewhat suggestive that the validity of the patent has not been adjudicated in view of the litigation begun. I simply say, however, that I do not think defendant has copied the complainant's structure with any idea that it disclosed patentable invention. The defendant has not conceded the validity of the patent in suit.

There will be a decree dismissing the bill, with costs.



AMERICAN LAUNDRY MACHINERY MFG. CO. v. TROY LAUNDRY  
MACHINERY CO., Limited.

(Circuit Court, N. D. New York. July 21, 1909.)

No. 7,193.

1. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—CLOTHES-DRIER.

The Barnes patent, No. 684,776, for a clothes-drier, consisting of a drying room through which the clothes are moved on a conveyer, was not anticipated, and is for a new combination of old elements, which by a new mode of operation produces an improved result and discloses patentable invention. Also, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

2. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—CLOTHES-DRIER.

The Hagen & Cooper patent, No. 785,366, for improvements in clothes-driers of the endless conveyer type, the improvements being in the conveyer, was not anticipated, and discloses invention. Also, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. Suit to restrain alleged infringement of United States letters patents for "clothes-drier" and "improvements in drier," respectively, and for an accounting.

See, also, 171 Fed. 870.

Church & Rich (Frederick F. Church, of counsel), for complainant.

E. B. Stocking, for defendant.

RAY, District Judge. Prior to the taking of the proofs herein, this suit was before me on motion for a preliminary injunction and fully and ably argued by the same counsel who presented it on the final hearing. This court then gave to the claims and prior art full and careful attention and wrote an opinion on denying the motion, which is found in 161 Fed. 556, and I need not repeat what was there said, as the proofs at final hearing are largely a reproduction of the evidence contained in the affidavits used on the motion. This court then intimated that the question of patentable invention, in view of the prior art, depended largely, if not wholly, on the question of whether the new combination or arrangement of old elements shows a new mode of operation with a new or an improved result.

Speaking in a general way, and not taking note of minor changes in form of construction, which it is conceded do not amount to patentable invention, the claims in issue, 1 to 6 inclusive, of the Barnes patent in suit, No. 684,776, dated October 22, 1901, for "clothes-drier," is a combination of old elements to form a drying room. Each and every element of these claims is found in the prior art. Drying rooms, heating coils on the side or sides of such rooms, conveyers traversing such rooms, absence of heating coils from the central portion of the room, and air circulating devices, such as a fan, driving the air downward, are found in the prior art or in analogous arts. Thus the proofs demonstrate beyond all question. However, we do not find in the prior art or in analogous arts the elements of the claims in suit arranged or located in the same way with respect to each other as in

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the patent in suit. In the prior art we do not find the same perfect, speedy, and uniform result that is produced by the combination in question. The result sought is the speedy, and thorough, and even drying of collars and cuffs, or other clothing or clothes without soiling or scorching. Laundrying and the drying of articles of clothing, either completed or in process of manufacture, by artificial means—that is, not in the open air, or by simply suspending same in the air in a room—is an important art, and with the growth of our great cities and large towns is becoming more and more so. The Pilgrim Fathers at Plymouth in 1620 had no use for such a structure. The housewife on the farm in Dakota has no use for them; but in great cities and populous centers the drying rooms are a necessity. Economy of space, cleanliness, capacity for drying a large number of articles evenly and uniformly in the drying room without entering it to suspend and remove the articles, and speed in drying, are all important. Others had occupied the field; but there was room for improvement in speed, uniformity of drying, cleanliness, and moving the articles into, through, and out of the room itself.

It is well-known that wet articles may be dried in cold dry air, and in hot or warm air, not loaded with moisture. Drying will take place with little circulation; but for speed and effectiveness circulation is necessary. The air loaded with moisture absorbed from the wet articles must escape from the drying room, and fresh air must be admitted, heated, and circulated. It is important that the general tendency of the main current of air be downward, and not from side to side or upward; that the air, hot, and that partially cooled, shall be thoroughly mixed when the drying articles are suspended; and that the temperature throughout the room be substantially the same. It is also important that all the articles to be dried be subjected to the same heat in the same order from the time of entering the room to the time of emerging therefrom. These conditions Barnes sought to satisfy, and, in my judgment, he made a substantial advance in the art. He has located his heaters on the sides of the room, his fan in the center overhead so constructed as to drive the air downward, except on the very sides of the room above the heaters, and he has not interfered with the downward current by placing heaters on the floor. The carrier so traverses the room that all the garments, collars, and cuffs, are exposed, substantially, to the same heat by direct radiation and the same heat and current after passing the heaters.

There is an abundance of evidence that this drying room is superior to any that preceded it. This is emphasized by the fact that the defendant has copied this arrangement and structure in all its parts. On the final hearing the defendant's counsel conceded this, stating that there were some differences, but none of sufficient moment to dwell upon. This is evidence of an improved result, viz., the better, speedier, more uniform drying of the articles. By the new arrangement of the different elements of the combination and added elements, we get a different mode of operation of the heated and circulated air upon the drying articles. The fan is in the upper part of the room, and it was there before. Heaters are on the sides of the room, and there were heaters on the sides of such rooms before; but, as

a whole, there is a different arrangement. In the prior art articles were dried, but not as speedily and uniformly as in this room. The air was heated, but not wholly at the same point or points. The air was circulated and commingled, "stirred up" by a fan, but not in the same way it is done by this Barnes machine. I think that patentable invention is disclosed. This is not a case of the transposition of elements from one sphere of action to another sphere of action. It is the taking of elements of this art, or elements of this and an analogous art, and forming a new combination so as to produce a new or different mode of action of the air upon the articles to be dried, and so produce a better, an improved result. I think this constitutes invention. It required much study and thought, and the combination when finally made was a happy one and beneficial in its results.

Barnes desired to apply heated air in a room to wet articles so as to dry them speedily and uniformly; that is, in a particular way. He desired to avoid their flapping against each other, to prevent their falling from their supports and becoming soiled, to prevent overheating and burning or scorching. By a new arrangement of old elements or devices and added devices, he has accomplished what he undertook. His device has largely superseded others used for the same purpose, and the defendant company has appropriated it. It is, of course, true that to constitute anticipation it is not necessary that we find the exact combination claimed in any one prior patent. Here we do not find the exact combination claimed by Barnes in any one prior patent or publication. We do not find all the elements of Barnes' combination in any one prior patent or publication. Hence we have a new combination. Elements are added, and by adding them we get a new mode of operation; that is, a new mode of applying the heated air to the wet or moist clothing and an improved result. Barnes did more than a mechanic skilled in the art was capable of doing. He was dealing with heated air and applying it to damp or wet articles to be dried. It was easy enough to construct a room, a fan, a carrier, a coil of pipes, or radiators heated with steam or hot water. It was easy to place these in the room and carry the articles in and about the room and out again; but it was not easy or simple to so arrange these elements as to give equal application of the heated air in succession to all the articles. Others had tried and failed, or were only partially successful. Barnes did what had not been done before. He accomplished more perfectly what had been accomplished before, viz., he dried speedily, uniformly, thoroughly, and without soiling or scorching a large number of articles in a moderate sized room all at the same time, and he did this much better than it had been done by the prior devices and more speedily and with less damage.

#### Hagen & Cooper Patent.

This patent, dated August 4, 1903, No. 735,366, to Arthur T. Hagen and Daniel M. Cooper, assignors to the A. T. Hagen Company, has 13 claims; the sixth, seventh, and tenth, being in issue here. These read as follows:

"6. The combination with a track, a conveyer traveling thereon having a plurality of carrying devices, a driving mechanism, and controlling devices for

the driving mechanism, of stop devices adjustable on the conveyer for co-operating with the controlling devices to arrest the movement of the conveyer when desired.

"7. The combination with a traveling conveyer having a plurality of carriers thereon, strippers for the carriers, and means for operating the strippers, of a driving mechanism for the conveyer, means for controlling the latter and adjustable stops on the carriers adapted to co-operate with the controlling means. \* \* \*

"10. The combination with the track, the conveyer, and supports on the latter operating on the track and a plurality of carriers on the conveyer, of driving devices for the conveyer, stationary means for controlling said driving devices, and means adjustable on the carriers engaging said means for controlling the driving devices by the movement of the conveyer on the track."

In the specifications it is stated:

"Our present invention has for its object to provide a drier of the endless-conveyer type particularly adapted for carrying small articles to be dried—such as articles of wearing apparel, collars, cuffs, etc.—into and through the drying room or apartment, the air in which is heated by steam or otherwise, and automatically removing the articles from the conveying mechanism, preferably on the outside of the chamber or room; and the invention relates particularly to mechanism for conveying the articles and removing them from the conveyer, and, further, in the provisions made for arresting the operation of the conveyer when desired. \* \* \* In using the apparatus the conveyer is driven continuously in the direction of the arrow shown in Fig. 1; the driving mechanism controlled by the controlling-lever, 16, being in the position shown in Fig. 2. The articles to be dried, such as collars or cuffs, are hung upon the pins, 23, of the carriers at some convenient point outside of the chamber; and they are then carried by the conveyer into the drying-chamber through the aperture, 50, and back and forth therein any desired number of times, and finally pass out of the aperture, 50, to the exterior. As the carriers, 22, pass beneath the projection or arm, 27, the upper ends, 26, of the strippers will be engaged thereby, and the strippers tilted to the position shown in dotted lines in Fig. 3, stripping the articles from the supporting-pins, 23, and allowing them to drop into a suitable receptacle placed beneath. When it is desired to arrest the operation of the conveyer—as, for instance, when one carrier has made a complete circuit of the drying chamber—the pin, 30, is inserted in the recess in the carrier which is to be arrested, and when this pin engages the arm, 20, of the lever, 16, the latter will be tilted and, drawing upon the flexible connection, 14, will operate the movable clutch-section and disconnect the driving mechanism. By providing means whereby the driving mechanism can be disconnected from the conveyer when any of the supports reach a predetermined position, the operators applying the articles may cause the stoppage of the mechanism as often as desired during its passage through the drying-chamber in order to permit the separate lots of articles to be deposited in different receptacles arranged beneath the stripper-operating cam; a change of receptacles being effected during the stoppage of the conveyer. We find in practice that, by arranging a separate positively-actuated stripper upon each of the supports attached to the conveyer, each stripper moving in close proximity to the supporting-pins, 23, the articles will be positively removed and cannot become fastened to the pins by the drying starch."

The utility of this combination in a drying room or chamber is easily understood. As the conveyer moves, the attendant attaches a row of collars, then a row of cuffs, or the goods of A. and then those of B. and then those of C. When dried and ready to be removed from the carrier by the stripping process, it is desirable that collars shall not be mixed with cuffs, or that the goods of A. shall not be commingled with those of B., and so on. If, now, when the collars are stripped off into a receptacle, the movement of the conveyer can be stopped until that receptacle is removed and another substituted to

receive the cuffs, or when the goods of A. are stripped off into its receptacle the movement is arrested until a new receptacle can be substituted to receive those of B., and so on, there is a great saving of time and labor in sorting, etc.

In the combination of claim 6, we have: (1) The track; (2) a conveyer traveling thereon, and having a plurality of carrying devices; (3) a driving mechanism; (4) controlling devices for the driving mechanism; and (5) stop devices, adjustable on the conveyer for co-operating with the controlling devices to arrest the movement of the conveyer when desired.

Claim 7 adds "strippers for the carriers" and "means for operating the strippers."

Claim 10 has: (1) The track; (2) the conveyer and supports thereon operating on the track; (3) a plurality of carriers on the conveyer; (4) driving devices for the conveyer; (5) stationary means for controlling the driving devices; and (6) means adjustable on the carriers, engaging such stationary means for controlling the driving devices by the movement of the conveyer on the track.

These elements act together and produce a result or results. As a general proposition, we have an endless chain mounted on a series of sprocket wheels and guideways. This is driven by a shaft which is geared with two of the sprocket wheels. To stop the movement of the conveyer temporarily, there is a driving shaft connected with the shaft by a clutch mechanism having two members (11 and 12), one of which is splined to the driving shaft, and the other to the sprocket shaft, and is so adapted as to be moved into and out of engagement with the fixed member of the clutch. The movements of one member into and out of engagement with the other are controlled by a lever connected with a handle, whereby the clutch members are engaged, and the lever is also connected with a cord or chain by which the members are disengaged. The disengagement is automatic, and the conveyer can be stopped at any predetermined point. This is done by means of pins or projections which are attached to the chain or to the hangers on which the articles to be dried are supported. The lever has an arm, which projects downwardly, which is held in the path of the projections on the conveyer by a weight thereto attached. This is capable of being moved by a projection or pin on the traveling chain to lift the weight, operate the lever, throw out the clutch and so arrest the conveyer. The goods, collars, cuffs, or other articles are suspended on the conveyer by hangers or carriers, which are provided with pins extending parallel with the conveyer. A stripping device is also mounted on each carrier. This embodies a pivoted plate having perforated ends, and the plate encircles the pins; also, an upwardly extending arm which is so arranged as to be engaged by a stationary cam or projection to tilt the stripper pivoted stripper plate, and so remove the dried articles from the pins when in the desired position outside the dryroom.

I do not find this in the prior art, or in analogous arts. Described in a general way, the operator stands outside the dryroom and attaches the articles to be dried to the carriers on the conveyer by pushing the

pins through the buttonholes. When all the collars are attached, or all the goods of A. are attached, the operator inserts the pin, 30, into a socket on the carrier, which is a part of the stripper of that carrier. The goods are then carried into and through the dryroom and dried. As they pass out, the end of the stripper engages the cam before mentioned, and the dried goods are disengaged and fall into a receptacle provided for the purpose. It is this pin, 30, that engages the end of the lever, 20, which is connected to the clutch mechanism, and the movement of the conveyer turns the lever and disengages the clutch and arrests the movement of the conveyer. This indicates that all the goods of a particular kind, as collars, or all the goods of a particular customer, as those of A., have been dried and dropped into its receptacle. The operator now changes the receptacle, removes the pin, and starts the movement of the conveyer by turning lever 20 and re-engaging the clutch. The pins may be applied to any carrier on the chain.

There is proof that this device has gone into general and extensive use, and the proof is quite conclusive that defendant has appropriated it and is using it. The real defense is that, in view of the prior art, it is not patentable. Infringement is substantially conceded if the patent, as to these claims in issue, is good.

I have examined the prior patents relied upon to show anticipation or to so limit the claims as to show want of patentable invention. Mr. Greeley, the defendant's expert, stated that the patent to Boswell, No. 118,783, contains the nearest approximation of the elements or parts recited in claims 6, 7, and 10, of the Hagen & Cooper patent in suit. He claims that it establishes anticipation, especially when considered with other prior patents. Mr. Freeman, the complainant's expert, on the other hand, fails to find therein any of the elements of the patent in suit, unless it be an endless conveyer. I am unable to agree fully with either expert. The device of the Boswell patent operates vertically, not horizontally. To the endless chain are attached, at intervals, horizontal platforms; those on one side being adapted to receive a load of material to convey it to the top of the building, or it may be at some intermediate floor. The platforms on the other side receive loads to carry them to the bottom of the shaft or the ground. As the starting, after a stop, is controlled by a man on one side, the ascending side, the one using the platforms on the other would risk his life every time he should step thereon. The traveling chain is driven by some operating power, engine or horse power, by means of a shaft. Between the driving shaft and the one connected to the sprocket wheel of the chain there is a clutch mechanism thrown into operation by a spring. To the clutch lever two sliding and pivoted bell cranks, which operate in suitable guides on the standard, are connected. One of the ends of these levers is adapted to be engaged by the ascending platforms. When the elevator is set in motion, it will ascend until one of the loaded platforms engages the bell crank, when the clutch is thrown out, and the operating mechanism held at rest until the operator kicks off the bell crank. The mechanism then starts, but is surely and inevitably stopped when the next platform reaches the bell crank. We have no stop devices adjust-

able on the conveyer, no adjustable stops on the carrier, no means adjustable on the carriers engaging means for controlling devices by the movement of the conveyer on the track.

The aim and purpose of the Hagen & Cooper patent is not to arrest the movement of the conveyer at any one point inevitably, but to permit it to travel any desired distance, and to stop at a point to be determined by the operator, and always with reference to the material carried. If the Boswell device could be adapted to a drying room and made to work in a horizontal plane, which I question, much time would be lost, as the conveyer would be stopping when no stop was desired, and much of the clothes-holding space would be useless or vacant at times, as the stops would be predetermined and only occur after a certain distance had been traveled. Hence a few articles would take up much space and in other cases there might be a stop when only part of the articles of a particular customer had been stripped. In Hagen & Cooper the starting and stopping is under the absolute control of the operator, and a given point on the conveyer may make an entire circuit of the room without any stop at all, if it is not desired to change receptacles. Applied to a drying room, the Boswell device would be far from effective. It would require much more than the skill of a mechanic to make the necessary changes, additions, and modifications to adapt the Boswell device to such a room. It has no hangers and no strippers. This Boswell patent is, at best, suggestive. It is not an anticipation.

I do not think it necessary to go into detail with the other patents. Nowhere do we find the device of the patent in suit. Nowhere, taking the prior patents altogether, do we find devices which combined by the skill of the mechanic would produce the device of the patent in suit. This being so, I am constrained to hold that the Hagen & Cooper patent is valid, not anticipated, discloses mental conception, with means for making it effective, which amounts to patentable invention. Here the patentee did what had not been done before by a combination of elements which is not found in the prior art. Its value is amply shown. Its success and desirability is not denied. Defendant uses it. Others demand it and use it. It is a time and labor saver.

It seems now a simple thing to do what the patentees did, and not all improvements constitute patentable invention. However, the state of the art and common knowledge, as they existed at the time of the alleged invention, are potent and controlling considerations. These patents are presumptively valid, and it cannot be said that they show want of patentable invention on their face. Considering the prior art and common knowledge and the patent itself, if the court has doubt, commercial success, general adoption by the trade, and by users of the patented device becomes an important, and many times a controlling, consideration, and the doubt is resolved in favor of the patent.

The defendant urges that there is no patentable co-operation between the automatic stopping mechanism and the stripping mechanism of claim 7 of this Hagen & Cooper patent. The contention is that the conveyer of this patent is in all essentials the conveyer of the Barnes patent, and also of the Norton patent (British), 1,204, and that the conveyer of the Barnes patent was provided with carriers and strippers

operated by the movement of the carrier, and that the Norton patent, 2,685, had automatic mechanism for releasing the goods on its conveyer. The defendant also contends that therefore, if there be any co-operation between the stripping and stopping mechanism of Hagen & Cooper, it is the result of selection, and not an inventive act. I do not think the result stated necessarily follows the premises. If the different mechanisms are in the prior art in the same and other combinations, or the one element is in one prior patent, and the other in another prior patent, or if there are two different mechanisms performing a certain function in the prior art, and if Hagen & Cooper have simply transferred them to their dryroom, brought them together to perform the same function, produce the same result, while acting in the same way, we have merely a selection of elements if there was more than one in the prior art. If only one, then we have merely a transfer from one dryer to another; but Hagen & Cooper have done much more. So far as mere names are concerned, they have taken elements from this or analogous arts, but they have different forms, a different combination, with a different mode of action and a new result. The defendant's counsel says in his brief:

"But it is said that stopping the conveyer and the strippers gives time in which the operator can remove one basket and replace another. The speed at which these conveyers travel gives ample time to change the basket, which would not take five seconds, while the conveyer is moving, as it travels at such a speed that collars and cuffs are delivered at intervals of ten seconds, as I have frequently timed them, so that this great advantage is so theoretical that it dwindles into insignificance when put to a practical test, and it is yet to be shown that these two devices are simultaneously used to any material respect whatever by practical laundrymen as all the articles are, in usual practice, indiscriminately put through the operations of a commercial laundry, and are identified by individual marking."

Individual marking by the owner, of course, enables the laundryman to identify the goods of A., of B., and so on; but it in no way tends to keep the goods of A. separate from those of B., unless sorting by hand is resorted to. The combination of the patent in suit does away with sorting after drying. The goods of A. are placed on the carriers and are stripped off altogether, in succession, of course, and then the conveyer stops. The receptacle is changed, and then the operator again starts the mechanism or movement of the conveyer. The quotation is rather addressed, it seems to me, to the nonutility of the complainant's device. I do not find it true that the conveyer moves so slowly that there is time to change the receptacle after the goods of A. have been stripped off before those of B. are dropped. I am convinced that, if the conveyer is left in normal movement, the strippers operating at the same time as the suspended goods are reached, and the receptacle containing the goods of A. is removed, some of those belonging to B. will be on the floor before any operator can put another receptacle in position. If this is not so, why does the defendant appropriate and use the devices of the patent in suit? Why has it copied so exactly the device of the Hagen & Cooper patent? I am always disposed to hold an alleged inventor to strict accountability, where he has no new elements in his combination, but only an alleged new arrangement, an alleged new mode of operation, and an



alleged new or improved result. It is clear to me that the patent in suit, Hagen & Cooper, is valid and infringed.

Recurring to the Barnes patent and the prior art applicable thereto, I think it well to refer more specifically to the Thompson (British) patent, No. 14,375, which invention relates to the dry-air stoves in which rubberproof garments are dried for vulcanizing and deodorizing purposes. It is designed, says the patent, "to provide mechanism for carrying the garments into, through, and out of the stove without the attendant opening or entering it." The garments are attached outside to the chain, or a band, which carries them into and through the stove and brings them out again. The stove is heated or may be heated by steam pipes and, says the patent, "the foul or vitiated air is drawn out by an air propeller or fan of any suitable construction." The chain travels continuously, and the garments enter the stove through holes or slits provided with flaps of rubber or other elastic or flexible material to close the openings after the garments have passed in or out, as the case may be, for the purpose of preventing the escape of heat.

The complete specifications state that this stove may be heated in any convenient way, preferably by steam pipes laid over the floor and extending up one or more sides of the chamber, and that the vapor arising from the garments is drawn off by a fan or air propeller of any suitable construction; fresh air being admitted through openings provided for the purpose.

It will be noted that this is merely a hot-air chamber through which the garments pass for the purpose of being vulcanized and deodorized, and that the fan is used simply to drive out the vitiated air. There is no special arrangement of elements for the purpose of securing uniformity of temperature throughout the stove or any particular current or currents of air, etc. The Barnes patent goes far beyond this in its scope and purpose. The Norton patent of October 29, 1864, No. 2,685, uses drying cylinders to commence the drying process, and, while it is a compound machine for both drying and tentering, either part may be used separately. The patentee also says that:

"In place of the preparatory drying being performed by means of the steam cylinders, the fabrics may be partially dried by being passed through a heated chamber, the fabrics passing over a series of rollers to and fro, or in a zigzag or other direction either vertically or otherwise. The chamber may be heated by coils or bends of steam pipes, arranged so that the fabrics pass between the coils or bends of pipe, or other convenient means of heating the chamber may also be resorted to. A steam blast or exhaust, or forcing fans, or blowers may be used with advantage in removing the moisture from the chamber."

It seems quite plain that Norton was striving to secure direct radiation for drying the articles of clothing, etc., and that the idea had not dawned upon him that the fan or blower, if used, could by proper arrangement be utilized to secure a proper mixture of the air, secure uniformity of temperature, aid in the drying process, and secure uniformity, speed, etc., as does Barnes. He uses his fan, if used, to drive the moisture from the room, and he arranges or locates same with no other purpose in mind. So his steam coils are arranged to secure drying by direct radiation. He again says:

"The hanks (of yarn) are dried by heat applied conveniently by coils of steam pipes, and the draught may be increased by using an exhaust or forcing fan."

While Norton has a room, a conveyer, clips to fasten the goods thereto, heating coils, and a fan if desired, he is far from the combination of the Barnes patent in suit, far from its conception, mode of operation, and result.

There will be a decree for the complainant on both patents in issue.

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#### FARBENFABRIKEN OF ELBERFELD CO. v. KUEHMSTED.

(Circuit Court, N. D. Illinois, E. D. August 11, 1909.)

No. 27,585.

#### PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—ASPERIN.

The Hoffman patent, No. 644,077, for acetyl salicylic acid, known medically as "aspirin," is for the product of a new process which for the first time produced it in a pure state and rendered it valuable for medicinal use and is valid. Also, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On final hearing.

Banning & Banning, Anthony Gref, and Livingston Gifford, for complainant.

John G. Elliott, for defendant.

SANBORN, District Judge. Suit for infringement of the Hoffman patent, No. 644,077, issued February 22, 1900, the application having been filed August 1, 1898, for a medicinal body whose trade-name is "aspirin," a product of coal tar, otherwise known as "acetyl salicylic acid." The single claim is for an article of manufacture, and not for the method or process of making it. In 1907 complainant's sales of aspirin amounted to 2,000,000 ounces, and it is said that the market for the said infringing article is equally large. The combined sales give it the largest market of any chemical preparation; quinine being next in amount of sales.

Acetyl salicylic acid was known as a chemical product for many years prior to the filing of this application; but it is alleged that it was never known in an unmixed or pure state until discovered by the patentee.

Salicylic acid is made from benzine, a coal-tar product, and is composed of carbon, oxygen, and hydrogen. Acetyl salicylic acid is obtained by replacing an atom of the hydrogen with acetic acid. Kraut, an eminent German chemist, produced it, but not in a pure state, by heating ten parts of salicylic acid with eight parts of acetyl chloride on a back-flow (reflux) cooler in a water bath, as long as hydrochloric

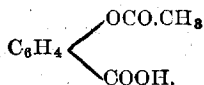
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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

acid would escape, and then cooled it into a crystalline mass, which, he said, could be purified by recrystallizing out from boiling water. The claim of the patentee is that, instead of being purified or recrystallized by boiling water, the product is split by hot water into acetic acid and salicylic acid, and he substituted a waterless process by purifying with dry chloroform. In other words, it is claimed that the substance produced by Kraut, and otherwise found in the prior art, was impure, having a small percentage of free salicylic acid, and some other impurities. The free acid made it injurious to the stomach, and the boiling water split it up or destroyed it, instead of purifying it. The patentee purifies it by the use of dry chloroform, and thus obtains a pure article of acetyl salicylic acid.

In his specifications the patentee says:

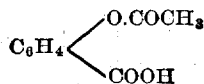
"In the *Annalen der Chemie und Pharmacie*, vol. 150, pages 11 and 12, Kraut has described that he obtained by the action of acetyl chlorid on salicylic acid a body which he thought to be acetyl salicylic acid. I have now found that on heating salicylic acid with acetic anhydride a body is obtained the properties of which are perfectly different from those of the body described by Kraut. According to my researches the body obtained by means of my new process is undoubtedly the real acetyl salicylic acid



"Therefore the compound described by Kraut cannot be the real acetyl salicylic acid, but is another compound. In the following I point out specifically the principal differences between my new compound and the body described by Kraut:

"If the Kraut product is boiled even for a long while with water (according to Kraut's statement) acetic acid is not produced, while my new body, when boiled with water, is readily split up; acetic and salicylic acid being produced. The watery solution of the Kraut body shows the same behavior on the addition of a small quantity of ferric chlorid as a watery solution of salicylic acid when mixed with a small quantity of ferric chlorid; that is to say, it assumes a violet color. On the contrary, a watery solution of my new body when mixed with ferric chlorid does not assume a violet color. If a melted test portion of the Kraut body is allowed to cool, it begins to solidify (according to Kraut's statement) at from 118 degrees to 118.5 degrees centigrade, while a melted test portion of my product solidifies at about 70 degrees centigrade. The melting points of the two compounds cannot be compared, because Kraut does not give the melting point of his compound. It follows from these details that the two compounds are absolutely different.

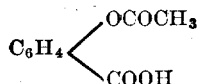
"In producing my new compound, I can proceed as follows (without limiting myself to the particulars given): A mixture prepared from 50 parts of salicylic acid and 75 parts of acetic anhydride is heated for about 2 hours at about 150 degrees centigrade in a vessel provided with a reflux condenser. Thus a clear liquid is obtained, from which on cooling a crystalline mass is separated, which is the acetyl salicylic acid. It is freed from the acetic anhydride by pressing and then recrystallized from dry chloroform. The acid is thus obtained in the shape of glittering white needles melting at about 135 degrees centigrade, which are easily soluble in benzine, alcohol, glacial acetic acid, and chloroform, but difficultly soluble in cold water. It has the formula:



and exhibits therapeutical properties."

His claim is:

"As a new article of manufacture the acetyl salicylic acid having the formula:



being when crystallized from dry chloroform in the shape of white glittering needles, easily soluble in benzine, alcohol and glacial acetic acid, difficultly soluble in cold water, being split by hot water into acetic acid and salicylic acid, melting at about 135 degrees centigrade, substantially as hereinbefore described."

The question for decision is whether it required invention to discover the improved purifying process, whether the patentee obtained a new article of manufacture, or whether the prior art shows the same substance.

In the publications of the prior art there are no statements specifically referring to the decomposition of acetyl salicylic acid by hot water, to its not assuming a violet color when mixed with ferric chlorid, that it melts at 135 degrees centigrade, or that it could be purified by a waterless process. It is also admitted by defendant's experts that the Kraut product contained a small amount of free salicylic acid, and that the patent process is a waterless one.

The laboratory experiments of defendant's experts show that it is possible to purify the product by the use of hot water; but in making these experiments they hurried the process by not heating up the product, but putting it into water already boiling by cooling the solution then obtained in an ice box, and by pouring off the "mother solution" still containing more than half the product in order to rescue the product already crystallized, and prevent its contamination by further contact with the decomposition products present. They made in this manner three to five purifications in order to obtain the pure substance. They also hurried the dissolving stage by finely dividing the mass, and by stirring it in, and the cooling stage by using a small amount of the mass. The result was the loss of about one-half of the product. The experiments show that it is possible to secure purification by the hot-water process; but they also demonstrate its practical inefficiency. In these experiments use was also made of the patented process to the extent that, being warned by the patentee that the crystalline mass was split up by hot water, they took extraordinary precautions to prevent it; and they also employed Hoffman's test that his product gave no violet color with iron chlorid, in order to determine when their product had become pure. In other words, they added Hoffman's discoveries to those of the prior art in order to attempt to demonstrate that such art contains everything discovered by Hoffman. He protects the mass from water altogether, and they protect it as much as possible. The prior art suggests a water purification, and Hoffman a waterless one. It does not appear that it would be industrially possible to produce the product in the manner suggested by the experiments, although Prof. Haines is of opinion that it would be. Complainant's experts testify otherwise. A person skilled in the art,

with a practical end in view, would not proceed as do defendant's experts, but would use the waterless process, because it is easier, cheaper in loss of substance, and more efficient.

That the discovery of the patentee was a most valuable one clearly appears. Even a small amount of free salicylic acid injures the stomach; but, if this can be taken out, the acid is not dissolved in the stomach and does not injure it, but is held in bond intact until it reaches the lower digestive tract. While the discoveries of Von Gilm, Kraut, and others were known for many years before 1898, yet no extensive practical use was ever made of them, while the patented product went into immediate use and so continues on a large scale.

It is true that Kraut produced acetyl salicylic acid in an impure state, having the same formula as the Hoffman product; but it was comparatively useless. Hoffman discovered a method of taking out the impurities which made the product immediately successful to an extraordinary degree. This he did by his discovery of the waterless process of getting rid of the impurities. Unless the patent law is clearly unfavorable, his discovery should be protected. Kraut's product was not beneficially capable of performing the function of a patented article, while Hoffman was the first to make a successful one. He took a comparatively worthless substance and changed it into a valuable one. It was he, and not Kraut or the other famous chemists of the prior art, who gave to the world this valuable remedy.

That the law is with the complainant from the facts stated seems to me to be clear. *Badische v. Kalle* (C. C.) 94 Fed. 163, and s. c. 104 Fed. 802, 44 C. C. A. 201, is perhaps the closest authority in point. Other decisions sustaining the patentability of asperin are: *Merrill v. Yeomans*, 94 U. S. 568, 24 L. Ed. 235; *Blumenthal v. Burrill*, 53 Fed. 105, 3 C. C. A. 462, 11 U. S. App. 619; *Badische v. Klipstein* (C. C.) 125 Fed. 543; *Mauer v. Dickerson*, 113 Fed. 870, 51 C. C. A. 494; *General Electric Co. v. Wise* (C. C.) 119 Fed. 926; *Kirchberger v. American Co.*, 128 Fed. 599, 64 C. C. A. 107; *Naylor v. Aslop Co.* (C. C. A.) 168 Fed. 911 (decided April, 1909); *Consolidated Co. v. Crosby Co.*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279; *Seymour v. Osborn*, 11 Wall. 516, 20 L. Ed. 33; *Mahony v. Malcolm*, 143 Fed. 124, 74 C. C. A. 318; *Queen v. Friedlander* (C. C.) 149 Fed. 771.

An English patent on the Hoffman invention was taken out by one Newton December 22, 1898. In 1905 an infringement suit was heard in the Chancery Division of the High Court of Justice before Mr. Justice Joyce, and resulted in the patent being declared void for anticipation. From the evidence in that case the court found that:

"The crystalline mass is substantially acetyl salicylic acid. Almost the whole of it is the compound acetyl salicylic acid completely formed. For practical purposes the whole may be taken to be and be used as acetyl salicylic acid. Its general and therapeutical characteristics are the same those of pure salicylic acid."

This finding is contrary to the evidence in this case, and is substantially contradicted by all of defendant's experts. Even if the proof in both cases were the same, the decision would not be a strong authority by reason of the differences in the patent systems of the two

countries. *Siemen v. Sellers*, 123 U. S. 276, 8 Sup. Ct. 117, 31 L. Ed. 153; *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800.

As to infringement, the substance sold by defendant answers to all the tests prescribed by the patent claim. Defendant testified that he sold it as the same chemical product as asperin and a substitute for asperin. The record shows sufficient prima facie evidence of infringement.

Complainant is entitled to a decree as prayed.

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FRIES-HARLEY CO. et al. v. DORNAN BROS.

(Circuit Court, E. D. Pennsylvania. July 23, 1909.)

No. 41.

PATENTS (§ 328\*)—INFRINGEMENT—CARPET.

The Heald patent, No. 661,640, for a woven fabric intended especially for carpets, claim 1, strictly construed as required by the prior art, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On final hearing.

John R. Nolan and H. T. Fenton, for complainants.

Henry D. Williams, for defendants.

J. B. McPHERSON, District Judge. This suit charges infringement of letters patent 661,640, granted November 13, 1900, to Alfred Heald for an improvement in woven fabrics. It is not for a machine or for a process of manufacture, but for the manufactured article itself, irrespective of the means by which it may be produced. Of course, as the fabric belongs to the art of weaving, it will as a practical matter be produced by using a loom with some of its adjuncts and appliances; but it may be as well to call attention to the fact that the invention has nothing to do with the loom or with any of its parts, but is concerned solely with a specific article, which is built up by combining threads in a particular fashion. The specification thus describes the fabric:

"My invention consists of a woven fabric intended especially for carpets, rugs, and the like, and of such character that, while it can be readily produced upon a loom such as is ordinarily employed for weaving ingrain carpet, it will form an acceptable substitute for an ordinary brussels carpet, as it bears a close resemblance to the latter in appearance and diversity of coloring, while it has the additional advantage of being, like an ingrain carpet, double faced and reversible; the fabric being, moreover, of close texture and having its faces or plies well tied together so as to be free from the objectionable pockets of an ingrain-carpet fabric. The fabric is also considerably cheaper than a brussels carpet fabric of corresponding quality."

Four kinds of thread are used by the patentee, heavy warp-threads, heavy weft-threads (called also figuring, or patterning, warp-threads and weft-threads), fine or binding warp-threads and fine or binding

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

weft-threads. The heavy warp-threads and the heavy weft-threads, either or both, are used to form the figure or pattern, when a figure is intended to be displayed, and the binding threads are used to fasten the fabric together, so as to give it firmness and stability. The method of construction is described in general terms as follows:

"My improved fabric in its preferred form consists of sets of patterning warp-threads alternating with pairs of fine binding warp-threads, and pairs of heavy weft-threads alternating with pairs of fine weft-threads. Each set of patterning warp-threads may comprise two, three, or more, and these threads may constitute either in whole or in part the surface-threads of the fabric whereby the pattern is produced. Each set of these warp-threads forms on each face of the fabric successive loops very similar to the looped pile-threads of an ordinary brussels carpet; the difference being that, instead of being tied into a backing fabric and otherwise unsupported, these loops are filled and supported by the heavy weft-threads of the fabric. The heavy weft-threads may serve simply as pile-loop filling or supporting threads, or may, in addition to performing this duty, in certain parts of the fabric appear upon either or both faces of the fabric in other parts, so as to diversify the coloring of the pattern. The fine weft-threads bind down and indent the pile-forming warp-threads between the successive pairs of heavy weft-threads, so as to form the desired pile-loop effect, and the fine warp-threads bind together the fine weft-threads of each pair and also the heavy weft-threads of each pair, so as to give the fabric the desired firm texture."

It will be observed from this description that the invention is not rigidly confined to one variety of fabric. Laying aside the plain or solid colored variety, it is clear that at least two other varieties are contemplated: One, where the pattern is produced by differently colored heavy warp-threads; and, another, where the pattern is produced by the combined use of such threads and of the heavy weft-threads. The heavy weft-threads may be brought to either surface of the fabric and may thus diversify the coloring of the pattern, or they may be buried out of sight, and in that event they will simply stuff out, or fill, the loops that are made by the binding-threads as they tie down the heavy warp-threads at frequent intervals. In the present suit the controversy is wholly about the variety first referred to—where the pattern is produced by differently colored heavy warp-threads—for it is only the first claim of the patent that is in issue, and it is clear from the language of the claim that in the fabric there described the heavy weft-threads do not come to the surface at all:

"1. A woven fabric in which sets of pile-forming warp-threads alternating with binding warp-threads are interwoven with heavy weft-threads alternating with binding weft-threads; said pile-forming warp-threads producing pile-loops on both faces of the fabric, the heavy weft-threads distending said pile-loops, the binding weft-threads tying and indenting the pile-forming warp-threads between the heavy weft-threads, and each binding warp-thread passing around a heavy weft-thread, thence to and around a binding weft-thread, and thence back and around a heavy weft-thread, substantially as specified."

The complainants concede that the prior art has several examples of double-faced fabrics, in which all the threads used by the patentee are employed to produce pile-like loops on either face; but it is declared in the brief of counsel that in none of them—

"were pairs of binding warp-threads alternated with sets of pile-forming warp-threads, and interwoven with pairs of binding weft-threads alternated

with heavy weft-threads in a manner to pass from the respective binding weft-threads engaged thereby reversely under and over adjacent heavy weft-threads within the pile-loops in a manner to exert in opposite directions a tying and binding force upon the binding weft-threads, and upon and about the heavy weft-threads, as comprehended by claim 1 of the patent. Or, in other words, the essential structural characteristic so succinctly described on page 1, lines 59 to 66 of the specification, is not found in the prior fabrics."

This essential characteristic (which has already been quoted) may be repeated:

"The fine weft-threads bind down and indent the pile-forming warp-threads between the successive pairs of heavy weft-threads, so as to form the desired pile-loop effect, and the fine warp-threads bind together the fine weft-threads of each pair, and also the heavy weft-threads of each pair so as to give the fabric the desired firm texture."

I have read attentively the record and the briefs of counsel, but I do not think it necessary to discuss the arguments in detail. The defendants insist that the claim has been anticipated, especially by the British patent 344 to Alfred Newton, dated February 2, 1872; the patent No. 388,682 to John Humphries, dated August 23, 1888; the patent No. 638,410 to Thomas Dornan, dated December 5, 1899; the patent No. 312,220 to Priestley & Kunkler, dated February 10, 1885; the patent No. 335,567 to George Crompton, dated February 9, 1886 (reissued July 6, 1886); and the patent No. 541,645 to William Weaver, dated June 25, 1895. Without following the expert testimony that attacks or supports the defense of anticipation, I think it is clear that, in view of the prior art disclosed by these references, the claim under consideration can only be saved if it be strictly construed—confined in effect to the specific fabric thus described. The complainants do not make and sell the article that is shown in the drawings; but in my opinion they have not departed from the claim if it is read in the light of the specification. The essential characteristic to which their counsel refers, namely, the course of the binding warp-thread as described in the last few lines of the claim, is undoubtedly present in the fabric that they do make and sell—the so-called Kashmir rug or carpet—and the other variations from the drawings that appear in the fabric are, I think, warranted by the specification and by the other language of the claim. But, while the patent may thus be saved, the conclusion is unavoidable that (if this view is correct) the defendants do not infringe, for in their fabric the course of the binding warp-thread is plainly different. It is correctly traced in the brief of their counsel (page 41):

"Each binding warp-thread, after passing around a heavy weft-thread—or, more properly, two unseparated heavy weft-threads—passes between a pair of binding weft-threads and thence around two unseparated heavy weft-threads, and thence upward and over and around a binding weft-thread, and thence downward and backward around another binding weft-thread, and then resumes the course as first described. The two binding warp-threads alternately and separately perform their binding functions. The result is an altogether different tying of the threads. The threads are interwoven differently."

Indeed, the defendants' fabric in this respect is nearly identical with the fabric of the Weaver patent, to which reference has been made;



the principal difference being in a part of the course taken by the binding warp-threads.

It should be said, also, that the commercial success that has attended both the complainants and defendants is, in my opinion, due in large part to a change in the course of trade. Probably this change has been as influential as any improvement in the respective fabrics that is due to the method of weaving. The earlier fabrics made under the patents to Priestley & Kunkler and to Crompton were also double faced, and imitated brussels carpets with a fair degree of success; but it was then necessary that they should be made of wool. The trade demanded that wool should be used, and would not have accepted cotton, even if the art of dyeing had at that time been adequate to the producing of colors in cotton that would be as durable and bright as colors in wool. The consequence was that the Priestley & Kunkler and the Crompton carpets were not able to compete with the cheaper tapestry carpets, and were compelled to surrender the market; but the conditions had changed when the complainants and the defendants began to offer their goods to the public. The art of dyeing had improved, so that better and more variegated designs could be produced in cotton as well as in wool, and the trade and the public had now become willing to accept carpets made of cotton. As a result, fabrics that closely resembled the productions of the prior art were received with favor, but by no means for the sole, or even for the principal, reason that the method of manufacture had been materially improved.

Another ground for construing the claim in question strictly is to be found in the proceedings before the commissioner of patents. When the patent was first presented for allowance, claim 1 described the course of the binding warp-threads as follows:

"Each binding warp-thread passing alternately over a heavy weft-thread and under a binding weft-thread, or vice versa, substantially as specified."

The claim in this form was rejected on the patents to Crompton and Newton. If it had been allowed to stand, the language is broad enough to include not only the Crompton and Newton fabrics, but also the fabric made by the defendants. Being rejected, however, the applicant amended the claim so as to present the language that now appears, and stated that the claim had thereby been "rendered more specific than before in (its) definition of the course of the binding warp-threads." No doubt such a result was thus produced, for the claim now is unquestionably more specific than it was in its original form; but the patentee, having limited his claim in order to succeed, is forbidden to insist upon a construction that would give him what he expressly surrendered. *Morgan Envelope Co. v. Albany, etc., Co.*, 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645. Since therefore the original claim was broad enough to cover the defendants' fabric, while the claim as amended does not cover it, except by applying the doctrine of equivalents, it seems to me that the patent must be construed according to its limited sense, and must be confined to the particular article that is described.

Accordingly, for the purposes of this case, I assume that claim 1 of the patent is valid, when restricted to the fabric there pointed out, and I hold that the claim, thus restricted, is not infringed by the fabric that is made by the defendants.

A decree may be entered dismissing the bill, with costs.

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WEBSTER v. OLIVER DITSON CO. et al.

(Circuit Court, D. Massachusetts. June 14, 1909.)

No. 285.

**EQUITY (§ 429\*)—DECREE FOR ACCOUNTING—POWER TO MODIFY.**

A decree entered in a federal court in a suit for an accounting in pursuance of equity rule 19, following an order that the bill be taken pro confesso, except that it renders such order absolute, is interlocutory only, and may be modified by the court where it directs the account to be stated in a manner not authorized by the allegations of the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1027; Dec. Dig. § 429.\*]

In Equity. On defendant's petition, filed May 22, 1909, for rectification of decree entered December 10, 1907.

J. W. Glennan and John M. Coleman, for complainant.

Alex. P. Browne and George K. Woodworth, for defendants.

DODGE, District Judge. The defendant company appeared, but filed no demurrer, plea, or answer, and an order that the bill be taken pro confesso was entered September 16, 1907. On December 10, 1907, the court proceeded to a decree in pursuance of equity rule 19. The order and the decree referred to were both entered after notice to the defendant and without objection on its part. The proper scope and effect of this decree was to render absolute the taking of the bill pro confesso, but it was a final decree in no other sense. The power of the court to let the defendant demur, plead, or answer expired with the term, as the rule provides; but it does not follow that the complainant then became entitled as of course to a final decree, or to any decree, according to the prayer of her bill. What ought to be decreed, in view of the allegations of the bill taken as confessed, was still a question to be passed upon by the court, and a question upon which a defendant, being properly before the court, had a right to be heard. *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105. The bill prayed for an account, and to an account the plaintiff was no doubt entitled; but before the master she had still to prove what was due her, and the defendant had the same right to contest her claim there made as if it had answered her bill. *Langdell*, Equity Pleading, § 84.

To the decree entered December 10, 1907, that the bill be finally taken pro confesso, was added the following clause:

"And that the defendant Oliver Ditson Company be required to account to the plaintiff in the manner prayed for in the bill."

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thereafter, on January 24, 1908, an order was entered appointing a master to state the account between the parties and directing him to ascertain (1) the principal sum now due the complainant by the defendant; (2) the amount of interest due by the defendant to the complainant; (3) the amount that the defendant has paid the complainant, stating the dates of payment. The accounting has since proceeded before the master.

The defendant now submits to the court, having apparently discovered the fact for the first time in the progress of the accounting, that the manner of accounting for which the bill prays is not warranted by the allegations which the bill makes. If this is true, it ought, indeed, to have been called to the attention of the court on December 10, 1907, in order that the last clause of the decree then entered might have been differently worded. But I see no reason to believe that it is now too late to vary the provisions of the clause in question, if that is necessary in order to make it direct only what it should have directed with regard to the accounting. Since the clause has nothing to do with making absolute the taking of the bill pro confesso, it is not governed by those provisions of rule 19 which apply to the remainder of the decree. I think it may be doubted whether this clause ought not, instead of being included in the decree entered December 10th, to have constituted or to have formed part of a distinct order of the court, relating only to the accounting. Such a decree would clearly have been interlocutory in every sense, and might have been modified by the court before final decree, at any term, if necessary to accomplish justice.

I have no doubt that the defendant is right in its contention regarding prayer 4 of the bill:

"That the defendants be required to account for and pay to your complainant \* \* \* the sum of three cents per copy \* \* \* for all copies, or any part or portions, of the Signet Ring that may have been printed, published, sold, or disposed of \* \* \* by any persons under their license or permission, or persons acting in trust for them."

To ask for this is to ask for something not warranted by any allegation to be found in the bill. Such persons are nowhere alleged to have agreed to pay or to have paid the defendant three cents per copy for all copies sold under the defendant's license or permission. Nothing more is alleged than that they have paid the defendant "certain sums" for such license or permission, and that the defendant has failed to account to the complainant for the amounts thus received. Whether any amounts have been so received, and what amounts, if any, and to what extent the defendant has failed to account for such amounts, if to any extent, are clearly the proper inquiries for the Master upon this branch of the case. A report from him, showing that he has done no more than ascertain the number of copies sold by persons other than the defendant under its license or permission and calculate the amount due from the defendant in respect of them at three cents per copy, would have to be recommitted before a proper final decree could be entered in the case. The complainant could not be allowed to recover, merely because of the clause above referred to in the decree of

December 10, 1907, an amount which may well be more than she is entitled to receive upon her own showing.

I think that the decree of December 10th ought to be modified in substance as prayed for by the defendant. The exact provisions regarding the accounting which are to be substituted for the last clause of that decree, and the terms upon which the modification is to be ordered, unless agreed to by the parties, may be settled hereafter.

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In re DRIGGS.

Ex parte RAYMOND et al.

(District Court, S. D. New York. July 8, 1909.)

**1. BANKRUPTCY (§ 217\*)—LIENS ACQUIRED BY JUDICIAL PROCEEDINGS—DIS-SOLUTION.**

Wages earned by a bankrupt prior to his bankruptcy and unpaid, not claimed as exempt, belong to his trustee, and a judgment creditor will be enjoined from collecting the same on an execution issued within four months.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. § 217.\*]

**2. BANKRUPTCY (§ 212\*)—JURISDICTION OF COURT—ADVERSE CLAIMS.**

A court of bankruptcy is without jurisdiction to summarily determine the rights of assignees of the bankrupt's wages, under assignments made prior to the bankruptcy, which can only be determined in plenary suits.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 212.\*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

**3. BANKRUPTCY (§ 217\*)—RIGHTS OF BANKRUPT—LIENS ON EXEMPT PROPERTY.**

A bankrupt is not entitled to an injunction from the court of bankruptcy to protect him from a garnishment, complete before the petition was filed, levied as execution upon exempt property, on the ground that his discharge will release him from the debt; the continued existence of the judgment not being necessary to the validity of the lien.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 217.\*]

**In Bankruptcy.**

This comes up on an order to show cause why a stay should not be granted to prevent certain creditors of the bankrupt from collecting their claims out of the wages of the bankrupt in the state courts. The petition and adjudication took place on May 25, 1909. On May 21st the creditor, Osterhoudt, who had obtained judgment against the bankrupt on that day, issued execution against his future wages, earnings, and salary, under section 1391 of the Code of Civil Procedure of the state of New York. The other two claimants, Raymond and Carroll, have each an assignment of the bankrupt's earnings, obtained before the bankruptcy occurred. It does not appear whether there were any wages earned by the bankrupt and unpaid prior to the filing of the petition, nor does it appear that the bankrupt made any claims to exemption of any part of his wages so due and owing.

Edmund Fletcher Driggs, for bankrupt.

Reginald H. Schenck, for Osterhoudt.

William H. Freedman, for Raymond.

HAND, District Judge (after stating the facts as above).<sup>\*</sup> In so far as there are any wages or salary due to the bankrupt at the date of the filing of the petition, these belong to the trustee, provided the bankrupt has made no claim for exemption; and it is quite clear that the judgment creditor must be enjoined from collecting any part of those wages. So far as the assignees are concerned, I have no jurisdiction over them in this case, and the validity of their assignment must be determined by plenary suit. If the bankrupt has claimed an exemption of wages actually due, I see no reason for the trustee to claim a stay, for in no event can they become a part of the estate. A different question arises as to whether the bankrupt is himself entitled to retain his wages earned. There is no difference between earned wages, for which he claims an exemption, and future wages, to the date of the petition, because neither of these can by any possibility go to the trustee.

The question is, therefore, squarely presented as to whether the bankrupt should be protected from garnishment, complete before petition filed, levied as execution upon exempt property. If the garnishment be no more than an attachment, and if the attachment be valid, it is no answer to say that the debt will be discharged. *Hill v. Harding*, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083; *Pickens v. Roy*, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128. The point is settled by *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, for there can be no distinction in the fact that the garnishment had there gone to decree. The whole rationale of that case was that the "lien" began when the creditor's bill was filed. That bill was as much "equitable execution" as this, and the creditor's rights, being acquired before bankruptcy and not invalidated by the act, simply remain in statu quo. The discharge, when it comes, will not, as said in *Re Beals* (D. C.) 116 Fed. 530, make the "judgment to be a nullity." A discharge is a bar which may be waived. But, regardless of metaphysics, the lien does not require the continued "existence" of the judgment. It is enough that the terms of the judgment circumscribe the quantity of the garnishor's interest. His property is measured by the sum there adjudged due. It is not necessary to determine whether the judgment qua judgment still endures, as it were, in limbo.

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JENNEY v. HAYDEN et al.

(Circuit Court, D. Massachusetts. July 19, 1909.)

No. 510.

COURTS (§ 310\*)—INDISPENSABLE PARTIES.

The bill alleged that the complainant directed C. to buy certain stock on the New York Stock Exchange; that the order was transmitted by C. to the defendant, or to some other person; that the stock was bought, and the certificate came into the defendant's hands with knowledge that the stock belonged to the complainant; that the complainant, having

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<sup>\*</sup>For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

paid C. in full, demanded the stock both of C. and of the defendant, but failed to obtain it; that if the defendant sold the stock, as the complainant was informed, its proceeds were in the defendant's hands free from lien; that the defendant had been paid in full on account of the transaction. The defendant pleaded that C. was a necessary party to the bill. *Held*, that the plea should be sustained.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. § 310.\*]

### In Equity.

Tower, Talbot & Hiler, for complainant.  
Henry W. Beal, for defendant Hayden.

LOWELL, Circuit Judge. The amended bill alleges that the complainant directed Currie to buy 100 shares of the Pennsylvania Railroad in the New York Stock Exchange; that this order was transmitted by Currie to the defendant, or to some one else; that the stock was bought, and the certificate came into the hands of the defendant with knowledge that the stock belonged to the complainant; that the complainant paid Currie in full for the stock, and demanded it of Currie, but did not get it; that Currie went into liquidation by the appointment of a receiver; that the complainant demanded the stock of the defendant at several times; that the complainant had been informed that the defendant had sold the stock in question; that, if the stock was sold, its proceeds are in the defendant's hands free from liens and demands; that the defendant has been paid in full on account of the transaction above mentioned. Allegations generally similar were made concerning another purchase of stock, viz., 100 shares of the Keweenaw Copper Company.

The defendant pleaded that Currie's receiver, who later became his trustee in bankruptcy, was a necessary party to the bill. The case is before the court in effect on the bill and plea. The complainant and defendant are citizens of different states, and, if no other persons are made parties, this court has jurisdiction of the proceedings. Currie seems to be a citizen of the same state as the complainant. A decision in favor of the plea will apparently oust this court's jurisdiction of the controversy. If the court can reach a fair determination of the cause without making Currie's representative a party, it ought to do so.

Even here, however, the defendant must be protected. The bill alleges that in his purchase of the stock (if he purchased it) he acted upon Currie's order. The bill does not allege that he then knew the complainant. Later he is said to have learned the complainant's rights, at some time and in some way not specified. Doubtless the bill alleges that Currie has been paid in full and that the stock is free from liens. But the defendant is entitled to have these issues settled as between himself and Currie, as well as between himself and the complainant. A mere allegation by A., a complainant, that B. has no right in the property in controversy, does not settle it that B. is not a necessary party to the bill. A

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

complainant commonly alleges title in himself rather than in another. In the case at bar, so far as appears from the bill, Hayden may have come into possession of this stock without knowledge of the complainant's rights, though as the result of the complainant's order given to Currie. Of that stock he cannot be deprived by the complainant without obtaining at the same time what amounts to a release or discharge from his liability to Currie, through whom the complainant's rights are derived. A mere allegation in the bill that Currie has no right in the stock is insufficient. The cases cited by the complainant to show that under the circumstances stated in the bill the complainant is entitled to the stock are irrelevant as concerning the question of necessary parties.

The defendant asks the court to read into the pleadings certain alleged facts relating to the transaction. I do not perceive how this is permissible. Even if it were, the complainant would gain nothing. Currie appears actually to have sued Hayden to establish some right in the stock here in controversy, which suit is still pending. Hayden is thus actually between two fires. As he knew Jenney only by way of Currie, he cannot be made liable to Jenney without reference to Currie.

Complainant has 30 days within which to amend his bill.

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KIRWIN et al. v. BOSTON & O. MINING CO.

(Circuit Court, D. Massachusetts. December 30, 1908.)

No. 533.

COURTS (§ 274\*)—FEDERAL COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT—PROCEEDINGS AGAINST CORPORATION.

A federal court of equity will not entertain jurisdiction of a suit to wind up a corporation or appoint a general receiver therefor, where neither the domicile nor property of the corporation are within the state or district and the residence of the stockholders is immaterial.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 274.\*

Citizenship as affecting the jurisdiction of the federal courts, see note to Shipp v. Williams, 10 C. C. A. 249.]

In Equity. On motion for appointment of receiver.

Arthur P. Teele, for the motion.

Homer Albers, opposed.

DODGE, District Judge. According to the allegations of this bill, the complainants are citizens of Massachusetts. The defendant corporation is established under the laws of South Dakota. It owns and operates a mine in Mexico, and it has an office in Boston, where its books and records are kept. According to the recital in the caption of the bill, the Boston office is the defendant's principal place of business, though there is no distinct allegation to that effect. Nor is it distinctly alleged that the corporation does any business in Massachusetts. Service of the order to show cause, however, has been

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

made on the Massachusetts commissioner of corporations. There has been no appearance on the corporation's behalf in the usual form; but an attested copy of a vote of the directors, authorizing and directing the treasurer to appear and consent to the appointment of a receiver, and a consent in writing on behalf of the corporation, signed by the treasurer, in pursuance of the vote, has been filed. The treasurer is also secretary and attests the vote in that capacity.

The complainants, who are two out of the seven directors of the corporation, allege themselves to be also creditors in the amount of \$4,052.67. They bring their bill also on behalf of all other creditors who may join. They allege dissension in the board of directors rendering continuance of business impossible, that the corporation is without funds to continue business and insolvent, that another director has sued it, and still other suits against it by him and by other creditors are threatened, and that seizure of the corporation's property in Mexico is also threatened, which will prevent the application of said property to all creditors' claims. They ask for the appointment of a receiver, for an injunction forbidding the disposal of the corporation's property by it or its directors, for an order of sale of said property to be executed in Boston by the receiver, and for the application of the proceeds of such sale to the payment of the corporation's debts.

The American Banking Company of Boston and Malvina A. Cutter of Newton, Mass., filed petitions alleging themselves to be creditors and asking leave to join in the prayers of the bill.

Herbert F. Pierce and Thomas Mannix, alleging themselves to be creditors and stockholders, appear specially to object to the jurisdiction of the court, and without waiving such objection ask to be heard on the question of appointing a receiver. Arthur Mulvey and Louis E. Flye ask leave to appear, object, and be heard in like manner, as stockholders. It appears that Mannix and Flye are directors of the corporation.

So far as residence, or citizenship, or due service upon the defendant are concerned, the jurisdiction of the court is not questioned. There has been no public notice of this application, without which, as this court has said in *Hutchinson v. American Palace Car Co.* (C. C.) 104 Fed. 182, 184, an interlocutory receivership of a corporation ought not to be granted except in very extreme emergencies; but, assuming that all creditors and stockholders who wish to object are before the court, has the court jurisdiction to grant the ultimate relief for which the bill prays? Unless it has, no receiver ought to be appointed.

The bill seeks a winding up of the corporation's affairs under the court's authority and direction, and the receivership applied for is incidental to that purpose. It was said in *Hutchinson v. American Palace Car Co.*, above cited, that:

"Where the purpose is to wind up a corporation, \* \* \* or where it is desired to obtain a 'general receivership,' as this expression is commonly understood, initial proceedings should be at the place of domicile, and the other receivership should be ancillary thereto." 104 Fed. 184.

If all the corporation's property were in Massachusetts, the case might stand differently; or, if any considerable part of its property



were here, this court might for some purposes institute a receivership of such assets. But it has no property of any consequence within this jurisdiction. Its property is in a foreign country, where it can be reached or controlled no more easily by this court than by that court which has authority to appoint a receiver for the corporation and wind it up. It is true that, according to the complainants' affidavits, "a large majority of the stockholders and all the officers of the corporation are residents of Massachusetts and within the jurisdiction of this court," and that the counter affidavits do not contradict these statements. Who the officers referred to are, and where each resides, does not appear. It appears without contradiction from the counter affidavits that the next annual meeting is to be held on January 19, 1909. Whether this be the fact or not, and assuming that the present officers will be continued in their offices, I am not satisfied that the court may properly entertain such a suit as this merely because the corporation's officers are within its jurisdiction, when its domicile and its property are both elsewhere. The residence of a majority of the stockholders seems to me immaterial.

Reasons against the exercise of the jurisdiction invoked by the bill seem to me to be found in the papers presented, even if the jurisdiction exists. As has been stated, two of the seven directors who manage the corporation are the complainants. One complainant is also president. The treasurer and secretary, also a director, appears to consent to the prayer of the bill. Another director appears as treasurer of the American Banking Company to join in the bill. The complainants are supported by all the directors, except the two who oppose this application. Yet though thus supported by a majority of the directors, they allege and rely upon dissensions in the board as to the management of the company's affairs. A minority of the directors who complained of violation of their rights by the majority might claim the aid of the court; but I think the court may well hesitate to relieve a majority of any of its responsibilities. The complainants are not judgment creditors, that they are creditors at all is not admitted, and on the affidavits there is reason to anticipate a controversy regarding their claims. On all the circumstances which appear, I must decline to make the appointment asked for.

Motion for appointment of receiver denied.

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### BURLINGAME v. ADAMS EXPRESS CO.

(Circuit Court, D. Rhode Island. July 22, 1909.)

No. 2,883.

#### 1. CARRIERS (§ 132\*)—EXPRESS COMPANIES—LOSS OF GOODS—PRESUMPTIONS.

Since an express company performs its services as carrier by various lines of railroad and other conveyances, it would be presumed, from an allegation in a declaration against an express company for loss of goods that the company received the goods addressed to a certain person and

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

destination, that it was a common carrier between the points of receipt and delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 578; Dec. Dig. § 132.\*]

**2. CARRIERS (§ 131\*)—DELIVERY TO CARRIER—DECLARATION.**

Where various counts in a declaration against an express company alleged delivery of the goods to defendant for transportation at different places, there was no other ambiguity or uncertainty than is permissible under a *videlicet*, so that proof of delivery at either of the places named would be sufficient.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 574; Dec. Dig. § 131.\*]

**3. CARRIERS (§ 95\*)—TRANSPORTATION—"PROMPTLY AND WITHOUT DELAY."**

The words "promptly and without delay," used to define a carrier's duty with reference to the transportation of goods, mean "with reasonable promptness, and without unreasonable delay."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 396; Dec. Dig. § 95.\*]

On Defendant's Demurrer to Plaintiff's Amended Declaration.

Barney & Lee, for plaintiff.

Green, Hinckley & Allen, for defendant.

BROWN, District Judge. The first count alleges a delivery of goods to the defendant as a common carrier and the receipt of the goods by the defendant for carriage as such common carrier, that the goods were addressed to a certain person at San Juan, Porto Rico, and that the plaintiff paid to the defendant its charges for transportation and carrying said goods to the addressee.

The first cause of demurrer is that the declaration does not state between what points the said defendant was a common carrier of goods, nor does it otherwise appear how it became or was the duty of said defendant to deliver said goods to said consignee. The contention on demurrer that, as a common carrier is not liable beyond its own lines, the limits of its lines should be stated, is of doubtful application to this declaration. The defendant is an express company and is charged in the declaration with the receipt of goods in that capacity for carriage to a particular destination. In substance it is alleged that it was a common carrier between the points of receipt and of delivery.

An express company is not, like a railroad, limited to particular lines, but performs its services as carrier by various lines of railroads and other conveyances. See *Bank of Kentucky v. Adams Express Company*, 93 U. S. 174-182, 23 L. Ed. 872, and *Moore on Carriers*, p. 35, § 9.

I am of the opinion that the declaration sufficiently charges, with certainty to a common intent, that the defendant was a common carrier between the point of receiving the goods and the point of destination.

The second ground of demurrer relates to counts 6 to 10, inclusive. The counts allege a delivery to the defendant, and it will be sufficient if proof of delivery at either of the places named is presented at the tri-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

al. There is no other ambiguity or uncertainty that is permissible under a *videlicet*.

The third ground of demurrer is addressed to the sixth to tenth counts, inclusive, and is disposed of by what we have said concerning the first cause of demurrer.

The fourth cause of demurrer relates to the first, second, third, fourth, fifth, sixth, eighth, ninth, and tenth counts. Upon a reasonable construction the terms "promptly and without delay" must be interpreted to mean "with reasonable promptness and without unreasonable delay"; and as the statement of fact, rather than the statement of legal duty, must be looked at in determining the validity of the declaration in point of substance, the fourth ground of demurrer is without substantial merit.

Demurrer overruled.

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#### THE WESTERLY.

(District Court, D. Rhode Island. July 16, 1909.)

No. 1,210.

#### TOWAGE (§ 11\*)—INJURY TO TOW—STRANDING.

A tug *held* liable for the stranding of a barge which she was docking in a difficult place, where, owing to the shallowness of the water and the presence of rocks at certain places, great care was required in handling the tow and in waiting for a favorable tide.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 17; Dec. Dig. § 11.\*]

In Admiralty.

Frank Healy, for libellant.

Archibald C. Matteson, for claimant.

BROWN, District Judge. The scow barge Stella O'Callaghan was being docked at the wharf of T. J. Welch & Co., on the Pawcatuck river at Westerly, R. I., by the steam tug Westerly, the only steam tug regularly employed upon the Pawcatuck river between Westerly, R. I., and the ocean.

The berth at this wharf is somewhat difficult of access, owing to the fact that the river is very shallow; so shallow that loaded vessels often lie aground except at high water. The Stella had on previous trips lain aground at Welch's wharf. The berth at this wharf is a pocket with a muddy bottom, comparatively level. Some 35 or 40 feet from, and parallel with, the wharf, is a ridge of hard material with more or less stone or rock, thrown up when the channel in the middle of the river was dredged.

The barge was taken up the river above Welch's wharf and opposite Segar's wharf, and was being dropped back into the berth at Welch's wharf, when she grounded so firmly that with the falling tide she could not be hauled off. She went aground at 3:30 p. m., October 28, 1907, about 30 or 40 minutes after the time of high water. It is contended for the tug that, owing to a fresh southeasterly wind, the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tide was backed up and had fallen but little, if at all. The rise and fall of the tide is about 2 feet at this point.

Opposite the southerly side of Segar's dock, and about 25 or 30 feet off, there is a narrow ledge of rock upon which at low tide there is about 7 feet of water. According to the preponderance of evidence the barge grounded at about this place; her stern being about 14 to 16 feet distant from Segar's dock, her bow about 8 feet from the dock.

The barge rested on rocks on her port side, and when subsequently surveyed it was found that one bottom plank was broken about 15 feet from the stern and 2 or 3 feet from amidships on the port side. The break was about 6 or 7 inches in diameter, and splintered in a fore-and-aft direction. A bilge plank on the port side about the same distance from the stern was damaged on the bottom edge.

From the evidence as to the bottom it appears that if, in dropping down, the stern of the barge had been kept closer to the dock, she would not have struck.

The defendant contends that the cause was the excessive overloading of the *Stella*; the master of the *Westerly* saying that he measured her draft and found it 9 feet. According to the preponderance of evidence, however, the draft of the *Stella* was little, if any, more than 8 feet 6 inches.

The peculiar difficulties in making a berth at this dock call for careful attention to the state of the tide and for a close observance of the limits of the narrow berths at these docks. The matter is necessarily left entirely to the knowledge and skill of those in charge of the tug. The existence of rocks at this point called for great diligence in keeping the barge well in toward the dock while she was being dropped back. If it was the fact, as the master of the *Westerly* contends, that the tide had not fallen, then there is no apparent reason why the barge, with careful handling, could not have been brought safely to her berth with a draft of 8 feet 6 inches.

If the tide had in fact fallen to any extent, it was especially necessary to keep as far as possible from the rocks on the outer edge of the berth, or even to wait for a later tide.

Aside from the contention that the draft of the barge was 9 feet, the defendant alleges no reason why the *Westerly* should not have been able to dock the barge safely at that state of the tide. If it was too late, owing to the fall of the tide, to make the berth, so that it was necessary for the barge to lay aground for a time before being taken to her berth, there was no apparent necessity for taking the risk that she might be forced to rest upon rocks at the point where she struck.

She took ground so firmly that she could not be hauled off on that tide or on subsequent tides, and was finally partially discharged by a lighter before she was released.

I am of the opinion that the tug must be held liable. A draft decree may be presented, accordingly.

## WING SING LUNG et al. v. UNITED STATES.

(Circuit Court, D. Massachusetts. June 18, 1909.)

No. 122 (1,801.)

## CUSTOMS DUTIES (§ 38\*)—CLASSIFICATION—"BOLOGNA SAUSAGES."

The provision for "sausages, Bologna," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 655, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1687), does not include all sausages in casings; and Chinese sausages in casings, which are not shown to be commercially known as "Bologna sausages," are not classifiable as such.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.\*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,250 (T. D. 26,-965), affirmed the assessment of duty by the collector of customs at the port of Boston. The Board's opinion reads as follows:

WAITE, General Appraiser. The commodity involved in this case is sausage imported from China, invoiced variously as "sausages," "cured sausage," "dried sausage," etc., etc. It consists, as testified to by a witness produced by the importers, of pork chopped up and mixed with salt and sauce and very little spice. An inspection of the commodity shows it to be a sausage in casing of from one-half to three-quarters of an inch in diameter, consisting of chunks of fat and lean meat in rather coarse condition. It was assessed as prepared meat, at 25 per cent. ad valorem, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 275, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652), and is claimed to be exempt from duty as Bologna sausage under section 2, Free List, par. 655, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1687). The case is presented by the importer on the theory that all chopped meat put up in casings in the form of sausage is subject to entry as Bologna sausage. There is no testimony to show that this commodity was commercially designated as Bologna sausage at the time of the passage of the act, or anything that satisfies us that it is generally known as Bologna sausage in the trade. There is a well-known commodity called Bologna sausage, which has been the subject of consideration by the department and Board in a number of decisions; but those are clearly distinguishable from this. We do not think that all sausage in casings is Bologna sausage. Such a construction would put the well-known fresh pork sausages in casings on the free list. There is nothing in the record to overcome the presumption attending the finding of the collector that this article is prepared meat.

We therefore overrule the protests and affirm the collector's decision.

Searle & Pillsbury (Guy Ham, of counsel), for importers.

William H. Garland, Asst. U. S. Atty.

LOWELL, Circuit Judge. The decision of the Board of General Appraisers is affirmed.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## UNITED STATES v. ALLEN et al.

(Circuit Court, E. D. Oklahoma. August 6, 1909.)

No. 284.

**1. COURTS (§ 302\*)—JURISDICTION OF FEDERAL COURTS—SUITS TO WHICH UNITED STATES IS PARTY.**

By virtue of Const. art. 3, § 2, and the federal judiciary acts (Act March 3, 1875, c. 137, § 1, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), a Circuit Court of the United States has jurisdiction of any suit in which the United States properly appears as plaintiff.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 843; Dec. Dig. § 302.\*]

**2. INDIANS (§ 13\*)—UNITED STATES—CAPACITY TO SUE—SUIT IN RELATION TO INDIAN LANDS.**

The several acts of Congress and treaties by which the United States made unconditional grants of lands in fee simple to each of the Five Civilized tribes of Indians in Indian Territory in their tribal capacity, subject to defeasance only in case the tribe should cease to exist or to occupy the lands, followed by the allotment of such lands in severalty to members of such tribes with the consent of the national government, left no vestige of title to lands so allotted in the United States which will support an action by it in its own behalf in respect to such lands.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.\*]

**3. INDIANS (§ 13\*)—STATUS OF MEMBERS OF FIVE CIVILIZED TRIBES—SUITS RESPECTING LANDS—PARTIES.**

By act March 3, 1901, c. 868, 31 Stat. 1447, amending section 6 of the general allotment act of February 8, 1887 (24 Stat. 390, c. 119), and providing, inter alia, that "every Indian in the Indian Territory is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges and immunities of such citizens," all members of either of the Five Civilized Tribes in such territory became and remain citizens, unaffected by the fact that by subsequent legislation their tribal existence was continued to await the final disposition of the tribal property, or that restrictions still exist on their power to alienate their lands after allotment in severalty; and such being their political and civil status, with full power to maintain suits to protect their rights, the United States occupies no such relationship of trust or guardianship toward them as entitles it to maintain in their behalf suits in its own name, to which they are not parties, to cancel conveyances made by them of their allotted lands.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.\*]

**4. EQUITY (§ 148\*)—BILL—"MULTIFARIOUSNESS."**

A bill filed by the United States to cancel for fraud a large number of separate conveyances made by individual Indians to the several defendants, and having no connection with each other, the suit being on behalf of the various grantors, is multifarious (citing Words and Phrases, vol. 5, p. 4616).

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.\*]

In Equity. On demurrer to bills.

Charles W. Russell, Asst. Atty. Gen., A. N. Frost, Sp. Asst. Atty. Gen., and William J. Gregg, U. S. Dist. Atty.

Robert L. Owen, Gibson, Ramsey & Thomas, Zevely, Givens &

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Smith, Parker & Rider, W. H. Kornegay, James E. Humphrey, B. B. Blakeney, Crump, Rogers & Harris, Rodgers & Clapp, Bond & Melton, Kane & Burford, Charles M. Fechheimer, Hutchings, Murphey & German, Brewers & Andrews, Kenneth S. Murchison, Brown & Stewart, Allen & Pinson, Fuller & Porter, W. W. Hastings, Preston S. Davis, Gilbert & Bond, J. F. McKeel, R. H. Matthews, E. E. McInnis, J. H. Keith, James S. Davenport, Roach & Bradley, Thomas A. Sanson, Stuart & Gordon, Cottingham & Bledsoe, Owen & Stone, Hocker & Bleakmore, Irvin Donovan, Utterback & Hayes, J. G. Ralls, Willmott & Wilhoit, S. V. O'Hare, F. H. Kellogg, D. L. Sleeper, Benj. Martin, Jr., Potterf & Walker, West, Mellette & Jones, Jesse W. Watts, Wrightsman, Diggs & Bush, W. M. Matthews, Cravens, Crosby & Crosby, Paul F. Mackey, S. B. Dawes, Bynum & Allen, C. C. Julian, A. L. Beaty, J. B. Tomlinson, J. M. Humphreys, Walter E. Elrod, Frank L. Warren, Geo. B. Denison, Wm. P. Thompson, Bailey & Kistler, Maxey & Runyan, Robt. F. Blair, W. W. Wood, R. A. Smith, and Enloe V. Vernor, for defendants.

CAMPBELL, District Judge. The United States, as complainants, have filed in this court numerous bills, in each of which many individuals are made defendants. Each bill has relation to lands of one of the Five Civilized Tribes. In the first paragraph of each bill it is alleged that, pursuant to the terms of certain treaties entered into between the United States and the tribe referred to, the United States granted by patent to each tribe certain lands in the Indian Territory, now the Eastern district of Oklahoma, and that by the terms of said treaties and the laws of the United States the United States solemnly obligated themselves to secure and protect such tribe of Indians and the members thereof in the possession, use, and enjoyment of and the title to said land, and that according to the terms of said treaties, and of said acts of Congress relating thereto, and of the patent to said lands, the said tribe of Indians and every member thereof have at all times been and now are without power to dispose of any part of said lands, or of any interest therein, without the consent and authority of the United States, or otherwise than in the manner prescribed by the United States.

It is alleged that by reason of the helpless and dependent character of such Indian tribe and the several members thereof the United States as the guardian have exclusive dominion over and control of the property of said tribe and the several members thereof, by virtue of which there is imposed upon the United States the duty to do whatever is necessary for the guidance, welfare, and protection of such Indians; that said tribe has always been and is now recognized, treated, and dealt with as a tribe of Indians by the United States, under the care of an Indian agent; that Congress still appropriates large sums of money for the benefit and protection of said tribe and the individual members thereof, and for school purposes; that the United States still have in their possession a large sum of money belonging to said tribe; and that there still remains unallotted a large body of land, the common property of such tribe.

Reference is then made to the acts of Congress under which the

lands of such tribe have been allotted to the individual members thereof, subject to the various restrictions against the alienation thereby imposed. Paragraph 4 of the bill then sets forth the character of the land involved at the date of the conveyance sought to be canceled, as to whether allotted or tribal. For convenience, the bills may be classed as follows:

Cherokee Nation: (1) All cases of conveyance by allottees to defendants where restrictions will be removed July 27, 1908. (2) All cases of land not allotted at the time of conveyance complained of, but sold by a person claiming a right to be enrolled, and later denied citizenship. (3) Sales, without approval of Secretary, of lands inherited by full blood heirs, before April 26, 1906. (4) Same as above, after April 26, 1906. (5) Homesteads of freedmen. (6) Conveyance by other than allottee covering land allotted at date of conveyance. (7) Conveyances by other than allottee covering lands which were tribal at date of conveyance. (8) Homesteads of intermarried whites. (9) Mixed bloods, homesteads of half bloods and more, and surplus of three-fourths blood and more. (10) Full bloods, prior to April 26, 1906. (11) Full bloods, after April 26, 1906.

In the Creek Nation the bills may be classified the same as above, except that there is no bill No. 8.

In the Choctaw and Chickasaw Nations the bills may be classed as above. In addition, there is, as to these nations, a bill covering Choctaw and Chickasaw lands sold prior to the removal of restrictions under Act May 27, 1908, c. 199, 35 Stat. 314.

As to the Seminole Nation, the bills may be classified as follows: Conveyances by freedmen after allotment and before issuance of patent; conveyances by full blood heirs before issuance of patent; conveyances by mixed bloods before issuance of patent; conveyance by other than allottees; conveyances by adopted citizens before issuance of patent; conveyances by full bloods.

It is to be noted that all the bills involve lands which had been allotted at the time of the conveyance complained of, except Nos. 2 and 7. None of the bills applying to the Seminole Nation involve unallotted lands. In class No. 2 it is alleged that the tracts of land involved comprise lands of the tribe which had never been allotted at the time of the execution and delivery and recording of the conveyances sought to be canceled, but were then tribal lands, and that no individual at that time nor ever has had any separate ownership thereof or right to transfer or incumber the same. In class No. 7 it is alleged that at the date of the conveyance sought to be canceled the lands were tribal lands, but it is not alleged that they are still tribal and unallotted. Paragraph 5 of the bill then proceeds substantially as follows:

"Your orator further shows that each of the deeds, mortgages, leases, contracts of sale, powers of attorney, and other evidence of title or incumbrance upon tracts of land as hereinafter set forth, was secured by defendants in default, willful, and open violation of law, and the duty which rested upon this nation and every member thereof, and for the purpose of unlawfully incumbering said lands allotted to members of the said Seminole tribe of Indians, all of whom, under the treaties and laws of the United States, were without power or authority to sell, alienate, or incumber said lands in any manner whatsoever. And your orator further shows that, by filing for record and



causing to be recorded the said deeds and other instruments of writing; each of the defendants herein named has unlawfully obtained for himself an apparent title or interest of record to the land hereinbefore described, all of which was done in defiance of said agency supervision and in open violation and contempt of the laws of the United States, to the great detriment, irreparable injury, and loss of said Indians, and in direct interference with the supervision, control, policy, and duty of the government of the United States in that behalf, and in obstruction of the execution of the laws."

Paragraph 6 then sets forth in detail the various conveyances sought to be canceled, involving numerous separate and distinct tracts of land, in each of which conveyances, in most instances, the individual allottee or those claiming through him appear as grantors, and one or more of the defendants appear as grantees.

Paragraph 7 alleges upon information and belief that the defendants have secured, or are proceeding to secure, other unlawful conveyances not now recorded, a minute description of which the pleader alleges cannot be given without the discovery prayed for, and that the defendants are continuing to induce the members of the tribe to execute and deliver to them such conveyances, etc., and in many instances are taking possession of the lands covered by such conveyances for wholly improper purposes, and in fraud of the said tribe. The bill then proceeds:

"And your orator further shows and avers that the defendants will so continue their unlawful acts and doings, and that their conduct as specifically alleged in paragraphs 5 and 6 hereof, as all their present and future conduct, as in this paragraph alleged, will, if continued, greatly harass your orator in the discharge of its duty to and in the administration of its policy in relation to said Indians, and compel it to bring many suits in order to annul and set aside the said deeds, conveyances, mortgages, powers of attorney, leases, and contracts for and about the said lands, which the defendants have taken, are taking, and will continue to take, as herein alleged."

The bill then proceeds specifically as follows:

"(8) And your orator further shows that, in addition to the instruments of writing hereinbefore mentioned and specified, upward of 4,000 other instruments of writing, of a nature similar to those hereinbefore set forth, purporting to convey or to incumber or to affect the title of lands located within the Eastern judicial district of Oklahoma, and only allotted to members of the Five Civilized Tribes, or belonging to said tribes, have been executed and placed on record by the defendants herein and other persons and corporations, in contravention to the treaties entered into between your orator and the said several Indian tribes and the laws of the United States; and your orator shows that unless it shall be permitted to join in its bills numerous defendants, against each of whom your orator has a like cause of action, and against each of whom your orator seeks the same relief, and whose pretended claims are based upon similar facts and involve precisely the same questions of law, your orator will be driven to the necessity of bringing a great number of separate and distinct suits, and that it will be practically impossible for your orator to prosecute and for the court to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time.

"(9) Your orator further shows that, under and by virtue of the aforesaid treaties and acts of Congress, all of the deeds and other instruments of writing hereinafter mentioned constitute a damage to the titles of the said members of the said tribes, thereby greatly deteriorating the value of the interests of the said tribes and members of said tribes in their lands, and that defendants are interfering with the possession and rights of the said tribes and members of the said tribes in their said lands, and are seriously retarding the control and supervision of the government over them, and are producing ir-

reparable injury to your orator and the said tribes and members of said tribes. And your orator further shows that by reason of the duties, obligations, and rights of the government, as set forth in this bill, the government is charged with the duty of protecting in the courts the rights of the said tribes and members thereof, and in that behalf is charged with a trust of a high and delicate character, and that in the performance of these obligations and trust duties it is necessary to seek the aid of this court, to the end that the defendants herein named should not only be ousted from the possession of the said lands, but that the court should order the said several deeds and instruments of writing herein specified and described to be surrendered and delivered up for cancellation, and the record purged of the same; that the court should order the defendants to discover all facts relating to their possession of said lands, and to set forth all deeds, conveyances, mortgages, powers of attorney, and contracts in their possession, other than those particularly mentioned and described in this bill, in order that the same may be canceled.

"(10) Your orator further shows that it has joined in this bill of complaint numerous defendants for the purpose of avoiding a multiplicity of suits to recover the possession of the said lands for the benefit of the said tribes and members thereof, and for the purpose of avoiding a multiplicity of suits to enjoin each of the several defendants herein from continuing to occupy the said lands and from taking any further deeds or other instruments of writing purporting to convey the title to said lands, and a multiplicity of suits to have the deeds and instruments of writing which they have induced the said members to make ordered surrendered and delivered up for cancellation and the record purged thereof; that the interest of your orator, as guardian and trustee for the Indians and as *parens patriæ*, is identical in all cases, and that the right of your orator for relief against the said several defendants is identically the same as against each, and the remedy against the said defendants hereinafter prayed for is precisely the same as against each.

"Forasmuch, therefore, as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable, and to the end that your orator may have that relief which it can only obtain in a court of equity, and that each of the defendants herein named may answer the premises, the benefit whereof is expressly waived by your order, your orator prays. \* \* \*"

The prayer of each bill is, first, that the conveyances set forth in paragraph 6 shall be decreed to be void and of no effect as instruments of conveyance, and shall be canceled, and that the title to the lands therein described be held and decreed to be in the allottees or their heirs, subject to the terms, conditions, and limitations contained in the treaties, agreements, and laws of the United States. It is further prayed that the defendants shall be required to make discovery and disclosure of all other possessions, claim to possessions, deeds, conveyances, mortgages, powers of attorneys, contracts, and other instruments of writing, setting forth a list or schedule thereof in their possession, conveying the lands allotted to any of the members of said tribe, or unallotted lands of the said tribe, and that the defendant be required to surrender and deliver up to the court all such deeds, etc., and that the same be canceled, and such lands decreed to be in the tribe or members thereof to whom they have been allotted, and that all defendants in possession or claiming possession thereof be ordered to vacate or cease making such claims; and then follows the usual prayer for subpoena.

Many of the defendants filed demurrers to these bills, and a date was set by the court for hearing arguments thereon, and all such de-

murrers were presented at the same time, fully argued by counsel, and thereupon submitted to the court. The demurrers set up many grounds, the main ones of which are in substance as follows: That the court is without jurisdiction; that the bill of complaint fails to show any such interest in the plaintiff as to entitle it to maintain these suits; because the plaintiff has no capacity to maintain these suits; because the bill of complaint is wholly devoid of equity; because by said bill it is sought to quiet titles to land of which the plaintiff is not now and has never been in possession; because there is a defect of parties to these suits; because there is a misjoinder of alleged causes of action, in this, that the alleged cause of action against each defendant is improperly joined with that of numerous other defendants, when there is no joint interest as between the defendants, or any joint occupation of the property or any reason that would authorize the joint suit alleged; because the bills are multifarious; because the bills do not disclose such a state of facts as entitle plaintiff to recover in any event.

While a few of the bills filed relate to transactions alleged to have taken place prior to allotment of the lands involved, it appears that such lands have since been allotted, and we have now to consider only lands of the Five Civilized Tribes allotted to citizens thereof.

The contention that the court has no jurisdiction is unsound, if the United States are properly parties plaintiff, because, wherever the United States appear as parties plaintiff or petitioners, the Circuit Court of the United States has jurisdiction. Const. art. 3, § 2, cl. 1; Act Cong. March 3, 1875, c. 137, § 1, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508).

The question of the capacity of the United States to sue involves the question as to whether they have such an interest in the controversy as will entitle them to maintain the suits; for unless they have such interest, either by way of title in the land, or duty or obligation in relation to the allottees and the lands involved, the demurrers on this point must be sustained. In *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747, a suit to annul and set aside a patent, the court say:

"But we are of opinion that, since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use—in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own—it can no more sustain such an action than any private person could under similar circumstances."

Has the government any interest by way of ownership of or title to these allotted lands? They were originally granted by patent to the respective tribes, to be owned and held by them while their tribal relations should exist, or until they should abandon the same. The treaty with the Choctaws provided that the land should be granted to them "in fee simple to them and their descendants, to inure to them while they should exist as a nation and live on it." Kappler, p. 311; 7 Stat. 333. This same title was vested in the Chickasaws. Kappler, p. 487; 11 Stat. 573. By treaty with the Cherokees, of December 29, 1836 (7 Stat. 478), it was agreed that the lands ceded them should be conveyed to them by patent, according to the provisions of the act of May 28, 1830, above referred to, and patent was issued accordingly. By treaty with the Creeks it was provided that the lands assigned them should be granted by patent in fee simple, and that the right thereby granted should be continued to said tribe so long as they should exist as a nation and continue to occupy the same. 7 Stat. 417. By treaty of 1866 (14 Stat. 755), the United States granted and sold to the Seminole Nation the major part, if not all, of the lands now allotted to them for the sum of 50 cents per acre, a total sum of \$100,000. This appears to have been an unconditional grant. The above land so granted to the several tribes was occupied by them in their tribal capacity until the allotment of these lands in severalty to the individual members, with the consent of the government, so that the tribal extinction or abandonment contemplated in the treaties is no longer to be considered. Since the utmost interest by way of title which it can possibly be contended remained in the government was the possibility of its reverting upon such tribal extinction or abandonment, it follows that no vestige of title to these lands now remains in the United States. These lands are now allotted lands; for which allotment certificates have issued, followed, in many instances, by patent, so that the equitable title, at least, has passed to the individual allottee. *Wallace v. Adams*, 143 Fed. 716, 74 C. C. A. 540.

Under the general allotment act, where the title passes direct from the government to the allottee, the issuance of patent passes title to the allottee in fee simple, and under no circumstances does it revert to the United States. *Schrimpscher v. Stockton*, 183 U. S. 290, 22 Sup. Ct. 107, 46 L. Ed. 203. There is less reason why it should revert here. It follows that the complainant can claim no such interest by way of title to these lands as would entitle it to maintain these suits.

In the act of Congress approved May 27, 1908 (35 Stat. 314, c. 199), relative to the removal of restrictions, is found the following provision:

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary

expenses incurred in so doing to be defrayed from the money appropriated by this act."

It is contended that this provision confers upon complainant authority to institute and maintain these suits in the name of the United States. The dominant purpose of this provision seems to be to preclude any such construction of the act as would deny the United States the right to bring such suits referred to, rather than to confer such right. The bill, as originally introduced, did not contain this provision. On February 10, 1908, at the same session, a bill was introduced by Mr. Sherman, in the House, and Senator Clapp, in the Senate, specifically conferring upon the Attorney General the right to bring such suits in the name of the United States, "for the use and benefit and on behalf of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes, or any enrolled member of either thereof." This bill covers over six pages, providing in detail for the conduct of such suits, and also providing for the transfer from the state to the federal courts of such suits in which the United States may become a party, as provided in the bill. This bill did not become a law. After its introduction, and while the committee on Indian affairs was considering the act of May 27, 1908 (35 Stat. 312, c. 199), the Assistant Attorney General for the Interior Department appeared before the committee (Report of Committee on Indian Affairs for March 20, 1908), stating that the department was in favor of the bill under consideration, but calling attention to the jurisdictional bill above referred to, saying that:

"The department believes that some provision for jurisdiction should be passed with the other bill, for these reasons, briefly, that, if it is not necessary, it could do no damage."

He then referred to a number of cases arising in the state courts, wherein he deemed it advisable that provision be made for removal to the federal court. He said:

"The department feels that if the restrictions bill should be passed separately that there would be no possible chance, perhaps, to enact this other bill, because the term is approaching its end, and it is very difficult to get legislation when there is any direct, active opposition to it. That being the history of such efforts, it is the feeling of the department that the two should be passed together."

Then followed a lengthy discussion between the representatives of the department and members of the committee relative to incorporating such jurisdictional provisions. It was conceded that without such provision the existence of the authority and jurisdiction was not without question; the Assistant Attorney General insisting, however, that it already existed. Three of the Oklahoma representatives on the committee opposed the incorporation of a measure granting additional jurisdiction, insisting that only such powers and jurisdiction as already existed by virtue of the enabling act and other legislation should be exercised by the federal government, and conceded that, if they existed, their exercise was proper. Finally the paragraph now being considered was incorporated.

The jurisdiction bill which failed was one positively and specifically conferring the authority and jurisdiction as if they had not there-

tofore existed. This provision is negative in its terms, not purporting to confer the right, but disavowing any intention to deny the same. Therefore it can hardly be said that these 11 lines were incorporated in this bill in lieu of the jurisdiction bill containing over six pages. In view of this legislative history, it is my opinion that it was only intended by this paragraph to provide that, if by existing legislation the United States had authority to institute and maintain such suits, it was not the desire nor the intention of Congress for this act to deny it, and it should not be so construed.

It is urged that the appropriation of money for such suits is a legislative recognition of their validity. In my judgment, it cannot be so construed in this case. It is the expressed purpose of Congress not to deny the right if it existed. A refusal to provide money for the conduct of such suits would have prevented their institution and maintenance, resulting the same as a denial of the right. Hence the appropriation. The authority of the complainant to maintain these suits, if it exists, must be found elsewhere. In the recent opinion of this court, overruling the demurrers in the town lot cases (*U. S. v. Rea-Read Mill & Elevator Co.*, 171 Fed. 501) the history of these Indians was thus reviewed:

"In the early part of the last century the Creek, Cherokee, Chickasaw, Choctaw, and Seminole tribes of Indians, known as the Five Civilized Tribes, occupied in their tribal capacity various portions of the states east of the Mississippi river. The growth and development in these then new states had caused the conflict between the advancing civilization of the white man and the habits and customs of these tribes to become more marked. The Indians as a rule were not then sufficiently advanced toward the civilization of their white neighbors to adapt themselves to the new order of things, and to merge these tribes into the body politic of the state was found to be impracticable. It was therefore apparent to Congress that some disposition of these Indians must be made. The plan of giving them, in exchange for their lands east of the Mississippi, portions of the public domain west of the Mississippi, where, as it then appeared, they would be undisturbed by the encroachment of white men for years to come, was finally devised, and on May 28, 1830, an act of Congress was passed (Act May 28, 1830, c. 148, 4 Stat. 411), providing that the President might cause the country west of the Mississippi, not within any state or organized territory and to which the Indian title had been extinguished, to be divided up into districts for the reception of such tribes or nations of Indians who might choose to exchange lands then occupied by them for such districts and remove thereto. This act contained the following provisions:

"Sec. 3. And be it further enacted, that in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided, always, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same."

Referring to the above act of Congress, it was said by Mr. Justice Davis, in *The Kansas Indians*, 5 Wall. 737, 18 L. Ed. 667:

"The well-defined policy of the government demanded the removal of the Indians from organized states, and it was supposed at the time the country selected for them was so remote as never to be needed for settlement," etc.

The Senate committee, whose report is quoted in *Stephens v. Cherokee Nation*, 174 U. S. 448, 19 Sup. Ct. 723 (43 L. Ed. 1041), took occasion to say, with reference to the Five Civilized Tribes:

"This section of country was set apart to the Indian with the avowed purpose of maintaining an Indian community beyond and away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indians from the whites, and nonparticipation by the whites in their political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations, and their Indian polity, laws, and civilization, if they wished so to do. And if now the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits. It must be assumed, in considering this question, that the Indians themselves have determined to abandon the policy of exclusiveness and to freely admit white people within the Indian Territory; for it cannot be possible that they can intend to demand the removal of the white people either by the government of the United States or their own. They must have realized that, when their policy of maintaining an Indian community isolated from the whites was abandoned for a time, it was abandoned forever."

It is common knowledge of persons conversant with local history that the situation had become such in 1893 that Congress decided that existing conditions should be changed, and that steps should be taken looking to ultimate statehood for Indian Territory and its inhabitants, Indian as well as white. By the appropriation act of that year (Act March 3, 1893, c. 209, 27 Stat. 613-645) a committee consisting of three members was provided for to enter into negotiations with these tribes for the purpose of the relinquishment of the tribal title and the allotment of the lands in severalty to the individual members, having in view the ultimate creation of a state or states of the Union which would embrace these lands. Up to this time the policy of the government had been to exclude white persons from these lands and from commingling with these Indians, but experience had shown this could no longer be done. The Indians themselves, by permitting intermarriage and by various ways, had defeated the governmental policy, and the white noncitizen population in the Indian Territory greatly outnumbered the Indians and was constantly increasing. They were not amenable to the Indian governments. The Indian governments were far from satisfactory to the Indians themselves. Such was the condition that the Senate committee was forced to report:

"It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government cannot be continued. It is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change cannot be much longer delayed. There can be no modification of the system. It cannot be reformed. It must be abandoned, and a better one substituted." *Stephens v. Cherokee Nation*, 174 U. S. 451, 19 Sup. Ct. 724, 43 L. Ed. 1041.

This was the situation which forced Congress to a radical change of policy and a determination to effect a state government for Indian Territory as soon as it could be accomplished consistent with the rights and interest of the Indians. In the Indian Appropriation Act of June 10, 1896, c. 398, 29 Stat. 321, Congress said:

"It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said territory, and afford needful protection to the lives and property of all citizens and residents thereof."

The work of preparing for this change fell upon the commission, first known as the "Dawes Commission," and latterly as the "Commission to the Five Civilized Tribes," acting under successive congressional enactments and agreements with the tribes. The titles to the lands occupied by the various tribes vested in the respective tribes, and not in the individual members. *Cherokee Nation v. Journeycake*, 155 U. S. 196, 15 Sup. Ct. 55, 39 L. Ed. 120; *Shulthis v. MacDougal* (C. C.) 162 Fed. 331. The work of the committee was first to determine who were the members of the tribes, and then to effect a division or allotment of the lands among them.

Agreements were entered into with the various tribes, pursuant to which this allotment of lands was made. In most instances the allottee took his land subject to restrictions upon alienation or incumbrance for a specified time; and it is the alleged sales or other disposition of such lands by the allottee before the expiration of the restriction period that has given rise to most of the suits now being considered. Their purpose is to restore to him the possession, where he is not now in possession, and to cancel and annul, as a cloud upon the title, all instruments involved in such sales or disposition. It is clear, therefore, that the allottee himself is vitally interested in the relief sought. Are his personal status and his relations to the United States such that these suits may be maintained solely in the name of the United States?

As to his personal status, a pertinent inquiry is: Are the members of the Five Civilized Tribes citizens of the United States? At the time they were granted the land comprising the Indian Territory, and during all the years they held the same up to the time when Congress first took active steps to effect an allotment in severalty, they were not citizens of the United States. *Elk v. Wilkins*, 112 U. S. 99, 5 Sup. Ct. 41, 28 L. Ed. 643. In Act Cong. May 2, 1890, c. 182, § 43, 26 Stat. 99, establishing a United States Court in Indian Territory, it was provided that:

"Any member of any Indian tribe or nation, residing in the Indian Territory, may apply to the United States court therein to become a citizen of the United States, and such court shall have jurisdiction thereof and shall hear and determine such application, as provided in the statutes of the United States."

But few Indians availed themselves of this privilege.

In Indian Appropriation Act March 3, 1893, 27 Stat. 645, is found the following provision:

"The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual



within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

In the general allotment act of 1887 (Act Feb. 8, 1887, c. 119, 24 Stat. 388) these Indians had been specifically excluded from its provisions. That act provided that those Indians receiving allotments under its terms should become citizens of the United States. Now, six years later, Congress, by the section just quoted, consents that the Five Civilized Tribes may allot lands in severalty to each of their members, as they may deem proper, and upon such allotment extends to such allottees the right of United States citizenship in all respects.

Section 16 of the same act provides for the Commission to the Five Civilized Tribes, to enter into negotiations with the tribes for the purpose of the extinguishment of the national or tribal title to their lands, and the allotment of the same in severalty to the individual members, with the view to such an adjustment upon the basis of justice and equity as met with the consent of such nations or tribes of Indians, so far as may be necessary, requisite, and suitable to enable the ultimate creation of a state or states of the Union, which shall embrace the lands within said territory. The consent to allotment expressed by Congress in section 15 was necessary, because under the grants conveying these lands to the tribes they could only be held by the Indians in their tribal capacity until such time as Congress should consent to a different holding. Sections 15 and 16 should be construed together. The purpose of Congress, as repeatedly expressed in this act, was to make an equitable division of the tribal or communal property, both personal and real, among the individual members of the tribes, to the end that a state might be formed. To do this the title had to be changed from tribal to individual, and Congress cleared the way for such distribution of property by consenting thereto. The tribes were then free to make such division, should they desire to do so, and it was the office of the Commission to endeavor to procure their consent to do so. The motive of Congress was to secure ultimate statehood, of which state the Indians should be citizens.

It is, of course, presumed that Congress in this legislation had in view what it conceived to be the greatest good to all concerned. It was not disposed to force statehood upon these people, even if it could have done so. But it could and did take the lead in the two very important steps looking to statehood, that of consenting to allotment and extending to allottees the privileges and immunities of United States citizenship. This was in 1893. It is now a matter of common knowledge that the Commission experienced many difficulties in reaching agreements with the tribes and much delay followed. It developed that it had a work of much more magnitude than had first been contemplated, and from time to time Congress enlarged its scope, and by successive acts provided more in detail for the accomplishment of

allotment and division of the lands. In 1901 its work was still unfinished; in fact, it was then just well begun. As yet but few of the Indians had taken their allotments, and, as these were not taken under the scheme provided by the act of 1893, it is doubtful whether they thus became citizens. By Act Cong. March 3, 1901, c. 868, 31 Stat. 1447, section 6 of the general allotment act of 1887 was amended by inserting the words "and every Indian in Indian Territory," so that the portion of the act relating to citizenship read:

"And every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Section 8 of the act of 1887, as originally passed, read as follows:

"That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miami, and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the state of New York, nor to that strip of territory in the state of Nebraska adjoining the Sioux Nation on the south added by executive order." 1 Kappler's Laws, 35.

It is contended that the amendment of 1901 made the act ambiguous and contradictory. It must be presumed that Congress had in mind all the terms of the act that was amended. It is clear that Congress meant to say, and did say, by the amendment:

"Every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, \* \* \* without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The language is clear, and its intent and meaning cannot well be mistaken, and if, in the other parts of the act as originally passed, there are found provisions in conflict with the clear purpose and intent of the amendment, they are in my judgment, so far as they conflict with the amendment, repealed by implication; but attention is called to the fact that section 6 was again amended by Act May 8, 1906, c. 2348, 34 Stat. 182. It is clear that the main purpose of this amendment was to provide that the allottee under the general allotment act of 1887 should not become a citizen of the United States upon delivery of the trust patent, but that such citizenship should be deferred until delivery of patent in fee simple. It is also observed that the words "and every Indian in Indian Territory," constituting the amendment of 1901, are omitted, and the section as amended is made to include this provision:

"And provided, further, that the provisions of this act shall not extend to any Indians in the Indian Territory."

At the same session, and only a few days before, Congress had passed an act providing for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory, and was then considering the Oklahoma enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267), which was passed shortly afterwards. It was natural, therefore, that, having specially legislated for the Five Civilized Tribes, they should, in amending this general allotment act, exclude therefrom all reference thereto. But the status of United States citizenship had attached to the individuals of the Five Civilized Tribes by the amendment of 1901. Without determining whether Congress could, without the consent of a citizen of the United States and without an act on his part forfeiting the same, withdraw such citizenship, it will not be presumed that Congress even intends to do so, except where such intent is expressed in clear and unmistakable terms; and in my judgment the amendment of 1906 does not admit of such construction.

On June 16, 1906, Congress passed the Oklahoma enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267), in the preamble of which it is described as:

"An act to enable the people of Oklahoma and the Indian Territory to frame a constitution and state government, and be admitted into the Union on an equal footing with the original states."

In this act it was further provided:

"That the inhabitants of all that part of the area of the United States now constituting the territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the state of Oklahoma, as hereinafter provided."

And in that act it was further provided:

"That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma, and who have resided within the limits of said proposed state for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state; and all persons qualified to vote for said delegates shall be eligible to serve as delegates."

Whether the Indians of the Five Civilized Tribes at the time of the passing of the enabling act were citizens of the United States or not, its terms clearly make them electors and give them the right to participate in the formation of the state Constitution and state government, if they were inhabitants of the area in the proposed state and are members of Indian nations or tribes. In fact, several of them were members of the constitutional convention. The Constitution framed pursuant to the enabling act provided that the qualified electors of the state shall be male citizens of the United States, male citizens of the state, and male persons of Indian descent native of the United States, who are over the age of 21 years, etc. Upon submission of the Constitution, as provided in the enabling act, the President of the United States proclaimed statehood. The members of the Five Civilized Tribes participate in all state, county, and municipal elections, hold state and county offices, a member of the Chickasaw Nation is now a representative in Congress, and a member of the Cherokee Nation

is now a United States Senator from Oklahoma. In *Boyd v. Thayer*, 143 U. S. 170, 12 Sup. Ct. 385 (36 L. Ed. 103) it is said:

"Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafterwards be controlled, and it also involves the adoption as citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new state with the consent of Congress."

In my judgment, therefore, the members of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges, and immunities of citizenship. I am not unmindful of the fact that Congress, by joint resolution of March 2, 1906 (34 Stat. 822), continued the tribal governments "in full force and effect for all purposes under existing laws, until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members," and that by act of Congress approved April 26, 1906 (34 Stat. 137, c. 1876) tribal existence was "continued in full force and effect for all purposes authorized by law until otherwise provided by law." But by various and successive acts of Congress these tribes have been shorn of their governmental functions. Their courts have long been abolished. Their principal chief, or governor, as the case may be, is subject to removal by the President, who may fill the vacancy by appointment. Provision is made that their public school system shall be superseded by the state public school system. Tribal tax is abolished. Provision is made for the sale of their public buildings and lands. Their Legislature shall not be in session for a longer period in any one year than 30 days, and no act, ordinance, or resolution thereof, except resolutions of adjournment, are valid without approval by the President. In *Buster v. Wright*, 135 Fed. 951, 68 C. C. A. 509, Judge Sanborn said:

"Between the years 1888 and 1901 the United States by various acts of Congress deprived this tribe [Creeks] of all its judicial power and curtailed its remaining authority until its powers of government have become the merest shadows of their former selves."

So it is with all the Five Civilized Tribes; but there is still undistributed tribal property, and until this is divided it is essential that the tribal entity shall be maintained. In my judgment, the existence of this undistributed tribal property was the main reason for continuing the tribal existence, and such must have been the principal motive actuating Congress when the resolution of March 2, 1906, was passed, providing for the continuance of tribal existence "until all property of such tribe, or the proceeds thereof, shall be distributed among the individual members of said tribe." It is a continuance of the tribe in mere legal effect, just as in many states corporations are continued as legal entities after they have ceased to do business, and are practically dissolved, for the purpose of winding up their affairs. It is not, in my judgment, a tribal existence incompatible with the enjoyment of full citizenship in the United States by the members of the tribes. Nor does the fact that these Indians have had restrictions upon alienation imposed upon their allotments necessarily affect their

political status as United States citizens. In *re Heff*, 197 U. S. 508, 25 Sup. Ct. 506, 49 L. Ed. 848.

Can the right to maintain these suits be based upon treaty provisions relating to the protection of these Indians in their possession of the lands originally granted to the tribe? The grants of land made under Act Cong. May 28, 1830, c. 148, 4 Stat. 411, and the treaties entered into pursuant thereof, were to the tribes as such, and not to the individual members. This is clear from the fact, as we have seen, that it was then contemplated that these lands were so remote that they would never be desired for white settlement. It was then the policy of the government to perpetuate the existence of the tribe, and there was no thought of tribal dissolution and the individual holding of the land. The guaranties in the treaties related to tribal protection, and in my judgment cannot be invoked by the individual allottee under the changed conditions now existing. They imposed no duty or obligation upon the United States upon which these suits may be based.

The trust relation of the government, recognized in *Beck v. Flournoy Co.*, 65 Fed. 30, 12 C. C. A. 497, and kindred cases, known as the "Flournoy Cases," as arising from the fact that the legal title to the lands there involved was still retained in the government, does not exist here. It is alleged that by reason of the duties, obligations, and rights of the government, as set forth in this bill, the government is charged with the duty of protecting in the courts the rights of the said tribes and members thereof, and in their behalf is charged with a trust of a high and delicate character. This is but a repetition of the allegation of guardianship, and we have now to consider whether, in view of existing legislation and the present status of the individual allottee of either of the Five Civilized Tribes, these suits may be maintained by the United States as guardian for the Indian, acting in his stead and without making him a party.

Does the relationship of guardian and ward now exist between the United States and the allottee with reference to his restricted land, in the sense originally recognized as existing between the United States and the tribe and members thereof with reference to tribal property? The theory upon which this relation of guardianship arose and was recognized for so many years is well stated in *United States v. Kagama*, 118 U. S., at page 383 et seq., 6 Sup. Ct. 1114 (30 L. Ed. 228), as follows:

"These Indian tribes are the wards of the nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. \* \* \* The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theater of its exercise is within

the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

It is evident the court has in mind tribal Indians, "communities dependent upon the United States; dependent largely for their daily food; dependent for political rights." They owed no allegiance to the states, and received from them no protection. To this class of Indians the court says there arises the duty of protection, and with it the power. Congress and the courts have long recognized the relation of guardianship in such cases, and such relation was recognized as existing over the Five Civilized Tribes before allotment, and in my judgment so exists now with reference to tribal property. *Choctaw Nation v. United States*, 119 U. S. 1, 7 Sup. Ct. 75, 30 L. Ed. 306.

The relation of guardianship is not established by Congress expressly saying in any particular act, "The United States is hereby declared to be the guardian of the Indians," but was deduced by the courts, from a consideration of natural conditions and constitutional and legislative provisions, as being that most nearly approaching the peculiar relation existing between the United States and the Indian tribes when the matter was first presented for judicial consideration (*Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25), and, of course, recognized as continuing so long as the conditions giving rise to it existed. But Congress may terminate this relation at any time. As said Mr. Justice Brewer, in the *Heff Case*, 197 U. S. 499, 25 Sup. Ct. 508, 49 L. Ed. 848:

"Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation; but when that purpose is made clear the question is at an end."

Whether the relation is now terminated, or materially changed, by Congress, we are to determine from a consideration of recent legislation and changes wrought thereby. As the relation was not established by any express provision, neither is it necessary to its termination. These allottees are now citizens of the United States and citizens of the state of Oklahoma. *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394. As such they have the right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property. *Civil Rights Cases*, 109 U. S. 1, 3 Sup. Ct. 18, 27 L. Ed. 835. The fact that the allottee holds land all or a part of which is inalienable for a fixed period does not affect his civil or political status. In *re Heff*, *supra*. Nor does it follow that, because as a citizen he may make contracts generally with reference to his property, he may therefore dispose of restricted lands before the expiration of the restricted period. *Flournoy Cases*, *supra*.

In 19 Opinions of Attorneys General, at page 232, Mr. Garland said of the effect of the general allotment act of 1887, whereby in-

dividual allottees were given the right of occupancy of separate tracts, the title to which the government held in trust for 25 years:

"In this new mode of life, the guardianship which heretofore has been exercised over the tribe is to be transferred to the individual allottees provided for in this act. \* \* \* Prior to the issuing of the second patent, the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe."

United States v. Dooley (C. C.) 151 Fed. 697, was a recent case instituted in the United States Circuit Court, Eastern District of Washington, by the government in its own behalf to cancel a deed made by Susan Swasey, an allottee holding a trust patent, to the other defendants. The allottee, Susan Swasey, is made a party defendant. Concerning the relation of the allottee to the government the court says:

"The contention that the relation of guardian and ward exists between the complainant and the allottee cannot be sustained, for the statute terminated that relation, at least in so far as it affects her personal and political status as an Indian. Such was the holding in the Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. The argument that the same relation exists between the government and the Indians since as before the passage of the act was answered by Mr. Justice Brewer in delivering the opinion of the court, as follows: 'But the logic of this argument implies that the United States can never release itself from the obligation of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national and therefore state citizenship, the benefits and burdens of the laws of the state, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that, because one has Indian and only Indian blood in his veins, he is to be forever one of a special class over whom the general government may in its discretion assume the rights of guardianship which it had once abandoned, and this whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound.' The right to maintain the suit must therefore rest on other grounds than that of the relation of guardian and ward; but it does not follow that, because such status has been abolished, the government is remediless. The authority rests upon another well-defined principle. The complainant is still vested with the legal title to the land," etc.

In *Ex parte Savage* (C. C.) 158 Fed. 205, Judge Pollock, of the Kansas district, said:

"Since the decision by the Supreme Court in the case of *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, \* \* \* it cannot be doubted, I think, under act of Congress of February 8, 1887, \* \* \* when Indians have been allotted in severalty and have received their patent, they are no longer wards of the government, but are citizens of the United States and of the state in which they reside, and are entitled to all the rights guaranteed to citizens of such state."

In the act of 1887, not only were the allottees restricted from selling the lands, but the legal title thereto was reserved in the United States during the restriction period. The allottees herein involved are restricted from selling for a fixed period, but the title is not reserved. Certainly, if in the former case the relation of guardian and ward does not exist, it does not in the latter, unless for some other reason. Had it been the desire of Congress and the Five Civilized Tribes that the trust relation provided in the general allotment act

should prevail here, it could readily have been accomplished by providing that the title should be held in trust by the tribe for the restricted period, to be finally patented to the allottee free from incumbrance, etc. The trust relation of the tribe and the unquestioned right of the government to control tribal property would, in my judgment, have entitled the United States to sue in behalf of the tribe to cancel any conveyance made by the allottee. This, of course, would have involved the continuation of the tribe in legal effect during the restriction period, or until other disposition of the trust was provided, and it is probable that, if such a disposition of the matter was considered, it was not adopted, because of the desire to sooner abolish tribal existence. It is to be remembered that the act of 1893 (27 Stat. 645) contemplated the extinguishment of the tribal title, either by cession to the United States or by allotment to the individual Indians. Had the former been done, then allotment could have been effected similar to that under the act of 1887; but this was not done. The restrictions upon alienation were placed upon these lands for some purpose, however. Let us see what it was. In *Beck v. Flournoy Company*, 65 Fed. 34, 12 C. C. A. 501, Judge Sanborn says:

"The motive that actuated the lawmaker in depriving the Indians of power of alienation is so obvious, and the language of the statute in that behalf is so plain, as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians."

Speaking of restricted allotments under the general act, Judge Phillips says, in *Goodrum v. Buffalo*, 162 Fed. 817, 89 C. C. A. 525:

"Accordingly, while authorizing the allotments in severalty, Congress conceded the lands with a firm cable attached to hold them to the exclusive use and possession of the Indians without qualification, restricting the power of divesting themselves of the use and title until after the fixed period."

There are numerous cases holding that the attempted conveyance of restricted allotted lands is void, and that the purchaser, even though he has paid the purchase price, does not secure even an equitable title; nor can title be built up by adverse possession, estoppel, or any statute of limitations. *Clark v. Akers*, 16 Kan. 166; *Sheldon v. Donohoe*, 40 Kan. 346, 19 Pac. 901; *Schrimscher v. Stockton*, 183 U. S. 295, 22 Sup. Ct. 107, 46 L. Ed. 203; *Beck v. Flournoy Company*, 65 Fed. 30, 12 C. C. A. 497; *Harris v. Hardridge* (C. C. A.) 166 Fed. 109; *Goodrum v. Buffalo*, 162 Fed. 817, 89 C. C. A. 525. In the *Buffalo Case*, last cited, Judge Phillips says:

"There is but one opinion among the courts, with the single exception of the ruling in said United States Court of the Indian Territory, as to the construction of such acts of Congress and patents made thereunder, and that is that any and all schemes and devices resorted to for the purpose of acquiring title to the Indian allotments, during the period of such limitation, are abortive; and this for the palpable reason that it is a period of absolute disability on the part of the Indian to alienate his lands."

It follows that, in any case wherein an allottee has been induced to dispose of any of his restricted land contrary to the laws under which it was set apart to him, he may, if the pretended purchaser has gone into possession, bring suit in ejectment and recover the same, and no



rights accrue to the defendant in such case by virtue of such transaction which he can interpose as a defense. If in such case the allottee is still in possession, he can successfully defend against a suit brought by such pretended purchaser to secure possession by virtue of such pretended conveyance. He can, in short, institute and maintain any action in relation to his restricted land which any other citizen might prosecute in relation to real property, and no deed, mortgage, lease, contract of sale, power of attorney, or other instrument or conveyance made by such allottee regarding his restricted land, contrary to the tribal agreements and acts of Congress relating thereto, can be legally urged as a defense to such action. As said by Judge Phillips in the Buffalo Case, *supra*:

"It should be understood, once for all, that no scheme or device, however ingenious or plausible, concocted by any person, can avail to divest the Indians of the title to their allotted lands within the period of limitation prescribed by Congress."

Having given the allottee the right of citizenship and clothed him with these unusual safeguards against his improvidence, has Congress, in addition thereto, by the mere fact of placing restrictions upon alienation of the land, intended thereby to reserve to the United States the right to sue in its own name to set aside such illegal transactions, and to recover for the allottee such restricted property? If such right is reserved to the government, and we are correct in the conclusion that the allottee is a citizen and may also maintain an action for the same purpose, then we have an anomalous condition under which, while the government suit is pending in this court, the allottee, who is not a party here, if he sees fit, may go into the state court and sue the same defendant for the same relief. What rule of law is there binding the allottee by the suit in this court, to which he is not a party, even though it be professedly for his benefit? My attention is called to none, nor do I know of any. Suppose a final decree is rendered in this court against the government with regard to any particular allotment, and suppose thereafter the allottee proceeds to bring suit in his own name against the same defendant or defendants, for identically the same cause of action and seeking identically the same relief; can these defendants plead as a defense in that suit the decree rendered here in a case to which the allottee was not a party? It is certainly extremely doubtful. In my judgment, the purpose of Congress to establish such an extraordinary condition as this must appear very plainly to warrant a court in arriving at such a conclusion. In *United States v. Paine Lumber Company*, 206 U. S., at page 473, 27 Sup. Ct. 699, 51 L. Ed. 1139, it is said:

"The restraint upon alienation must not be exaggerated. It does not of itself divest the right below a fee."

"It must be borne in mind that the cardinal purpose of Congress was the creation of a state, of which the Indians were to be citizens. Continued guardianship of the Indians was incompatible with citizenship, national and state. In my judgment, when Congress clothed the allottee with full citizenship, and to provide against his improvidence vested in him title to his inalienable land, so that no scheme nor de-

vice, however ingenious, could divest him thereof, it did so for the very reason that in carrying out the original plan of statehood, which was to include the Indian, his status as ward of the government was not in the nature of things compatible with full citizenship in the state and union, and that it was not intended by Congress that the guardianship should longer continue. *United States v. Auger* (C. C.) 153 Fed. 671.

By this I do not mean to say that Congress may not make any law or regulation respecting such Indians, their lands, property, or other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if statehood had not ensued; for it reserved that right in the enabling act. But we are not now concerned with what Congress may do, but what it has done. I am not unmindful of the act of March 3, 1905, and subsequent acts relative thereto. By Act March 3, 1905, c. 1479, 33 Stat. 1060, it is provided:

"It shall be the duty of the Secretary of the Interior to investigate, or cause to be investigated, any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, and he shall in any such case where in his opinion the evidence warrants it, refer the matter to the Attorney General for suit in the proper United States court to cancel the same, and in all cases where it may appear to the court that any lease was obtained by fraud or in violation of such agreement, judgment shall be rendered canceling the same upon such terms and conditions as equity may prescribe, and it shall be allowable where all parties in interest consent thereto to modify any lease and to continue the same as modified: Provided, no lease made by any administrator, executor, guardian, or curator which has been investigated by and has received the approval of the United States court having jurisdiction of the proceeding shall be subject to suit or proceeding by the Secretary of the Interior or Attorney General."

Act March 1, 1907, c. 2285, 34 Stat. 1026, contains this provision:

"To enable the Secretary of the Interior to investigate or cause to be investigated any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the act approved March third, nineteen hundred and five, ten thousand dollars."

Act April 30, 1908, c. 153, 35 Stat. 90 (Indian appropriation act), also provided:

"To enable the Secretary of the Interior to investigate or cause to be investigated any lease, power of attorney, contract, deed, or agreement to sell any allotted land which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the act approved March third, nineteen hundred and five, ten thousand dollars."

This act is a legislative declaration that in 1905, before it was passed, no duty devolved upon the Secretary to supervise the allottee in the leasing of his land, except where the law specifically provided that such lease should be subject to his approval. In *Beck v. Flournoy Company*, supra, Judge Thayer said:

"It is manifest that the amendment in question, authorizing allotted land to be leased in certain cases under the direction of the Secretary of the Interior, was unnecessary, if power to execute leases of allotted lands had already been conferred by previous enactments or treaty stipulation. The last-mentioned act, therefore, is a legislative declaration that Congress did not in-

tend by any previous statute to authorize the leasing of any lands that might be assigned to Indians to be held by them in severalty."

But the Secretary of the Interior is charged with the supervision of all Indian matters wherein the government still retains guardianship, and this duty would have existed without legislation, if at that time the government still retained the guardianship of the allottee with regard to the land covered by the lease referred to. It is noted, further, that the matter is to be referred to the Attorney General for suit in the proper United States court, and in the proviso they are referred to as suits or proceedings by the Secretary of the Interior or the Attorney General. Whatever may have been the status of the allottee in 1905, it is clear that, in a suit now instituted under this provision to cancel or modify a lease, the allottee is a necessary party, first, because he is one of the main parties in interest, and for reasons heretofore adverted to is necessary to a complete determination of the controversy; and, second, because as one of the parties in interest his consent to any modification of the lease as provided for is necessary.

While the appropriation of April 30, 1908, is made to cover investigation by the Secretary of powers of attorney, deeds, or agreements to sell any allotted land, in addition to the leases, provided for in the original act and other appropriation acts, the act refers in terms to the original act, which provides only for suits by the Attorney General regarding leases. There is nothing in this legislation which, in my judgment, authorizes the government to maintain the suits at bar independent of the allottee and without making him a party. It follows that in the present bills there is a defect of parties.

It is urged that, even though the complainant may have the capacity to maintain these suits, the bills are subject to the objection of multifariousness, because numerous defendants are joined in each bill, for the reason that they are alleged to be connected with many distinct transactions regarding as many distinct tracts of land. A bill is said to be multifarious when it improperly joins distinct and independent matters, and thereby confounds them, as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. Words and Phrases, vol. 5, p. 4616. In *Barcus v. Gates*, 89 Fed. 783, 32 C. C. A. 337, it is said:

"Multifariousness arises from the fact either that the transactions which form the subject-matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that one defendant is able to say that as to a large number of the transactions set out in the bill he has no interest or connection whatever. A bill is not multifarious because there are several causes of action. If they occurred out of the same transaction, and if all the defendants are interested in the same rights and the relief against each is of the same general character, the bill may be sustained."

In *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, the suit of a receiver against numerous stockholders to enforce their liability, the court approves and adopts the opinion of District Judge McPherson in the lower court. While that discusses the question of multiplicity of suits, rather than multifariousness, the opinion is very

pertinent to the situation here. In the course of the opinion, it is said:

"If as is sure to happen, different defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. \* \* \* But even if the grounds of diminished trouble and expense may seem to be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, that is probably the only pecuniary advantage to be enjoyed by this cumbersome bill over separate actions at law."

Suppose the court were to retain jurisdiction of these bills, and require that the allottees all be made parties, either as plaintiffs or defendants. The bill would then essentially involve a multitude of separate suits, each by an allottee, the main party in interest, as plaintiff, and one or more, but not all, of the defendants, as defendants. I appreciate fully the motive of the pleaders, who conceived that the government was the only necessary plaintiff, so that each bill would be merely the suit of one plaintiff against various defendants, and, conceiving that each bill involved practically but one question of law, in the determination of which all the defendants were equally interested, deemed it most practical to institute one suit instead of many. But to my mind these bills, viewed from any standpoint consistent with the facts and conditions involved, each essentially combine a multitude of separate and distinct causes of action, by separate and distinct plaintiffs, against separate and distinct defendants, and are subject to the objection of multifariousness.

There are other grounds of objection raised by the demurrers not necessary now to consider. For the reasons set forth in this opinion, the demurrers, in my judgment, should be sustained, and the bills dismissed.

It is so ordered.

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### THE INDRAPURA.

(District Court, D. Oregon. June 14, 1909.)

No. 4,757.

#### 1. INSURANCE (§ 607\*)—MARINE INSURANCE—LOSS OF CARGO—SUBROGATION OF INSURER—ACTION FOR DAMAGES BY INSURER AS ASSIGNEE.

An insurer of cargo lost, who has taken an assignment of the claim of the assured against the vessel, must recover thereon, if at all, in the right of its assignor, and not by any contractual relation springing from the contract of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1512; Dec. Dig. § 607.\*]

#### 2. SHIPPING (§ 125\*)—CARRIAGE OF GOODS—DEVIATION.

It is the duty of the owner of a vessel receiving cargo for transportation to proceed without unnecessary deviation or delay in the course

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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agreed upon in the contract, or if none be designated in the customary or usual track of sea, to the port of delivery.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 459; Dec. Dig. § 125.\*]

**3. SHIPPING (§ 125\*)—LIABILITY FOR LOSS OF CARGO—DEVIATION.**

The placing of a vessel in dry dock after she had received cargo on board for the voyage, for the purpose of painting her bottom when that was not a maritime necessity, constituted a deviation from the voyage, which rendered the vessel liable for a loss of cargo by fire while she was so in the dry dock, in the absence of affirmative proof that the deviation was not a contributing cause; the rule of some courts that mere delay does not render a carrier liable for a loss of goods of which the delay was not the proximate cause being limited, and not applicable to a case of positive breach of contract by deviation which makes the carrier an insurer against any loss resulting directly or indirectly.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 460; Dec. Dig. § 125.\*]

**4. SHIPPING (§§ 134, 141\*)—LIABILITY FOR LOSS OF CARGO—STATUTORY AND CONTRACT EXEMPTIONS.**

The owner of a vessel which has deviated from her voyage by his order is not relieved from liability for loss of cargo by fire during such deviation either by an exemption of loss by fire in the bill of lading or by Rev. St. §§ 4282, 4283 (U. S. Comp. St. 1901, p. 2943), which exempt him from liability for fire "unless caused by the design or neglect of such owner," and limit his liability for any loss occurring without his privity or knowledge.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. §§ 134, 141.\*]

Statutory exemptions of shipowners from liability, see notes to *Nord-Deutscher Lloyd v. Insurance Co. of North America*, 49 C. C. A. 11; *Ral-l v. New York & T. S. S. Co.*, 83 C. C. A. 294.

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

In Admiralty. On exceptions to libel.

Williams, Wood & Linthicum, for libellant.

Bauer & Greene, for *The Indrapura*.

W. W. Cotton and A. C. Spencer, for respondent.

**WOLVERTON**, District Judge. The steamship *Indrapura* was chartered by the Oregon Railroad & Navigation Company from the *Indrapura Steamship Company* to ply between the ports of Portland, Or., and Hong Kong, China. The charter party was assigned by the Oregon Railroad & Navigation Company, with the consent of the steamship company, to the Portland & Asiatic Steamship Company, a subsidiary concern of the Oregon Railroad & Navigation Company. In October, 1902, on a proposed voyage out from Hong Kong bound for Portland, she received from libellant's assignors for carriage to Portland 361 bales of jute, 119 bales of Hessian cloth, and 60 bales of twilled cloth, alleged to be of the value of upwards of \$15,000. This cargo had been shipped from Calcutta to Hong Kong on another steamer, and was at the latter port transhipped to the *Indrapura*. It appears from the libel that, after the shipment was received by the Portland & Asiatic Company and laden aboard the vessel for transportation to Portland in accordance with the bill of lading, the steamship, by order and direction of the owners and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

managing owner, and with the full knowledge and consent of the Portland & Asiatic Company, was placed in a dry dock at Hong Kong, without maritime necessity, to have her bottom painted; that while in dry dock, and after she had been there for two days, and while the goods aforesaid were laden aboard of her as a part of her cargo and while her bottom was being painted, to wit, on November 16, 1902, the Indrapura by the negligence of the owners and officers and crew was set on fire; that after ineffectual attempts to extinguish the fire that portion of the ship's hold containing the merchandise was flooded with water, in consequence of which the jute and Hessian cloth were destroyed or rendered valueless, and the twilled cloth was damaged to such an extent that the salvage on it amounted to but \$284.58. Libelant is assignee of the claims for damage resulting from the disaster, and brings this suit to recover therefor.

Exceptions were interposed to the libel, which proceed upon the ground that the respondent is exempt from liability under the provisions of section 4282 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2948), damage to the cargo having been caused by "fire happening to or on board the vessel," coupled with the general objection that the libel does not state facts sufficient upon which to base the suit. Libelant's cause is based upon the theory that by going into dry dock after the goods were received for transportation the ship was guilty of a deviation, in consequence of which the owners became liable in damages for the value of the cargo destroyed as for a breach of the contract of affreightment. The injured cargo having been insured against marine loss, and the libelant having taken an assignment of the assured's right of action against respondent, the libelant must recover, if at all, in the right of the shipper against the carrier, and not by any contractual relation springing from the contracts of insurance. *St. Louis, etc., Railway v. Commercial Ins. Co.*, 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154. It is the duty of the owner of a vessel receiving cargo for transportation to proceed without unnecessary deviation or delay in the course agreed upon in the contract, or, if none be designated, in the customary or usual track of sea to the port of delivery. *Carver, Carriage by Sea*, § 285; 1 *Parsons on Shipping & Admiralty*, p. 171, note; *Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41; *Express Co. v. Kountze*, 8 Wall. 342, 19 L. Ed. 457; *Merrick v. Webster*, 3 Mich. 268; *Davis v. Garrett*, 6 Bing. 716, 19 E. C. L. 212. It therefore becomes necessary to inquire, first, whether the vessel deviated; and, second, what the effect thereof is, if it did.

The term "deviation" in the law of shipping has at the present day a varied meaning and wide significance. It was originally employed, no doubt, for the purpose its lexicographical definition implies, namely, to express the wandering or straying of a vessel from the customary course of voyage; but it seems now to comprehend in general every conduct of a ship or other vehicle used in commerce tending to vary or increase the risk incident to a shipment. Thus delay in starting a shipment when unreasonable or unexcused came to be regarded as a deviation, not because the vehicle employed departed from the usual route of travel, but because the risk of shipment was changed or increased, and became, in effect, not the same as the one with reference

to which the parties contracted. 3 Kent's Com. 315; Coffin v. Marine Ins. Co., 9 Mass. 436; Phillips v. Irving, 49 E. C. L. 325; Mount v. Larkins, 8 Bing. 108, 21 E. C. L. 214. The reason for grafting this meaning upon the word is stated in this last case to be:

"Because the voyage, commenced after an unreasonable interval of time, would have become a voyage at a different period of the year, at a more advanced age of the ship, and, in short, a different voyage than if it had been prosecuted with proper and ordinary diligence; that is, the risk would have been altered from that which was intended by all parties when the policy was effected."

So also for like reasons towing or being towed was added to the list of acts to which is properly imputable an element of risk not contemplated by the contract, and therefore constituting a deviation. Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592; Scaramonga v. Stamp, 5 C. P. Div. 295; Crocker v. Jackson, 1 Sp. 141, Fed. Cas. No. 3,398; Stewart v. Tennessee Marine Ins. Co., 1 Humph. (Tenn.) 242. In consonance with the enlargement of the meaning of "deviation" in maritime law to meet the exigencies of commerce, it seems a just estimate of its present scope that the Supreme Court of Ohio made in Wilkins v. Insurance Company, 30 Ohio St. 317, 341, 27 Am. Rep. 455, namely:

"Strictly speaking, a 'deviation' originally meant only a departure from the course of the voyage, but now it is always understood in the sense of a material departure from or change in the risk insured against, without just cause"—quoting 2 Parsons, Mar. Ins. p. 1.

The same broad meaning is recognized and sanctioned in Audenreid v. Mercantile Ins. Co., 60 N. Y. 482, 19 Am. Rep. 204:

"It [deviation] is not confined to a departure from or going out of the direct or usual course of a voyage; but it comprehends unusual or unnecessary delay or any act of the charterer or his agent which, without necessity or just cause, increases or changes the risk included in the policy."

And in Bulkley v. Insurance Co., 2 Paine (U. S.) 82, Fed. Cas. No. 2,118, Thompson, Circuit Justice, said:

"The shortness of time or distance of deviation is immaterial if voluntary and without necessity, and not justified by usage."

A case of value in this discussion is Amsinck v. American Ins. Co., 129 Mass. 185, 186, where we find the following statement of the law:

"Any departure from the route named in the policy to a port or place not named, and any delay in prosecuting the voyage, without necessity or just cause, or any delay at a port named in the policy, for the prosecution of business not connected with the business of the voyage, or any unreasonable delay at such port in prosecuting the business of the voyage, is a deviation. Whether the risk is increased thereby is immaterial. The assured has no right to substitute a different voyage from that which is insured, and can only recover for a loss sustained while the ship is prosecuting the voyage named in the policy; and, if she has deviated prior to the loss, she is not then prosecuting the voyage for which she was insured. Whenever, therefore, she departs from the route, or delays in the prosecution of it, it is incumbent on the assured to show that the departure was caused by necessity, or that the delay at a port named in the policy was reasonable under the circumstances in order to accomplish the objects of the voyage. Burgess v. Equitable Ins. Co., 126 Mass. 70, 30 Am. Rep. 654, and cases cited; African Merchants v. British Ins. Co., L. R. 8 Ex. 154."

The significance of the term "deviation" thus developed has peculiar adaptability and relation to the law of insurance. As applied to the relation of carrier and shipper, shorn of all obligations entailed by reason of insurance of cargo or freight, the term is not applied in so strict a sense as will appear further on in the discussion of this controversy. At least, it would seem that there exists in legal contemplation and consequence a difference between a deviation proper—that is, an unwarranted digression from a fixed and contemplated route, or course—and an unnecessary and inexcusable delay or interruption in forwarding freight from point where received to point of destination.

Let us apply the principle to the act of the *Indrapura* in going into dry dock after receiving libellant's merchandise for transportation. The contract of carriage was by the law maritime that libellant's property should, after its receipt and deposit aboard ship by respondent, be transported promptly, directly, without unnecessary delay, and by the usual route to its destination. This manifestly was not done. Instead, it was taken to a place never contemplated or agreed upon, namely, to a dry dock, where, together with the ship, it was lifted entirely out of the water and subjected to totally different or additional sources of risk, among which may be mentioned fire, theft, and seizure. Since the distance taken to effect this different and increased risk can cut no figure, I do not see what better right respondent had to take the cargo into dry dock at Hong Kong than it would have had to take it into such a place at Nagasaki or Yokohama, or some other foreign port, or how, in principle, it can make the case any different in what port the fault occurred, or whether the distance covered for such purpose and before the act was accomplished be one mile or one hundred. The effect upon the contract is, it seems to me, the same. Indeed, it cannot be supposed it would be contended that, if the same thing were done at some port on the voyage, there would not be a deviation. Yet the effect on the contract, all must agree, is the same in one case as in the other. Whether there was an increase of risk or not the elevation of the ship out of its natural element after the merchandise was received for transportation was an act beyond question not contemplated by the shipper, and was assuredly a breach of the implied contract that the ship should remain upon the water and proceed with all practicable dispatch to destination; and the only thing that would or could justify a deviation from this course is an absolute maritime exigency. As to this, the libel alleges there was none. If there were, and this existed prior to the loading of the cargo, it would constitute no excuse, and it cannot now be assumed that any arose after the cargo was taken in. I think a case of deviation has clearly been made out within the principle and reasoning of the adjudged law.

This brings us to an inquiry as to what was the effect of the deviation. A leading case upon the subject is that of *Davis v. Garrett*, 6 Bingham, 716. From the report it appears that the plaintiff shipped a cargo of lime, to be carried on a vessel called "*Safety*" from Bewly Cliff, in the county of Kent to the Regent's Canal, in the county of Middlesex, "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what



nature or kind soever excepted." The vessel, however, did not proceed by the customary and usual course of passage, but departed therefrom into certain places called the "East Swale" and Whitstable Bay, and while so out of her course was overtaken by storm and heavy seas, which wet the lime, causing the vessel to ignite and burn, whereby both it and the cargo were destroyed. The opinion of Tindal, C. J., is so apposite and cogent that I take the liberty of quoting from it at considerable length. Two points are discussed, the first only of which is relevant here. As to this, which was "whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action," the court says:

"But the objection taken is that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course. But, if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover; for, if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in *Parker v. James*, 4 Campb. 112 (a), where the ship was captured whilst in the act of deviation, no such ground of defense was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage. The same answer might be attempted to an action against a defendant who had by mistake forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable. But we think the real answer to the objection is that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case."

The doctrine seems to have the sanction of the lower federal courts. In *Bond v. Cora*, 3 Fed. Cas. No. 1,621, which involves an alleged departure of a vessel from the accustomed course, Washington, Circuit Justice, has this to say:

"Whether he (the freighter) be insured or not, the owner of the vessel is responsible to him, if a loss happen in consequence of the deviation. If so, then it is the owner of the vessel, and not the freighter, who risks the value of the cargo as well as that of the vessel and freight."

In *Knox v. The Ninetta*, 14 Fed. Cas. No. 7,912, which was also a case of a departure by the vessel by running into the river Piankitank, in Virginia, and taking additional cargo upon her deck, and also into Norfolk, by reason whereof she sprung a leak and the ship's cargo was damaged, Randall, District Judge, says:

"The greatest difficulty I have had in this case has been to determine whether this damage was occasioned by the fault or improper conduct of the captain in putting into the Piankitank; but, when I reflect that this was in violation of an express contract with the shipper, who was put to considerable trouble and expense in order to obtain the exclusive use of the vessel, I think

the party who violates such a contract, and takes in additional cargo, without the consent of the first shipper, assumes the risk and responsibility of an insurer, and should be liable for any loss that may afterwards occur."

Referring to the conclusions thus reached, Mr. Parsons says: "This we consider to be the well-settled rule of law." 1 Parsons on Shipping & Admiralty, p. 171, note 4.

The weight of authority elsewhere seems to be to the same purpose. In *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745, the jury was instructed that if the master of the vessel departed from the usual route in pursuing his voyage without reasonable necessity, and the loss of which the plaintiff complained was occasioned thereby, the owner of the vessel would be liable, and the Supreme Court affirmed the ruling. In the *S. D. Seavey Company v. Union Transit Company*, 106 Wis. 394, 82 N. W. 285, where there was a clear deviation, the court says:

"Under its contract it (the defendant) had no right to adopt any method other than that specified for transportation and delivery of the goods, and, when it did so, it became liable as an insurer for any injury that might result by reason of its unauthorized act."

So in *Robertson v. N. S. Company*, 139 N. Y. 416, 419, 34 N. E. 1053, 1054, the court says:

"It cannot be disputed that, if there was such a deviation as is claimed (a carriage by rail instead of by boat), the defendant became an insurer, and thus responsible for all loss and damage to the merchandise, even from unavoidable casualty."

Other cases which involve carriage by railroad by different route than contemplated by the contract of carriage are to the same effect. See *Phillips et al. v. Brigham, Kelly & Co. et al.*, 26 Ga. 617, 71 Am. Dec. 237; *Georgia Railroad Company v. Cole & Co.*, 68 Ga. 623; *Merchants' Despatch Transportation Co. v. Moses Kahn et al.*, 76 Ill. 520; *Chicago Great Western Ry. Co. v. Dunlap*, 71 Kan. 67, 80 Pac. 34; *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.*, 94 Minn. 269, 102 N. W. 709, 69 L. R. A. 509, 110 Am. St. Rep. 361. Text-writers take a like view of the proposition. Carver, in his work on *Carriage by Sea*, § 287, says:

"When a vessel has deviated from her proper course, the shipowner is not only liable for the delay, but he becomes absolutely responsible for any loss or damage to the goods which may occur during the deviation, and which can be attributed to it. He is not protected by the exception of perils in the contract."

Hutchinson in his work on *Carriers* (section 294) is equally explicit. He says:

"So, if the carrier deviate without necessity from the regular and usual course, he will be held responsible for any loss which may occur, whether by the act of God or from any other cause. And it will not be competent for him to show that, had he gone the usual and customary route, he would in all probability have encountered the same danger with the same consequences. Nor will it avail him that, had he done so, the same misfortune would beyond a reasonable doubt have overtaken him. Having been guilty of an inexcusable fault in the commencement of his undertaking, he takes the risk of all the consequences to its end, and the law will not permit him to say, when the loss happens, that the chances were that it would have happened in the same way and from the same cause had he done his duty. And if there be two

routes, one of which is more dangerous than the other, which is known to the carrier, if he take the unsafe or dangerous route instead of the safer one, he takes the risk of loss by so doing."

See, also, 1 Parsons on Shipping & Admiralty, cited supra.

Without looking further, these authorities would seem to be conclusive of the question of the carrier's liability for injury or loss arising by reason of the deviation from the agreed route of carriage, and this regardless of the question of the proximity of cause. There is, however, a well-considered line of cases which clearly apply the doctrine of proximate cause where the carrier has been guilty of delay through negligence and the freight is injured or destroyed, whereas there would have been no injury had there been no delay. The application of the rule is based upon the ground that the carrier cannot reasonably anticipate the result of his delay, and that for aught he could possibly foresee promptness might expose the freight to the risk quite as much as delay. Hence it is held, using the language of the court in *Hoadley v. Northern Transportation Company*, 115 Mass. 304, 307, 15 Am. Rep. 106:

"In actions of this description the injury complained of must be shown to be the direct consequence of the defendant's negligence. This is the only practical rule which can be adopted by courts in the administration of justice. It is not enough that the act charged may constitute one of a series of antecedent events without which, as the result proves, the damage would not have happened. The legal damages which follow any wrong are only such as, according to common experience and the usual course of events, might reasonably be anticipated. The defendant's liability extends only to natural and probable consequences."

This was a case arising from delay in forwarding some machinery from Chicago, Ill., whereby it was destroyed by the great fire of 1871, and of this the court further says:

"The delay did not destroy the property, and there was no connection between the fire and the detention."

Another case illustrative of the principle is *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695. A canal boat was delayed by reason of its being drawn by a lame horse. While on its voyage the boat was overtaken by an extraordinary flood, and wrecked; and its cargo destroyed. Had it not been for the delay, the storm would not have been encountered, but nevertheless it was held that the flood was the proximate, and the delay only the remote cause of the injury to the cargo, and the carrier was relieved of liability. But see *Phila., etc., R. Co. v. Beck*, 125 Pa. 620, 17 Atl. 505, 11 Am. St. Rep. 924. In another case analogous to that—*Daniels et al. v. Ballantine et al.*, 23 Ohio St. 532, 540, 13 Am. Rep. 264—the court says:

"It (the unnecessary delay) constituted a breach of the contract, and for any injury naturally resulting therefrom the defendants were clearly responsible, but except by a conjunction, which there was no reason to anticipate, and which was merely fortuitous, with a subsequent event, it had no agency in causing the loss of the barge. Of that loss the storm was the proximate and sufficient cause."

Other cases to the same purpose are *Denny v. N. Y. C. R. R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645; *Railroad v. Millsaps*, 76 Miss.

855, 25 South. 672; *Herring v. Chesapeake & W. R. Co.*, 101 Va. 778, 45 S. E. 322; *Elam et al. v. St. Louis & S. F. R. Co.* (Mo. App.) 93 S. W. 851. The rule has furthermore been adopted by the federal Supreme Court in *Railroad Company v. Reeves*, 10 Wall. 176, 19 L. Ed. 909, where it was held that, "in case of a loss of which the proximate cause is the act of God or the public enemy, the common carrier is excused, though his own negligence or laches may have contributed as a remote cause." While there are strong authorities averse to the rule here adopted, I am bound by the precedent of *Railroad Company v. Reeves*, and should follow it without reserve were the rule applicable to the facts of the present controversy. It will be noted, however, that these are all cases where delay and not departure from an agreed route of carriage has been the contributing, but remote, cause of the injury complained of. But one case has been cited, nor have I discovered any other, which involves a deviation by explicit departure from the agreed course. I allude to the case of *Souter v. Baymore*, 7 Pa. 415, 47 Am. Dec. 518. But the authority of that case is much weakened by the circumstance that, soon after the suit was brought in the state court, another was instituted in the federal court under the title of *Knox v. The Ninetta*, cited above, where it was held, as has been shown, that the carrier became an insurer, and the ship was liable for any subsequent loss. In the course of his discussion of the cases holding pro and con as it concerns the liability of the carrier where his unnecessary delay has contributed, though remotely, to the injury, Mr. Hutchinson has this further to say (section 301):

"Nothing is better settled than that in case of an unnecessary deviation the carrier will be liable, no matter what the immediate cause of the loss may have been, because the law will trace the loss back to the first fault and will there fix the liability for it, even though the immediate cause may have been some violent and unavoidable change or convulsion in nature. In other words, whenever the carrier attempts to evade responsibility for the loss by charging it to such a cause, he can be successfully met by showing the deviation. And it is difficult to understand why, if he is liable for a loss or injury in case of an unnecessary deviation, he should be excused where he has neglected to send the goods forward with reasonable dispatch. In either case there is a failure to comply with an obligation imposed by the contract of carriage, and it would seem that the same degree of responsibility should attach."

Notwithstanding the divergence of authority as it relates to the effect of an unnecessary delay, there is, so far as I am at present advised, a unanimity of authority as applied to a deviation involving a clear departure from the proposed route of carriage. In either case there is a breach of the contract of carriage. One is a breach rather of omission, and the other is of commission. The one is a delinquency suffered; the other a positive violation by doing something else than that which was stipulated should be done. The wrong "ensuing" therefor in the latter instance is positive in character, and, while the party violating his contract is so in the wrong, he will not be heard to say that his wrongful act is not a contributing cause to the injury sustained, when, if he had not committed the act, the injury would not have ensued. And it seems to me more consonant with justice that the carrier who contracts to carry by a particular route, but notwith-

standing proceeds to carry by another and totally different route, should stand responsible for any loss sustained to the cargo that would not have been sustained had it not been for the deviation, whether the immediate cause of the loss was the act of God or some cause excepted against in the contract itself. It does not seem right that the shipper should lose in such an exigency. He is in no default, he is perfectly innocent of any breach of the contract; while, on the other hand, had it not been for the wrongful carriage of his goods by another route, no loss would have been sustained. Should the shipper lose, or the one who committed the wrong? It seems but reasonable and just that the latter should sustain the loss. If it were a case where neither party was at fault, then the loss would fall upon the owner. There would then be in reality a loss without a wrong, and very naturally no relief could be had on account thereof.

Such being the law, it is nevertheless strenuously insisted that the carrier is relieved from liability by operation of sections 4282 and 4283 of the Revised Statutes of the United States. These sections have received ample construction, and have become well understood. The first exempts the owner from liability for any damage or loss occasioned by fire, unless it was caused by the design or neglect of the owner. Its application renders the owner liable for his personal acts only, not for the acts or negligence of his agents or employés. There must be personal participation in the act of delinquency or omission leading to the loss. The latter section restricts the liability of the owner to the value of his interest in the vessel where the damage is occasioned without the knowledge or privity of such owner. The loss might happen by the neglect, not by the design of the owner, and yet not be occasioned by his knowledge or privity; negligence being of a broader scope than actual knowledge or privity. Such is the judicial construction of these sections. *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; *Craig v. Continental Insurance Co.*, 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; *La Bourgogne*, 210 U. S. 95, 120, 28 Sup. Ct. 664, 52 L. Ed. 973.

Libellant avers that the steamship *Indrapura* was, by order and direction of said owners and managing owner, and with the full knowledge and consent of the Portland & Asiatic Steamship Company, and without maritime necessity therefor, placed in dry dock. This is tantamount to an averment that the deviation—the docking being equivalent thereto—was made with the knowledge and privity of the owners of the *Indrapura*. Where the carrier, however, has thus deviated, being at fault, he becomes an insurer of the cargo which he has undertaken to carry, and, if any loss arises by reason of the fault, he cannot claim the benefit of the statute. *Davis v. Garrett*, *supra*, determines the case by analogy. There the parties by stipulation exempted the carrier from loss by fire, but the court refused to give the stipulation effect, seeing that the carrier was in the wrong. The language of Randall, District Judge, in *Knox v. The Ninetta*, *supra*, is very explicit to the same purpose. I repeat it here:

"I think [says the learned judge] the party who violates such a contract, and takes in additional cargo, without the consent of the first shipper, as-

sumes the risk and responsibility of an insurer, and should be liable for any loss that may afterwards occur."

So it is said by Andrews, Judge, in *Maghee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514, 522, 6 Am. Rep. 124:

"When a carrier accepts goods to be carried with a direction on the part of the owner, to carry them in a particular way, or by a specified route, he is bound to obey such direction; and, if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exceptions in the contract."

The legal effect of these sections of the Revised Statutes is to read them into all contracts of affreightment, so that they become part and parcel of such contracts. But it was not intended, I presume, that they should be the more operative while the carrier is in fault than a stipulation of the parties themselves to the same effect. So that the respondent being in fault by a purposeful deviation, he is not in a position to invoke the benefit of the statute. The ordinary rule holds the carrier responsible for injury or loss during carriage, and he is only exempt when he can show that the loss or injury was caused by the act of God. But, if he is himself in fault, when the loss ensues, he cannot even claim this exemption; and the case cannot be made stronger by the statute declaring the exemption from loss by fire where it is not attributable to the carrier's personal negligence. In this view of the case, it would seem that the respondent is liable under the allegations of the libel. There was a deviation, and while the respondent was purposely at fault the fire occurred. If it can be shown that the fire would have occurred notwithstanding the deviation, this would be a defense. But the burden is cast upon the respondent to maintain that defense; or, in other words, respondent must show that his fault was not a contributing cause to the loss by fire. The principle is aptly stated by the authors of 7 *American & English Encyclopedia of Law*, pp. 207, 208:

"It is the duty of the owner of a vessel, whether a general ship or one chartered for the special purpose of a particular voyage, to proceed, without unnecessary deviation, in the course designated by the contract, or, if no particular course is designated, in the course customarily taken by vessels making the designated voyage; and the general rule is that for any loss sustained during an unnecessary deviation the owner of the cargo may recover commensurate damages. \* \* \* It having been shown that a deviation was made, and that a loss occurred during such deviation, or, it seems, thereafter on the voyage, the presumption arises that such loss was caused by the deviation, and the shipowner to escape liability must show that the loss not only might have happened, but must have happened, although the deviation had not been made."

It follows from these considerations that the exceptions to the libel must be overruled.

## GOODNOUGH MERCANTILE &amp; STOCK CO. v. GALLOWAY et al.

(District Court, D. Oregon. July 19, 1909.)

No. 4,851.

## 1. BANKRUPTCY (§ 303\*)—EQUITABLE LIEN—EVIDENCE.

Evidence held to establish an agreement between complainant and a bankrupt that complainant should have security for advances of money and supplies to be made to the bankrupt from time to time to enable him to perform certain logging contracts, by a lien on the lumber manufactured and the proceeds thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. § 303.\*]

## 2. SALES (§ 235\*)—BILL OF SALE—BONA FIDE PURCHASERS.

Bills of sale not properly acknowledged, and so not entitled to record, are invalid as against persons without notice, or innocent purchasers for value.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 684; Dec. Dig. § 235.\*]

## 3. LIENS (§ 7\*)—EQUITABLE LIENS.

An agreement between complainant and a bankrupt that complainant should have present security on the timber covered by certain logging contracts, the logs cut therefrom, and the lumber manufactured from the logs, in return for money and supplies advanced, to enable the bankrupt to complete his lumber operations, constituted an equitable lien, effective against all save purchasers for value without notice, under the rule that equity looks on things agreed to be done as actually performed.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 26; Dec. Dig. § 7.\*]

## 4. BANKRUPTCY (§ 267\*)—FUNDS OF ESTATE—EQUITABLE LIEN.

Where complainant had an equitable lien on timber and lumber manufactured by a bankrupt, the lien attached to a fund derived from a sale thereof in the hands of the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 380; Dec. Dig. § 267.\*]

## 5. BANKRUPTCY (§ 198\*)—ATTACHMENT LIEN—TERMINATION.

Where no attempt was made in a bankruptcy proceeding to reserve a prior attachment lien of a creditor for the benefit of the estate, as authorized by Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), and no order of the bankruptcy court was made to that end, the lien was dissolved by the bankruptcy proceedings.

Dec. Dig. § 198.\*]

## 6. BANKRUPTCY (§ 207\*)—ATTACHMENT—PRESERVATION.

Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), authorizing the preservation of an attachment lien for the benefit of the estate, was designed only to preserve some interest acquired by virtue of the attachment which would not otherwise pass to the bankrupt's trustee, by virtue of the proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 207.\*]

## 7. BANKRUPTCY (§ 155\*)—INTEREST OF TRUSTEE.

A trustee in bankruptcy takes the bankrupt's property in cases unaffected by fraud in the same condition that the bankrupt held it, and subject to the equities thereon in the bankrupt's hands, except where there has

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been a conveyance or incumbrance void as against the trustee by some express provision in the act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.\*]

**8. BANKRUPTCY (§ 177\*)—BILLS OF SALE—PRIOR EQUITABLE LIEN.**

Bills of sale, assignments, etc., executed by a bankrupt within four months prior to the filing of the bankrupt's petition, but to carry into effect a prior agreement for security for advances and supplies made more than eight months prior to the filing of the petition, were not void because made within four months of the bankruptcy adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 263; Dec. Dig. § 177.\*]

**9. FRAUDS, STATUTE OF (§ 72\*)—"INTEREST IN LAND"—TIMBER CONTRACTS.**

A contract for the sale of standing timber, contemplating separation from the soil within a reasonable time, without any stipulation for the beneficial use of the soil, but with a mere license to enter and take them away, is not a sale of an "interest in land" within the fourth section of the statute of frauds, but is a sale of goods only.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 117; Dec. Dig. § 72.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3700; vol. 8, p. 7691.]

**10. FRAUDS, STATUTE OF (§ 63\*)—TIMBER CONTRACTS—ASSIGNMENT.**

Assignment of timber contracts, contemplating a removal of the timber within a reasonable time, need not be by deed.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 100; Dec. Dig. § 63.\*]

See, also, 156 Fed. 504.

Ramsey & Oliver, for complainant.

J. D. Slater, for defendants.

**WOLVERTON**, District Judge. This is a suit for establishing a lien upon certain alleged trust funds now in the hands of the trustee in bankruptcy, and also upon certain timber contracts which have been heretofore assigned to the complainant. The facts, about which there is no dispute or controversy, are as follows:

On September 27, 1901, Jackson Lewis sold, under written contract, to one G. W. Buck, all standing saw timber of certain specified dimensions contained upon certain premises comprising 160 acres, with the right of possession of such premises for five years for logging purposes, and the removal of the timber; and on the same date Albert Lewis, by a similar contract, sold to Buck the standing saw timber contained upon a certain other tract of land, comprising also 160 acres. On May 2, 1903, both these contracts were assigned, by separate writings, by Buck to the complainant.

On January 31, 1903, Buck executed and delivered to complainant the following writing:

"This is to certify that I have this day sold to G. M. & S. Co., of Elgin, Or., 1,588 logs, 332,100 feet of good merchantable timber, decked up on skidways at my sawmill, 8 miles N. W. of Elgin, at \$2.50 per M—\$830.25. For which I have received value in mdse. supplies furnished my men. This sale is given as collateral security for advances made.

G. W. Buck.

"Witness: J. H. Compton."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



And on February 28, 1903, another writing, as follows:

"This is to certify that I have this day sold to G. M. & S. Co. 145,660 ft. logs 677 @ \$2.50 per M—\$364.15. Given as collateral security on a/c. The same being decked in my millyard at the sawmill. G. W. Buck.

"Witness: T. E. Smith."

This instrument bears date as of the year 1902, but the true date is 1903. Both these instruments were filed for record in the recorder's office for Union county on April 7, 1903.

On January 23d Buck entered into a contract with the Elgin Lumber Company, whereby he agreed to sell to said company 4,000,000 feet of lumber, the output of his mill, at prices stated, according to the quality of the lumber; the lumber to be delivered by Buck into the lumber yard of the second party at Elgin, Or. Indorsed upon the back of this contract is the following, bearing date April 16, 1903:

"Gentlemen: Please pay to the Goodnough Merc. & Stock Co. all money on the within contract, and I will make settlement with them. G. W. Buck."

The defendant Cecil Galloway is the trustee in bankruptcy of G. W. Buck. The bankruptcy of Buck was involuntary, the petition having been filed on the 22d day of May, 1903; and the adjudication was had June 13, 1903. On the 7th day of May, 1903, the Bank of Elgin, in an action instituted in the circuit court of the state of Oregon for Union county against Buck, attached all his right, title, and interest in and to all the lumber and logs then on the latter's sawmill yard, and all the logs cut and then in the timber, and also the timber contracts with Jackson and Albert Lewis. The sawmill was incumbered with a first chattel mortgage in favor of one Jesse Hindman, and with a second mortgage of like character in favor of the First Bank of Elgin. These mortgages were for a larger amount than the mill and property covered were worth. Buck also had a contract with one George Smittle, entered into in September, 1902, whereby he purchased of Smittle the standing saw timber upon a certain other tract of land; but this contract is not involved in the present controversy. Buck's sawmill was erected upon the premises of Albert Lewis, as described in the said timber contract with him. On April 16, 1903, Buck executed to complainant his promissory note for the sum of \$3,850, covering advances made to Buck in the way of money to assist him in cutting logs from the timber, hauling the same to the mill, and manufacturing them into lumber, and also in the way of supplies furnished to Buck and his employes from complainant's store during the period subsequent to September 1, 1902. On May 6, 1903, complainant and Buck had an accounting for money and supplies furnished in like manner from April 16th to that date, whereby it was found that the additional sum of \$390.33 was then due from Buck to complainant. Subsequent to Galloway's appointment as trustee in bankruptcy of the estate of Buck, he sold the logs and timber which Buck had on hand at the time of the institution of bankruptcy proceedings against him, and received therefor the sum of \$2,873. Out of this sum Galloway has paid the claims of laborers amounting to the sum of \$705.57, leaving in his hands a balance of \$2,167.43. This is the fund upon which complain-

ant claims a lien, as well as upon the Jackson and Albert Lewis timber contracts.

The real contention here is concerning the nature of complainant's agreement with Buck, whereby that company claims a lien upon the fund, and whether it was sufficient in legal contemplation to impose any lien thereon or upon the timber contracts of the Lewises. This necessitates a careful review of the testimony bearing upon the subject.

G. W. Buck testifies; as questioned, as follows:

"Q. Were you engaged in the sawmill business there from about the first of September, 1902, until sometime in May, 1903? A. I was.

"Q. State whether or not you made any contract with the plaintiff about the 1st day of September, 1902, with reference to furnishing you supplies and money, etc., to assist you in carrying on the sawmill business, and, if you made any such contract, state as nearly as you can what the contract was? A. Yes, I made such an arrangement. The arrangement I made was furnishing supplies and money when it was needed to pay for help in moving my mill from the old site to the new site and for manufacturing the lumber the coming season.

"Q. Who was to furnish these supplies when needed? A. The Goodnough Mercantile & Stock Company.

"Q. To whom were these supplies and money to be furnished? A. To me, for the purpose of altering the sawmill.

"Q. Did you at that time have any means of your own with which you could carry on such business? A. None to speak of.

"Q. Did you run the mill under that arrangement between the 1st day of September, 1902, and some time in May, 1903? A. I did.

"Q. State what the fact is as to whether or not the plaintiff was to furnish you money and supplies to pay for cutting and hauling logs and also to pay the expense of manufacturing those logs into lumber under the contract. A. Yes.

"Q. Did you at the time you made that arrangement with the plaintiff own and hold any contracts for purchase of timber and leases? A. I did.

"Q. State what the agreement was between you and plaintiff made 1st of September, 1902, with reference to your paying them or repaying them what they agreed to furnish you to carry on this sawmill business. A. The arrangement was that they were to have securities on the logs sawed and in the timber and on the logs in the millyard and on the lumber when it was manufactured.

"Q. They were to have security for what? A. For supplies and money furnished in manufacturing the same.

"Q. Was there anything said in the contract or arrangement to which you referred as to their having or not having a lien on timber that you had contracted for to secure them for their advances made to you in this contract? A. They was to have security on the standing timber which I had on a contract for all moneys furnished to pay for same.

"Q. Did this lien on the timber apply only to the moneys furnished to pay for timber, or did it apply on supplies furnished to carry on the sawmill business? A. Timber and supplies; the security on the timber was to be given for supplies and money furnished to pay for the timber or labor.

"Q. When you say that the plaintiff was to have security on the timber, logs, and lumber, what do you mean by the word 'security'? A. They were to have the lien on it or a bill of sale to secure them for the money advanced.

"Q. How, according to this contract, were they to get their money out of property upon which was the lien or security? A. It was supposed to be manufactured in the lumber, and I had a contract for about 3,000,000 feet of lumber to be delivered to the Elgin Lumber Company at Elgin, Or., and this contract was assigned to G. M. S. & Co. and whenever payments were due on same they was to collect the money to the amount of my indebtedness to them at any time or other, supposed to be at the end of each month, after commencing sawing."

After stating that the bills of sale, being the writings of date January 31 and February 28, 1903, heretofore alluded to, and recorded in the recorder's office, were made to secure complainant for advances, he further testifies:

"They were made with the intention of carrying out the original plan or contract of giving security for what I got."

The witness disclaimed any intent or purpose through such arrangement to secure the complainant for advances to hinder, delay, or in any manner defraud his creditors. On recross-examination, witness further states:

"A. These sales or assignments were made from time to time to corroborate any former contract or agreement which might not be in proper form.

"Q. Then, if I understand you, your contract with plaintiff was, in substance, that you would from time to time secure them for these advances by giving them such bills of sale or assignments as they might require, and that in conformity with that agreement and at their request you executed and delivered these bills of sale, the promissory note, and the assignment of these contracts? A. That is correct."

And on redirect examination:

"Q. Wasn't it in accordance with the original contract made September, 1902, that the plaintiff was to have security or a lien upon the standing timber logs cut, and the lumber manufactured, to secure them for any money or supplies they should furnish you under that contract. A. Yes, it was."

On recross-examination the witness further states that these assignments and contracts were subject to their demand at any time, whenever they asked it, after September of 1902.

W. I. Dishman, the vice president of the Goodnough Mercantile & Stock Company, testifies:

"Q. State what contract, if any, was made by your company plaintiff and the defendant G. W. Buck with reference to the company's furnishing money and supplies to G. W. Buck. A. Well, we entered a contract that we were to have all the security that he could give us in the way of contracts, timber contracts, and security, as I thought a second mortgage on the sawmill, knowing that Jesse B. Hindman had a first mortgage, and he was to contract his lumber if possible and turn us the contract as security. If he failed to contract his mill cut of the year 1903, we were to take the lumber, sell it, and protect Jesse Hindman with as we supposed 25 cents a thousand on the mill cut, as we had the year before, 1902, and take our pay, and Mr. Buck was to have the remainder, the way I understood it.

"Q. What was he to secure you for? A. We were to have security for furnishing him money and supplies to run his sawmill.

"Q. Now, please state what your company agreed to do for him and what he agreed to do with the way of security. A. He agreed to give us all of the security that he had on our demand. We agreed with him that we would furnish him supplies and what necessary money that he would have to have to run his sawmill, with the understanding that he was to get the same contract with the Elgin Lumber Company that he had the year before if possible, and that we were to take Jesse Hindman in so much a thousand for the use of the mill. Didn't know how much that would be. Of course, it would be about 25 cents a thousand, what we paid the year before.

"Q. What were you to have security on, if anything, for your advances? A. We were to have security on those timber contracts, the contracts for lumber, providing he could get one, and a mortgage on the mill, and we were to have, the best I recollect, I don't believe there was any personal property mentioned, I wouldn't say, I think there wasn't. He had a little personal security, but I don't think it was mentioned.

"Q. Well, what is the fact as to your having or not having a lien or security upon all the logs cut and the lumber cut by this party if anything? A. He was to give us a bill of sale of logs, and lumber as on our demand at any time that we asked for it, what logs and lumber he had.

"Q. What did he give you the bill of sale for? A. It was for security for money supplies furnished on the contract."

The witness continues:

"A. According to our contract in September, Mr. Buck was to turn any contract that he could make with any parties over to us at our approval if the contract suited us as security on furnishing him money supplies to run his mill.

"Q. Now state, if you can, why this order on the back of this contract, being plaintiff's Exhibit No. 1 plaintiff's proofs, was made to your company? A. Well, it was signed and turned over to us as security for supplies and money furnished Mr. Buck according to contract in September as security on contracts.

"Q. If you know, state for what purpose Exhibit No. 4 of plaintiff's proofs, being a bill of sale dated January 31, 1903, by G. W. Buck, was made? A. Best of my recollection when we entered into this contract that Mr. Buck was to give us the bill of sale of all the logs that was put in the yards at winter, the fall and winter. I told Frank Smith one day that I hadn't seen any security on that contract; told him that he better look after it. He told me that he had seen Mr. Buck, and that Mr. Buck had given him a bill of sale for the timber and logs. The first time I saw that contract was just now. I had just looked at it.

"Q. If you know for what purpose bill of sale by G. W. Buck to your company dated February 28, 1902, the true year being, as Mr. Buck explained, 1903, for saw logs, being Exhibit No. 5 of plaintiff's proofs, was made, please state for what purpose it was made. A. It was made for security. I seen Mr. Buck and told him I wanted him to fix it up according to contract.

"Q. You have stated that you were given security. Please state what the security was for. A. It was given as security on contract entered in with Mr. Buck in September for supplies and money that we had furnished to him to run his sawmill or logging camp."

A little later the witness further testifies:

"Q. State if you know for what consideration the assignment of the Jackson Lewis contract and lease, being Exhibit No. 2 plaintiff's proofs herein, was made to your company. I refer to written assignment dated May 2, 1903, written on said Exhibit No. 2. A. It was assigned, turned over to the company as security for supplies and money furnished Mr. Buck on contract made in September, at our demand.

"Q. State for what purpose the Albert Lewis timber contract and lease, being Exhibit No. 3 plaintiff's proofs herein, was assigned by said G. W. Buck to your company. I refer to the assignment in writing on said contract dated May 2, 1903. A. It was turned over to us as security for supplies furnished Mr. Buck and money on contract made in September, 1902, with Mr. Buck.

"Q. In the contract to which you have testified made between your company and G. W. Buck about September 1, 1902, was there anything said or understood between the parties hereto as to whether or not your company should have a lien on said timber contract that Buck had with the Lewises and on any logs that might be cut and lumber manufactured therefrom? If so, state what was said or agreed in regard thereto. A. Mr. Buck was to turn over those timber contracts, give us a bill of sale, logs, and give us bill of sale of that lumber that was cut at our demand any time.

"Q. Under your contract with Mr. Buck, made in September, 1902, was he to have the right to sell any lumber or any of the logs or any of that timber without your approval or consent? A. He was not."

The witness further testifies on cross-examination:

"A. My contract, or our contract rather, with Mr. Buck along about September 1, 1902, was that we was to have all the lands on the standing timber,

sawlogs, and lumber as they was cut into lumber and all the property that he had, mill and all. We were to hold the liens on that property, and Mr. Buck was to make us over these timber contracts and bills of sale and sawmill as security on these, on this money and goods that we were furnishing him from the date of September 1st, as security to secure the liens on all this property, and he was to do it at our request any time.

"Q. At any time you demanded this kind of security for advancements you had made or were to make he agreed to give it you? A. He give it to us right then. It was the understanding that we have a lien on all the property, all of it, from that date.

"Q. Well, now, you say this was the understanding? A. It was the contract.

"Q. Or the contract, please state the conversation you had as nearly as you can remember it word for word, with Mr. Buck, including what he said, the exact language he used, and what you said, the exact language you used as nearly as you can remember it, not including anything told you by Smith, or anybody else. A. Well, Mr. Buck and I had a conversation. He came to me and asked me in regard to moving his sawmill, and I asked him what security that he had to secure us in helping him move his sawmill, and he told me that he didn't know how much he would need in moving, how much money he would need in moving his mill, as he hadn't got all his lumber in from the old shedding, and that he would need a little assistance he thought, and that he would want some assistance to run his mill and get in logs, etc. After he had moved there, and asked in a general way what help he could get, then he went on to tell me he give us a lien on the timber on the Lewis lands, those lands on his, on all his property, his sawmill, the whole thing, I rather think I asked him what it was, I ain't sure as to what he said about it, as to what it was, those timber contracts I recollect that very well and the sawmill, and I rather thought there was something said about some horses and cows. I ain't sure about that.

"Q. Among other things, he was to give you a second mortgage on the sawmill, I believe you testified? A. I asked Mr. Buck that question, and he told me that if he was going to pay Jesse Hindman's mortgage off that year, and he said that he didn't hardly think he could, but he could make arrangements with Jesse to carry that over. I don't know what amount it would be, naturally supposing that we would have a lien on the mill."

Perhaps a clearer statement of the alleged agreement for a lien is made by Frank E. Smith, who was secretary of the complainant company. He testifies as follows:

"Q. State what contract was made, if you know, between the plaintiff in this action and G. W. Buck about the 1st day of September, 1902, in relation to plaintiff's furnishing supplies or money to Buck to enable him to carry on the sawmilling business. A. Well, along about the last of August or first of September, Mr. Buck asked us if we would furnish him supplies and money to move his mill and cut logs and lumber for the coming season. He said that he had some lumber left at his old setting. He bought the timber from the Lewises. Said he would turn us over the lumber, that he had left from the old setting, that was going to the Elgin Lumber Company, on the old contract, and for the supplies and money furnished he would give us security on the logs and the timber land that he had got from the Lewises, and the timber that would go into the mill.

"Q. What did the plaintiff do with reference to his offer as to accepting it or not? A. It was agreed that it would be done in that way.

"Q. What was there said in that agreement, if anything, with regard to plaintiff's having or not having any lien upon the lumber that should be manufactured from the timber? A. Along with the agreement was the condition that Mr. Buck was, if possible, to sell his lumber to the Elgin Lumber Company, as he had done the year before, and that if that contract that he would make was acceptable G. W. Buck was to turn the proceeds of that contract to us, and if not we would handle the lumber ourselves or in some other manner.

"Q. Under the contract between Buck and the company, was he to have the absolute right to sell the property without the consent or approval of the company or not? A. Why, the understanding was that any contract that he made that we considered safe and that there was a fair margin of profit would be acceptable to us.

"Q. Under the contract referred to, to whom were the proceeds of the sale of lumber to be paid? A. Under the contract the money was to be turned over to us.

Q. State what the fact is as to whether or not that Buck and plaintiff company went ahead and operated under that contract. A. We did.

"Q. How much did the plaintiff company advance in the way of money and supplies and furnish money under said contract between the 1st day of September, 1902, and the 7th day of May, 1903, if you know? A. \$5,188.74, it figures out.

"Q. How much of that did Mr. Buck pay during that time, and how did he make payments? A. He paid \$948.41. There was some ties turned in, and there was one payment of \$680 coming from the sale of his lumber he had at his old setting, and he sold us I think 12 lots. There was a credit there of \$165.60. There was some aggregate amounts that made the total \$948.41. The amounts were credited between September 1st and May the 7th.

"Q. What balance does that leave due from G. W. Buck to the company? A. It made a total balance of \$4,240.33. He had given us a note for \$3,850, along about the middle of April, and the book balance above that note on May the 7th was \$390.33.

"Q. This payment made as the proceeds of lumber to which you have referred, was for lumber that he cut prior to September 1, 1902, was it not? A. Yes, it was cut before September 1st.

"Q. Under the contract between the plaintiff and G. W. Buck to which you have testified, was the lien the plaintiff was to have on the property of said G. W. Buck to extend to all the logs and lumber that he would have at the mill during the season of 1903, or did it extend only to a part? A. It extended to everything that would be cut that season.

"Q. Were you present at Elgin when Mr. G. W. Buck made a written assignment of the Albert Lewis contract and lease, and the Jackson Lewis contract and lease, which are marked Exhibits No. 3 and 2 of plaintiff's proofs herein; said written assignments on said contract bearing date of May 2, 1903? A. I was at Elgin at the time.

"Q. Were you present when these two timber contracts with the written assignments thereof were delivered by Buck to plaintiff company, if they were delivered? A. I think they were delivered to Mr. Dishman.

"Q. Were you there when it was done? A. Yes, I was at Elgin when it was done.

"Q. Do you know for what purpose Mr. Buck assigned these two timber contracts to the plaintiff? A. It was in fulfillment of his contract made along about the 1st of September in regard to security to be given us.

"Q. Do you know for what purpose or what security the two bills of sale that have been referred to in your examination were made and delivered by G. W. Buck to the plaintiff company? A. They were made in fulfillment of his contract which was made about the 1st of September for security for money and supplies furnished.

"Q. State, if you know, for what purpose the order was made by G. W. Buck to the Elgin Lumber Company, to pay the money on the money to be due on the Elgin Lumber contract, marked Exhibit No. 1 of plaintiff's proofs herein, being the written order indorsed on said Elgin contract bearing date of April 16, 1903. A. That was also in fulfillment of his contract made in September."

And on cross-examination the witness further testifies:

"Q. All these bills of sale, assignments of contracts, and the execution of this promissory note were in fulfillment of the contract you made with Mr. Buck in September, 1902, were they not? A. Yes, according to the agreement made at that time.

"Q. In other words, at that time it was agreed between you people and Mr. Buck that he should give you such security at any time you demanded? Is that what you mean, by these assignments and bills of sale having been executed and delivered in fulfillment of the contract? A. Partially so. His contract called for him furnishing us security on the lumber and logs and the standing timber for what material and supplies and cash we furnished as his work progressed, and whenever he made a contract for his lumber that contract was to go to us, and the money was to be received on that contract for the sale of his lumber to liquidate his account with us.

"Q. And in fulfillment of that agreement you had him execute to you, or he did execute and deliver to you, the assignment of the contract with the Elgin Lumber Company for the sale of his lumber and of the two Lewis contracts and the two bills of sale, that are all in evidence as exhibits in this case? A. Yes, sir."

And further:

"Q. Is it not a fact, Mr. Smith, that at about the time you secured these bills of sale and the assignment of this lumber contract with the Elgin Lumber Company, that you had learned by investigation and talks with other creditors of defendant Buck that he was liable to have trouble, and that these bills of sale and the assignment of this lumber contract were taken for the purpose of securing yourselves against what you considered the probable attempts of other creditors to get their claims? A. It was done in accordance with the agreement and contract. We had been paying creditors right along for what he owed them, and we knew that there were no others only Jesse Hindman and the First Bank of Elgin, and they were secured with a mortgage on the mill. There was no talk of other creditors giving any trouble whatever."

From this testimony—and there is nothing in the record to counteract it—I think it appears, not so definitely as it might, but with sufficient precision, that the understanding and agreement between Buck and the complainant company was that the complainant should have security for the advances in money and supplies, which it agreed to make from time to time as needed by Buck, and that that security should consist in the timber contracts, the logs cut from the timber, and the lumber manufactured from the logs. The mill was also included with the other property. It was subsequently ascertained, however, that the mill was mortgaged to Jesse Hindman and the Elgin Bank for as much as it was worth, and was therefore worthless as additional security, and no further attention was paid to that property by the complainant. There is a suggestion that the purport of the agreement was that the security should be given when asked for, in the future, as the occasion might arise; but the better interpretation seems to be that it was agreed that the complainant should then have security upon the property designated, and that the future transfers and assignments should follow in pursuance of such agreement, and in furtherance thereof. It was upon that consideration alone that the company agreed to make the advances to aid Buck in carrying on the mill business; otherwise Buck would have been unable to cut the logs and manufacture the lumber, the proceeds of which constitute the especial subject of this litigation. The subsequent conduct and acts of the parties point to this understanding of the agreement as the one intended.

On January 31, 1903, the bill of sale was given upon certain logs, and on February 28th following another bill of sale was executed with the apparent purpose of carrying into effect the original agreement.

It developed later that these bills of sale were not properly acknowledged, and hence were not entitled to record, so that, as to third parties without notice of their existence, or innocent purchasers for value, they were without effect as an incumbrance upon the property described; but, what is more significant, it was agreed at the time that Buck should not sell or dispose of any of the lumber without the approval of the Goodnough Mercantile & Stock Company. Later, on January 23d, a contract was entered into with the Elgin Lumber Company for the purchase by that company of the output of the lumber from Buck's mill. This did not meet with the approval of the Goodnough Mercantile & Stock Company until there was a modification by the Elgin Company agreeing to pay an advance of \$1 per 1,000 on certain kinds of the lumber covered by the contract. Later, when the adjustment was made, to wit, on April 16th, an order was indorsed upon the contract to pay the Goodnough Mercantile & Stock Company all money falling due from deliveries of lumber under its terms. Somewhat later the two timber contracts were assigned to the complainant, and, as witnesses say, in pursuance of the original agreement on the part of Buck to secure the complainant for the advances of money and provisions to Buck and his employés, to enable Buck to carry on the logging and milling business.

It should be remarked that, at the time the principal agreement was entered into, the logs had not been cut, or at least in large proportion, nor was any of the lumber manufactured; but Buck possessed a potential interest therein, having the timber contracts. The complainant's reimbursement was to come from the proceeds of the product of the timber, so that the contract appears to be a perfectly natural one to make under the circumstances; Buck being otherwise involved. Aside from this, there is a positive equity in the idea that complainant should be secured in its advances, which enabled Buck to produce the logs and lumber, the proceeds of which now constitute the subject of controversy. The agreement that the Goodnough Mercantile & Stock Company should have security—that is, a present security upon the property—constituted an equitable lien, which attended the property, the timber in the tree, the logs cut therefrom, and the lumber manufactured from such logs, and was effective against all others, save such as might have purchased for value, without notice or knowledge of the existing contractual relations between Buck and the complainant. "Equity looks upon things agreed to be done as actually performed." Buck having agreed that the complainant should be secured for the advances upon certain and definitely specified property, equity will, for the purpose of making the contract effective, deem that the security was actually given, and so treat the transaction. By virtue of the agreement therefore the complainant acquired an equitable lien upon the property designated, and that lien attends the fund in the hands of the trustee in bankruptcy unless displaced by the attachment proceeding inaugurated by the First Bank of Elgin, or in some way by the bankruptcy proceedings. See *Hauselt v. Harrison*, 105 U. S. 401, 26 L. Ed. 1075, and the decision rendered in the case at bar, on demurrer to the bill. (D. C.) 156 Fed. 504.



Much testimony has been adduced with a view to showing that the First Bank of Elgin had notice of the agreement between Buck and complainant, whereby the latter was accorded a lien upon the property concerned; but that inquiry is rendered irrelevant on account of the dissolution of the attachment following the assignment in bankruptcy. Section 67f of the act of bankruptcy (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) is effective to so dissolve the attachment. There is provided in that subdivision a method whereby the lien of attachment may in proper cases be preserved for the benefit of the estate. This may be done by order of the court on due notice. No attempt, however, was made in the bankruptcy proceeding to so preserve the attachment lien of the bank for the benefit of the estate, and no such order of court has been made within the purview of the act, and hence it cannot be insisted that the attachment lien still exists for any purpose. The statute was designed to preserve some interest acquired by virtue of the attachment, which would not pass to the trustee by virtue of the bankruptcy proceeding. To illustrate, it is said in *Thompson v. Fairbanks*, 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899:

"If there is no other lien on the property, there can be no occasion for such order, for, on the dissolution of the attachment, the property, unless exempt, would pass to the trustee anyway. It is only when the property for some reason may not otherwise pass to the trustee as a part of the estate that such order is necessary."

If the property passes at any rate to the trustee, there is no necessity for invoking the order of the court. The attachment being dissolved, the trustee is not further embarrassed in his settlement of the estate. It is therefore for preserving some interest that the attaching creditor has acquired for the benefit of the estate, that would not otherwise pass to the trustee, that the court's order may be brought into requisition. *First National Bank v. Staake*, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967. Such is not the case at bar, as the property passes to the trustee in any event, whether there was a previous attachment of it or not.

The next inquiry is whether the trustee in bankruptcy takes by any better or superior right or title than the bankrupt possessed immediately preceding the assignment. This question has become finally settled by recent decisions of the Supreme Court. In *Thompson v. Fairbanks*, 196 U. S. 516, 526, 25 Sup. Ct. 306, 310, 49 L. Ed. 577, the court uses this language:

"Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

The principle is strongly reaffirmed in *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, where the later authorities are cited. See, also, *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986.

It should be observed that the two bills of sale and the assignments

of the timber contracts, as well as the lumber contract by Buck to the Elgin Lumber Company, and the indorsement of the order thereon requiring the payment of the price of the lumber sales to the complainant, were all made within four months of the filing of the petition in bankruptcy. These were all made, however, in pursuance of the original contract or agreement under which the complainant advanced the money and supplies, which was entered into more than eight months prior to the filing of said petition. These bills of sale, assignments, and the lumber contract and the indorsement thereon, were not therefore void as being made within four months of the assignment in bankruptcy. *Sabin v. Camp* (C. C.) 98 Fed. 974; *Thompson v. Fairbanks*, supra.

Incidentally, the question has been presented whether the right to cut and remove standing timber is an interest in land which must be transferred by deed. In regard to the question, "it is now very generally recognized," say the authors of the *American & English Encyclopedia of Law* (volume 28, p. 541), "that a contract for the sale of trees, if the vendee is to have the right to the soil for a time for the purpose of further growth and profit, is a contract for an interest in land, but that where the trees are sold in the prospect of separation from the soil immediately or within a reasonable time, without any stipulation for the beneficial use of the soil, but with license to enter and take them away, it is regarded as a sale of goods only, and not within the fourth section of the statute."

Under this rule the timber contracts were subject to assignment without the observance of the formalities of a deed.

It follows from these considerations that the decree must be for complainant for the balance of the fund arising from the sale of the logs and lumber now in the hands of the trustee, after deducting the amount expended for labor claims; and it will be further decreed that the complainant has a lien upon the Jackson and Albert Lewis timber contracts, which should be sold to satisfy its demands.

## FONOTIPIA LIMITED et al. v. BRADLEY.

### VICTOR TALKING MACH. CO. v. SAME.

(Circuit Court, E. D. New York. August 7, 1909.)

#### 1. TRADE-MARKS AND TRADE-NAMES (§ 58\*)—INFRINGEMENT—IMITATION.

A red seal or label, containing a trade-mark, placed in the center of a talking machine disc record, is not imitated so as to give the maker a remedy in equity for infringement of trade-mark by reason of the placing by another manufacturer of a label in the same place on his discs, or because it is surrounded by a red band, where it has no other resemblance to complainants'.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. §§ 66, 67; Dec. Dig. § 58.\*]

#### 2. TRADE-MARKS AND TRADE-NAMES (§ 67\*)—UNFAIR COMPETITION—RIGHT TO MAINTAIN SUIT.

The fact that an article is made under a patent, and that the manufacturer might have a remedy against another manufacturer for infringe-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment of such patent, does not preclude him from maintaining a suit against such manufacturer for unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. § 67.\*]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 163; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

**3. INJUNCTION (§ 34\*)—SUBJECTS OF PROTECTION—PROPERTY RIGHTS.**

Complainants manufacture, under patents, disc records for use in machines for the reproduction of sound containing records of vocal and instrumental music originally rendered by artists of distinction, who receive payments and royalties from complainants. Defendant made and sold records containing the same songs or music, advertising and claiming them to be duplicates of the originals, equal to them in all respects, and sold at one half the price. Such records were made by taking a matrix from one of the commercial records of complainants from which copies were made. *Held*, that aside from any question of infringement of trade-mark or imitation of label, or deception of the public, complainants were entitled to relief in equity by injunction to restrain the sale of such copies as a wrongful appropriation of their property.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 74; Dec. Dig. § 34.\*]

**4. INJUNCTION (§ 114\*)—PARTIES.**

To such a suit the artist whose music is reproduced, and who receives a royalty on the number of records sold, is not a necessary or an indispensable party.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 202; Dec. Dig. § 114.\*]

**5. MONOPOLIES (§ 12\*)—FEDERAL ANTI-TRUST ACT—CONTRACTS PROHIBITED.**

An agreement between competing manufacturers to maintain the prices of their respective products may not be in restraint of trade nor within the prohibition of the federal anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.\*]

**In Equity.**

Ralph L. Scott (Philip Mauro and C. A. L. Massie, of counsel), for Fonotipia Limited and Columbia Phonograph Co.

Horace Pettit, for Victor Talking Mach. Co.

Waldo G. Morse, for defendant.

CHATFIELD, District Judge. The present cases have been heard upon a record consisting of pleadings and affidavits presented originally upon a motion for preliminary injunctions and by stipulation made the record and testimony on final hearing. The two actions involve substantially the same principles and can be disposed of together, the slight differences between the positions of the parties, and certain questions peculiar to the allegations of each complainant, being capable of statement and determination in connection with the main issues, which are alike in the two suits.

The complainants at the present time are producing and putting upon the market records of vocal and instrumental music, for use upon machines for the reproduction of sound, and constructed in a form suitable for operation with these records in the flat and circular or disc form described in the patent to Berliner, No. 534,543, Feb-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruary 19, 1895 (*Victor v. Amer. Grapho. Co.*, 145 Fed. 350, 76 C. C. A. 180), and *Jones*, No. 688,739, December 10, 1901 (*Amer. Grapho. Co. v. Universal Co.*, 151 Fed. 595, 81 C. C. A. 139). It is unnecessary to consider in detail the machines made by either company, further than to say that those manufactured by the complainant the Victor Talking Machine Company are known generally as the "Victor talking machines," and those put upon the market by the Columbia Company are called "graphophones," and the discs described can be interchangeably used upon either type of instrument.

The discs themselves, as at present made, are of some such substance as hard rubber, and are said to be made by causing the music to be sung or played into a receiving instrument, which records the waves of sound upon a disc properly prepared, which, in turn, by an electroplating process, is used to yield a matrix of metal. From this matrix numberless reproductions, substantially duplicates even in minute details of the original record, are produced by processes perfected by each company, and these reproduced discs, when used upon the talking machine or graphophone, turn back, by means of the diaphragm of the instrument, the lines of the record into sound waves, which are the equivalent of those originally sung or played.

In the case of the Victor Company, the discs sold by it within the United States are plainly marked with notice of the patent, and also with notice that the disc is sold for use only upon a talking machine, for the reproduction of sound. The price at which the discs are to be sold is also printed upon each disc, and the maintenance of this price is made a condition of the sale under license. Thus actual notice is given to each purchaser or user of the Victor Company's discs, of the conditions under which they have been sold, and that the article has to do with a patented product. It also appears that a company was organized in Canada by Berliner, who had previously assigned his patent to the Victor Company, and the Berliner Company, Limited, of Canada, has for a number of years been furnished with matrices of the Victor records, and has put upon the market and sold discs reproduced from these matrices, bearing similar license notices to those used by the Victor Company of this country.

The Fonotipia Limited is a British corporation, and the Columbia Phonograph Company is a corporation organized under the laws of West Virginia; the Fonotipia Limited conducting business in England, and in Italy, Germany, and other places on the Continent of Europe, while the Columbia Phonograph Company carries on its business within the United States.

It appears that both companies produce sound records in disc form, and manufacture and sell the duplicates or commercial records in large quantities. By agreement the Fonotipia Limited has contracted with the Columbia Phonograph Company that the latter should have within the United States and Canada the exclusive right to make, or cause to be made, to use, and to sell discs originally recorded by the Fonotipia Limited in Europe. The Fonotipia Limited furnish matrices for this purpose; the Columbia Phonograph Company paying a royalty therefor according to the number of duplicates manufactured, and in addition paying the royalty to be accounted for to the artist orig-

inally making the record, at the rate of the contract by that artist with the Fonotipia Limited. The Columbia Phonograph Company further agreed not to export any of its records out of the United States or Canada. It also appears that all three of the complainant companies have invested large sums of money in building up their business, and in connection with their business the Victor Company has established a very large plant at Camden, N. J. Each of the companies named has advertised extensively and at great expense.

Particular attention has been called to the trade-mark of the Victor Company, which, both as a trade-mark and as an advertisement, in the shape of a dog listening to the sounds from a talking machine horn, and labeled "His master's voice," has become familiar to the public. The methods employed by all of the complainant companies, the uniform care and excellent reproducing qualities of their products (both machines and records), has educated the public to expect the successful reproduction of music of a high standard of quality in the reproduction, and, as shown by the record, the grade of goods produced by the complainant companies upholds the standards which they have established. The public is protected in its purchases by the evenness and excellence of the output.

In addition to the expense and the rights represented by the business indicated, all three of the complainant companies have entered into separate contracts with individual singers and musicians, and particularly in the case of singers under contracts with the so-called "Grand Opera Companies" of New York, Paris, London, Berlin, Milan, etc. Under these contracts with artists able to command large prices, the initial cost of producing the record is great, and the companies are under an agreement to pay a royalty for each record produced from the original matrix, thus furnishing a continuing contract and expense, of which the benefit is going to the singer.

It may be remarked that the defendant has answered, claiming that each of these singers is a necessary party to this suit, inasmuch as their contracts are affected; but it need only be said that they are neither necessary nor indispensable parties, for the reason that their contracts are entirely dependent upon sales, and they are interested in the present questions only in the sense that their profits would be greater or less as sales increase or diminish. The court must also take into account, in any such matter as the present, not only questions of public policy, but questions of public benefit, and it is evident, from the common use of various forms of talking machines or phonographs and graphophones, that the better class of music is brought within the observation and study of many persons who would have neither time nor opportunity to become familiar with it in other ways. The reproduction of songs by famous singers and artists is both educational and beneficial to the people as a whole, and the court cannot but take notice of the fact that such music has an educational side, and appeals to substantially every one, even though they be unconscious of this result.

The defendant has been connected with the business of selling phonographs and sound producing machines for a number of years. He is shown by the record to be more or less familiar with the busi-

ness and to be at present acting as sales agent for a corporation called the Continental Record Company, which is stated in the papers of incorporation to have its home office at New Baltimore, N. Y. The records show that at New Baltimore no plant or office is maintained, but that the company has a local attorney or representative to comply with the requirements of the law. In New York City the only address shown by the testimony as that of the Continental Record Company is the address contained in a bill for certain discs purchased by a representative of one of the complainants; the general literature of the Continental Record Company giving merely New York City as its location. The address shown upon the bill referred to, No. 147 West Thirty-Fifth street, is an office building occupied by a storage company, and the testimony does not show that any sign or other indication of occupancy by the Continental Record Company is displayed. The defendant Bradley, the agent for this company, claims in his testimony to have no interest in the business of the Continental Record Company except as its selling agent; but all allegations as to the history of the business, the production of the records in question, and the source from which these records were purchased, is dependent upon the testimony and affidavits of Bradley alone, he being the only affiant or witness. We have therefore no more information about the Continental Record Company and its business than that which its selling agent has furnished, and what has been discovered by those investigating on behalf of the complainants as above set forth.

The defendant has been for some months advertising by circular letter and in other ways his ability to sell records of the Continental Record Company, stating in these advertisements that the records are sold at prices not more than half those now charged for the original records. The advertisements claim that the records themselves are pressed upon the very highest class of material finished equal to the original, that the character of the record itself is identical with the original record, and that experts who have listened to samples are unable to determine between the original and the copy. The catalogue contains a statement that the records offered by Bradley are "all duplicates from the original records made by the artists whose names are used herein."

It is apparent from the explanation which has been already made that the commercial records sold by the complainants are copies or duplicates, in the sense that they are made from a matrix or metallic plate, but are in no sense duplicate originals; that is, actually made by the sound waves of the singer at the time of the original song. In this sense the defendant's records, if made from one of the commercial records of the complainants, may be a duplicate in the sense of being an exact reproduction, even to such peculiarities as noticeable marks in the lines upon the disc and in the position and relative location of those marks or lines; but the defendant's records are not duplicates, even in the sense that they are removed from the original singing by but one reproduction from a matrix. The testimony shows that the defendant the Continental Record Company makes its records from commercial discs of the complainants and must pro-

duce a second matrix before the copies can be pressed or stamped. The testimony does not show that the complainants themselves confine their sales entirely to records that have but one matrix between the commercial discs and the original singing; but the testimony does show that the uniformity of the product and the carefulness of construction renders a disc placed upon the market by the complainants substantially equal to the record made at the original singing, and is thus separated from it by but one matrix or reproducing process.

The Victor Company has, in addition to its patents and license system, and to its trade-mark, adopted a design for the center or identifying part of the commercial records, and has made use of a so-called "red seal" to cover the center of its higher grade of records. These centers or seals are made of some foreign substance, applied to the record, containing the labels and notices together with the trade-mark, and are printed in type. The imitation or use of centers or seals calculated or likely to deceive the purchaser into thinking that he was buying these so-called "red seal" or other records, has been enjoined by Judge Lacombe, in the case of Victor Talking Mach. Co. v. Armstrong et al. (C. C.) 132 Fed. 711, and there would seem to be no room for argument about that particular question; but in the present case the same proposition is urged as a basis for an injunction against the defendant by the Victor Company, upon the ground that the so-called "Continental" records have the center label or seal encircled with a red border, and it is urged that the mere use of red, and the general style of placing the seal upon the record, is an attempt to evade the effect of the injunction in the suit above mentioned.

The Fonotipia Limited and the Columbia Company do not urge the same question, inasmuch as they do not charge imitation of any characteristic registered label, but they do urge that the defendant is intentionally offering to the public a disc with a center or label of the same general style and character as those of the Fonotipia Limited and Columbia Company, and which purport to be guaranties of a careful reproduction of the original record, and thus the element of imposing upon the public, or of imitating and appropriating the complainants' property rights, is present, even if the appearance of the label be not an imitation. It need only be said that the use of a red band cannot of itself be deemed an imitation of a red label, where the general style of the design is entirely different. The Victor Company does not seem to have the right to prevent, solely from the standpoint of its trade-mark, the use of a label of any sort affixed to the center of a disc, nor even of a circular label; and the fact that all of the labels are appropriate for use upon sound discs does not give either of the complainant companies right to relief solely from registration of trade-mark.

It would seem to be true, in a sense (and the evidence tending to show likeness between the original records of the complainant companies and the particular records sold by the defendant only accentuates this testimony), that the records put upon the market by the defendant have been made, through some transmutation, from original songs sung under contract by the artist to whom the disc is accredited, and to whom a royalty is being paid by one of the complain-

ants, and with whom the defendant has no contractual or business relations whatever. In such case it is impossible to hold that the public is being deceived in the representation that the original song, from which the matrices and reproductions were derived, was sung by the artist to whom it is accredited. Certain mistakes in labeling are shown; but these are merely evidence of the way in which the work was done, rather than sufficient grounds for decree by themselves. Nor is there sufficient similarity to hold, as has been said, that the discs sold by the defendant are in appearance sufficiently like any other discs of the complainants as to bring them within the case of *Victor Talking Mach. Co. v. Armstrong et al.*, supra.

But a more serious question comes from the testimony offered by the discs presented in the case themselves. If the defendant is selling to customers records reproduced by processes of the Continental Record Company, by means of discs purchased in the market by that company for the purpose, and if he advertises and guarantees to his customers that the Continental records are duplicates equal in all respects, including composition and finish, and that it is impossible to distinguish between the Continental records and those produced by the complainants, we have a question of fact presented in which the public is interested, namely, do the records submitted as evidence in the case lead to any determination upon the question of deception or imitation of the product, and the resultant benefit to the imitator, with corresponding injury to the imitated, by the results of the sales, and by the effect upon future sales if the product of the imitation be unsatisfactory?

It may be argued that the imitation would go out of the market and be removed from interference with the original if the product proved unsatisfactory; but it would seem that business reputation and excellence of product are entitled to some protection from imitations which discourage further use and prove unsatisfactory as a whole, because the result of the sale of such a product must necessarily affect adversely the opinion of the very class of customers which is sought to be enlarged by the sale of a satisfactory product.

A comparison, in order to observe points of similarity between the records put in evidence by the complainants, and made by themselves, with the records produced by the defendant and introduced as purchases from him, leads irresistibly to the conclusion that the material used in the Continental Record Company's discs is greatly inferior, contains imperfections which cause scratchings and irritating sounds, is subject to warp, and is so much softer or destructible in character that the commercial value of the defendant's records is much less than that of the complainant companies' records. Actual comparison of the discs warrants the finding that the Continental records are not in every way the equal, even when played upon the same machine, of the complainants' records, and it is impossible to hold that they are duplicates in the sense that they cannot, in most cases, be distinguished from the genuine, or that the imitation product is the duplicate in the sense of being the equal of the original. The defendant's records do not show the use of as good material in the discs, nor as much durability and freedom from warping as those of the



complainants, and a comparison shows in many instances a dulling or far away effect in the defendant's discs.

But before determining whether the complainants can have any remedy under the doctrine of unfair competition, certain questions must be disposed of, which cannot control, and which will complicate the issue if not separately taken up at the outset. First, the defendant contends that the complainants should be compelled to rely upon their patent rights; and inasmuch as their rights under their patents would prevent infringing, making, and sale of discs of the form in question, if their patents be valid, the defendant attempts to urge the converse of the proposition, and asks the court to dismiss this action on the ground that the complainants have an adequate remedy, not at law, but in equity, for infringement of patent. This would necessitate the finding of an additional proposition, namely, that the complainants are not entitled to a decree based upon the doctrine of unfair competition, if they could accomplish the same results by means of an injunction suit upon their patents; but if they should fail in upholding the validity of their patents or proving infringement, or when their patents expire, we should again be facing the same situation now presented, namely, that the doctrine of unfair competition is claimed by the defendant to be limited to cases in which an intent to deceive can be found, either because of misrepresentations or imitation of the trade-name or outward appearance of the article over which the competition exists, or that some special quality in the nature of the product renders the sale of the competing article unfair competition, such as was shown in the stock-ticker, trading-stamp, or railroad-ticket cases, referred to below. The license system of the complainant companies, as shown by the notices printed upon the discs when sold, is based upon patent rights, and upon the legality of the use of patented articles in order to give the person owning the patent the full enjoyment of the monopoly secured thereby.

It is unnecessary to consider whether every record in existence has been issued subject to such a license, for it is apparent that the records or discs of which the defendant is offering so-called "duplicates" for sale are put upon the market in the United States only under a license, are not manufactured in Canada, in the case of the Victor records, except by the Berliner Company, which also purchases the right to use them under a license, or in Europe, in the case of Columbia records and Fonotipia records, under a similar license system, and that the defendant, as well as the Continental Record Company, has knowledge of this system. In fact, the answer of the defendant, to the effect that the records reproduced by him were purchased out of the United States, is evidence of his knowledge of the existence of the license system in the United States, and, in so far as sales of the defendant's discs might be effected to dealers having knowledge of the license system of the complainants, the question of contributory infringement or of inequitable inducement to violate a contract agreement would immediately present itself, and would render a court of equity more willing to prevent that situation by a decree forbidding the sale of a product which would cause the injuries described.

It is also contended by the defendant that the license agreement

of the Victor Company, and its attempt to restrict or control the retail price at which its records shall be sold, by printing a notice upon its discs that the record is sold only to be retailed at a certain rate, and an agreement which has been entered into between the Victor Company and the Columbia Company, are all in restraint of trade and contrary to the so-called "anti-trust law," forbidding monopolies, enacted by the Congress of the United States, on the 2d day of July, 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]): But, if we are dealing with a patented product a "monopoly," in the sense of right to control the sale of the product and the price which shall be asked therefor, is admittedly within the legal benefits conveyed to the patentee by the issuance of the patent. *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. If the patents be disregarded, and the matter be considered as a purely business arrangement, it is impossible to see where any offense against the statute mentioned has been shown. Restriction of competition may not include a fair and reasonable attempt to avoid loss by trade agreements which are aimed to prevent nothing but the cutting of rates below the reasonable expense of production and reasonable profit thereon; nor is a "monopoly," in the sense meant by the statute, merely the complete occupation of a certain field where that occupation does not unfairly exclude other competitors. The fact that a certain person is the only dealer in certain goods may be entirely consistent with a free and unlimited opportunity to every other person to deal in the same goods, and the law of proper demand and supply may result in but one source from which certain things can be secured, without thereby rendering the person supplying these goods liable to the accusation of illegally maintaining a monopoly. A certain intent and certain motives, which need not be discussed at length, must be present to establish the interference with competition and the existence of the monopoly at which the statute above mentioned was aimed and which is included within its provisions. A mere attempt to obtain a fair profit, even by an agreement not to undersell, must be tested by the measure of what would be a fair price under competition, and it must be determined whether the centralization or control of the output is intended to or does accomplish any interference with the free action of independent parties who might compete, or with the securing to the public of all the benefits to which they are entitled, over and above the reasonable cost of production and reasonable profit.

But, as has been already said, the question of imitation of trade-mark cannot control the present case and we must therefore consider the broad question presented by the issue, namely, whether the taking of property in the shape of valuable ideas and products, by mechanical imitation or reproduction, is susceptible of notice by a court of equity, and whether any remedy therefor can exist apart from the questions of patent, trade-mark, and intentional deception or imitation and deceitful substitution of the product.

The question in the present case depends upon two situations: First, in case it be found that the records from which the defendant's manufacturers have produced their matrices or reproductions were pur-

chased in the United States; and, second (even if relief could be granted in the first case), whether the purchases of those original records out of the United States changes the rights of the complainants to protect their product against sales by the defendant within this country.

The testimony shows that microscopic examination, as well as auricular tests by experts in the employ of the complainant companies, disclose certain marks or irregularities in both the Columbia and Victor discs, which have been introduced in evidence, that are duplicated in the Continental records also in evidence. The correspondence in position, number and relation of these peculiarities is such that it seems to be satisfactorily shown that the Continental records indicated were made by the use of a matrix representing the impression of the actual rendering of the song recorded upon the discs of the complainant companies in evidence. In addition, the erasure of the serial numbers corroborates these questions of identity, and, in the case of one of the Columbia double-faced records, a mistake in the labeled title of the Continental record would indicate that the song had been reproduced from one side, and the label taken from the reverse side of the record actually duplicated and sold in this country by the Columbia Company alone; it appearing that the Fonotipia Limited does not make or sell in Europe any of these double-faced records. This evidence either disproves the contention of the defendant that the Continental records in the instances in question were reproduced from discs purchased in foreign countries, unless they were purchased from individuals rather than dealers; and, whether purchased from individuals or dealers, they were subject to the licenses granted, and the defendant must be held to have actual notice that any record so purchased would be subject, if brought within the United States, or used or sold here, to whatever rights the complainants might have under their patents and license system.

It might be argued from this that the complainants would have a remedy in a specific case, either for infringing use or for other so-called contributory infringement by reason of inducing license violations; but the testimony does not show the defendant Bradley to be a party to any license agreements, and the effect of the testimony is merely to show knowledge on his part of the complainants' rights and to furnish an additional reason in equity why he should not be allowed to use the property of the complainants in an unfair way. There would seem to be no doubt that property rights in connection with material objects may exist, and consist of incorporeal rights to enjoyment of the material object, and that equity will protect such incorporeal rights as property (*Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031), and the same principle is involved in all copyright and patent litigation.

We therefore reach the broad question of the power of a court of equity to secure to an individual by injunction the full enjoyment of both corporeal and incorporeal rights in property created by him or at his expense, and capable of a taking by another, where such taking either diminishes or destroys the enjoyment of those rights by the

owner and diverts a part of the enjoyment or profits from the rights to the one complained of.

In the case of *Victor Talking Mach. Co. v. Armstrong*, supra, Judge Lacombe says:

"The complainant contends that defendants have no right to take the discs which it produced as records of a piece of music specially executed, and reproduce from them duplicates thereof. The novel and interesting question thus presented need not now be discussed."

No case cited and decided strictly upon the question of unfair competition, so far as called to the attention of the court, has ever granted relief in instances outside of imitation or deception, and where the public would be likely to be misled by the points of similarity involved; but equity has granted relief in certain typical lines of cases where the doctrine of unfair competition seems to have been the guide to the decision, but where the basis upon which the relief was granted was the unfair taking of the complainant's property, rather than the deception of the purchaser, or the imitation of a patented or copyrighted article, or a registered trade-mark or trade-name.

In the cases of *National Tel. News Co. et al. v. Western Union Tel. Co.*, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805, and *Illinois Commission Co. et al. v. Cleveland Tel. Co. et al.*, 119 Fed. 301, 56 C. C. A. 205, the dissemination of market news by a tape ticker was held not to be copyrightable; but the court determined that the business was lawful and involved the use of property which included intangible rights which were capable of illegal or inequitable appropriation and use by another party. The service of news by means of such a tape ticker was protected, and the further sale of the items of news given to the public by the ticker service was enjoined, apparently upon the theory that the appropriation of such property was the taking of that property from the person entitled to the enjoyment thereof. These cases were substantially approved by the Supreme Court of the United States in *Board of Trade v. Christie Grain & Stock Co.*, supra, and the court says:

"The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's"—comparing *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460.

And while the approval by the Supreme Court of the United States in this particular case seems to have been specially given because the acts complained of therein induced a breach of trust, it is difficult to see any distinction between the questions involved in the present litigation and that in the stock-ticker cases.

Another line of cases involving somewhat similar determinations are known as the "ticket-scalper cases," such as: *Bitterman v. Louisville & N. R. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, affirming *Louisville & N. R. Co. v. Bitterman*, 144 Fed. 34, 75 C. C. A. 192; *Penna. Co. v. Bay et al.* (C. C.) 150 Fed. 770; *Illinois Central R. R. Co. v. Caffrey et al.* (C. C.) 128 Fed. 770; *Nashville, C. & St. L. Ry. Co. v. McConnell et al.* (C. C.) 82 Fed. 65. And also the trading-stamp cases. *Sperry & Hutchinson Co. v. Mechanics' Clothing*

Co. (C. C.) 128 Fed. 800; Same v. Louis Weber & Co. (C. C.) 161 Fed. 219, and cases therein cited.

In the ticket-scalper cases injunctions were granted, not because the purchasers of tickets were deceived by imitation or fraudulent tickets, but because the railroads issuing the tickets were injured by the trade in tickets obtained from them under special contracts, and then sold to other individuals who were not entitled to enjoy those contracts. In the trading-stamp cases, relief was granted, not to the extent of holding that trading stamps could not be transferred, nor upon the ground that persons obtaining trading stamps were being defrauded by a transfer of the right to redeem, but on the theory that the use of trading stamps as premiums, for the sake of soliciting trade by persons not parties to the original contracts under which the Sperry & Hutchinson Company agreed to issue the tickets, was a wrongful appropriation of property rights belonging to the Sperry & Hutchinson Company.

The present case is extremely like these just considered in principle. It is almost as if the court should be asked to enjoin individuals from theft, upon the ground that the criminal statutes did not make the taking of the particular kind of property in question larceny, and in cases where equitable relief was therefore appealed to because of the absence of any adequate remedy at law.

The principle involved is far-reaching, especially in that it carries the scope of equitable jurisdiction into matters frequently considered to be purely the result of business competition, and which, even if in themselves morally or financially wrong, are supposed to be without remedy where no contractual relations have existed from which suits for damages could arise. Various statutes have been passed in an attempt by legislation to protect certain classes of rights, such as the recording acts of the various states, and the lien laws of different jurisdictions. The patent, trade-mark, and copyright laws of different governments and the history of legislation as well as law, prove that where an act is admittedly wrong in the eyes of the public, and where the interests of individuals are being interfered with by commissions of the acts in question, legislation in the appropriate jurisdiction usually follows, and a legal remedy is created; but such legal remedies must be with relation to a specific class of acts. The jurisdiction of a court of equity has always been invoked to prevent the continuance of acts of injury to property and to personal rights generally, where the law had not provided a specific legal remedy, and it would seem that the appropriation of what has come to be recognized as property rights or incorporeal interests in material objects, out of which pecuniary profits can fairly be secured, may properly, in certain kinds of cases, be protected by legislation; but such intangible or abstract property rights would seem to have claims upon the protection of equity, where the ground for legislation is uncertain or difficult of determination, and where the principles of equity plainly apply. The so-called "common-law right" in literary property before its publication has long been recognized in the law. After the passage of legislation, literary property was secured, even in the published article, by the various copyright statutes of the different na-

tions. When such a copyright statute has been passed, all property rights in the published article must be secured and controlled by strict compliance with the statute.

It has been held that under the copyright law in effect prior to the 1st day of July, 1909, musical compositions, unless transcribed in print or musical characters, upon paper, were incapable of copyright (*White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655). Since the beginning of the present action, the copyright law has been amended, and since the 1st day of July, 1909, any form of recording or transcribing a musical composition, or rendition of such composition, has been capable of registration, and the property rights therein secured under the copyright statute (Act March 4, 1909, c. 320, 35 Stat. 1075).

It would seem therefore that the questions raised in the present case may be avoided as to future compositions by copyrighting the original rendition of the song, provided the singer has the right to use it for that purpose, and the disc record by which the rendition is preserved; but question will still remain as to the records produced prior to the present copyright law, and serious discussion may arise over the right obtained, for instance, by a grand opera singer who files a copyright for the resinging of a song already recorded by him or her, and sold to the public upon a disc record. With that we have nothing to do here, and the relief asked in this case would protect those who have already sung or played compositions having a pecuniary value, because of their musical excellence, and also the persons who have invested capital and labor in putting a valuable product upon the market. The education of the public by the dissemination of good music is an object worthy of protection, and it is apparent that such results could not be attained if the production of the original records was stopped by the wrongful taking of both product and profit by any one who could produce sound discs free from the expense of obtaining the original record.

It has been said in the case of *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609, that the basis of recovery is the damage to property rights of the complainant, rather than the deception of the public. It is from this contended: The better the imitation, the greater reason there is for issuing an injunction. And, in the sense that the marketable qualities of an article can be appropriated by a good substitute, this statement is true; but it necessarily follows that the injury to reputation and to the demand for the article would be greater if the imitations do not prove satisfactory, and there be no way of informing the public that the genuine is preferable or superior. In the case of sound discs such as those involved in the present action, a careful comparison of the records is necessary to emphasize the superiority of the discs made with better material, more careful and experienced workmanship, and improved methods; and it is also evident that to the untrained ear such differences cannot be carried in mind and appreciated, unless the opportunity for direct comparison be immediately present. An actual playing of the discs introduced as evidence in this case illustrates the point involved, for the testimony and also experiments show that in

some cases the records sold by the defendant are with difficulty distinguished from those sold by the complainant, unless one is played immediately following the other and under the same circumstances, so that comparison would be fair.

Reference has been made to the rights of a photographer who should make a film for moving pictures, of some historical or unique occasion, and should sell the film to parties who should reproduce it in a moving-picture machine. Other parties might make pictures from the film, or from the exposures, and a question, in some respects, similar to the present, might be involved. A dressmaking establishment might employ high-priced designers, and their product might be copied, and the designs thus appropriated. Architects might build houses and utilize extremely valuable methods and ideas, and others building houses might follow these ideas. Sculptors might carve statutes of great commercial value, and stone carvers might copy these sculptures.

It cannot now be determined how far such appropriation of ideas could be prevented; but it would seem that where a product is placed upon the market, under advertisement and statement that the substitute or imitating product is a duplicate of the original, and where the commercial value of the imitation lies in the fact that it takes advantage of and appropriates to itself the commercial qualities, reputation, and salable properties of the original, equity should grant relief.

That is the particular proposition presented in the present case, and to that extent it seems to the court that the principles applied in the stock-ticker and similar cases above recited should be followed, and relief by injunction granted.

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### BOATMEN'S BANK v. TROWER BROS. CO.

(Circuit Court, W. D. Missouri, W. D. July 19, 1909.)

No. 2,722.

#### 1. REFERENCE (§§ 24, 100, 101, 106\*)—PRACTICE IN FEDERAL COURTS—CONSENT OF PARTIES—REPORT AND FINDINGS OF REFEREE.

It is a recognized practice in the federal courts to make a reference in law actions by consent of the parties, when either party may file objections to the referee's report, and the court may make a re-reference for further findings or enter judgment on the record, in which case, while it will be strongly inclined to follow the findings of the referee upon the facts, it is not bound to do so either as to the facts or law.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157-180, 206; Dec. Dig. §§ 24, 100, 101, 106.\*]

#### 2. ESTOPPEL (§ 94\*)—ACTS CREATING EQUITABLE ESTOPPEL—ASSENT TO MORTGAGE OF PROPERTY BY ANOTHER.

One representing that he had purchased certain cattle went in company with the seller and obtained a loan from defendants, giving a chattel mortgage on the cattle as security. The mortgage recited the sale, and the seller signed the note as surety and received the benefit of the proceeds in paying off a prior note and mortgage given by him. *Held* that, as against defendant, neither he nor his privies could thereafter assert

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

title to the cattle, nor could he by any subsequent act affect defendant's rights under his mortgage.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 245, 247, 276-284; Dec. Dig. § 94.\*]

3. EVIDENCE (§ 271\*)—COMPETENCY—STATEMENTS BY AGENT AS AGAINST ADVERSE PARTY.

In an action between two mortgagees of the same property, each claiming priority of lien, statements made by an agent of one in a report to his principal are not evidence admissible against the other.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1087; Dec. Dig. § 271.\*]

4. CHATTEL MORTGAGES (§ 178\*)—ACTION BETWEEN MORTGAGEES—ACTION—BURDEN OF PROOF.

In an action of trover brought by a chattel mortgagee against one claiming under a prior mortgage, given by another, where the general issue is pleaded, the burden rests on the plaintiff to prove not only that the property was within his mortgage, but also that it was owned by the mortgagor when such mortgage was made before defendant can be required to prove his own title.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 178.\*]

5. CHATTEL MORTGAGES (§ 178\*)—VALIDITY—IMPEACHMENT OF MORTGAGOR'S TITLE.

Defendant took a chattel mortgage on certain cattle to secure a loan of money which was used to pay off a prior mortgage given by one from whom the mortgagor claimed to have purchased the cattle; the mortgage reciting that the cattle were so purchased. The former owner was present and assisted in negotiating the loan and signed the note as surety. The mortgage was duly recorded. Subsequently such former owner gave a mortgage to plaintiff covering a larger number of cattle, and containing a general description claimed by plaintiff to include the cattle mortgaged to defendant. Such cattle having been shipped to defendant by its mortgagee and sold, plaintiff sued for their conversion. *Held*, that the evidence was insufficient to sustain the burden of proof resting on plaintiff to impeach the validity of defendant's mortgage or the title of its mortgagor.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 178.\*]

At Law. On report of referee and objections thereto.

Botsford, Deatherage, Young & Creason, for plaintiff.

J. C. Petherbridge, for defendant.

PHILIPS, District Judge. This is an action in trover, based upon a chattel mortgage on about 1,500 head of cattle in Chase and Morris counties, Kan., executed by Sam Harrison to the plaintiff on June 21, 1901. Trial by jury was waived, and afterwards, by consent of parties, the court referred the case to Willard P. Hall, Esq., "to take the evidence, make findings of fact, and adopt conclusions of law," and to report to the court by a given time. The referee having made report, recommending judgment on the second count of the petition for \$2,277.10, and on the third count for \$4,183.57 (the first count having been dismissed), the defendant filed written objections thereto, based on the insufficiency of the evidence, and questions of law.

While the federal statute makes no provision for such reference in a law action, it is a recognized practice in the federal jurisdiction to make such reference by consent of parties; and, after the coming in

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



of the referee's report, before judgment is entered upon the findings, either party may interpose objections thereto in writing, and the court may, upon request of either party, re-refer the matter for further findings, or proceed to verdict and judgment on the record as the evidence and the law may direct. *Hecker v. Fowler*, 2 Wall. 123-129, 17 L. Ed. 759; *St. L. Elec. Light & P. Co. v. Edison, etc.* (C. C.) 64 Fed. 997-1004.

As in allied proceedings, the courts strongly incline in favor of the findings of the chosen arbiter of the parties on questions of fact. It inheres, however, in courts of justice, to see that no rank injustice be done, and they may, upon objection timely taken, so far examine into the conclusion of the referee as to see if he has erred in matters of law in any material respect, whereby his conclusions on disputed facts were influenced, and determine whether or not there be sufficient evidence to warrant his conclusions.

In the very outset of this discussion it is apparent that the referee gave too little consideration to the important fact that the defendant must be regarded throughout as an innocent purchaser for value. Its claim to the cattle in question was and is based upon a chattel mortgage executed to it by A. C. Harrison, of date January 4, 1901, more than five months prior to the mortgage under which the plaintiff claims title. In so far as the defendant is concerned, there is not an atom of tangible evidence to impeach the integrity of its mortgage. That it advanced the \$7,000, and more, consideration expressed in the mortgage, does not admit of doubt. Equally unquestionable is it that the money thus loaned by the defendant went to an anterior mortgage made by Sam Harrison in favor of Elmore-Cooper on the same cattle. The referee indicates in his report a suspicion, if not an impression, that the claim of A. C. Harrison that he had bought the cattle in question from Sam Harrison was feigned, and that in fact the cattle remained the property of Sam Harrison. If this were material, I fail to find any tangible, reliable evidence to support it. The claim of A. C. Harrison at the time of making the mortgage was: That he had bought the cattle from Sam Harrison, who was his cousin: that while he had been working for Sam Harrison, and possessed but small means, he made the venture upon an experiment to see if he could not, by the care and feeding of cattle, make a profit for himself as an independent dealer. He was the head of a family about to enter upon a rented farm to operate for himself. I fail to perceive anything either unusual or unnatural in such a transaction, and a most conclusive answer to the suggestion of the referee is that Sam Harrison was present assisting A. C. Harrison in effecting the loan of the money from the defendant, that he signed the note to the defendant as surety for A. C. Harrison, was present when the mortgage was made, which recited on its face that Sam Harrison had sold the cattle to A. C. Harrison, and the money obtained on this mortgage, as already stated, went to the benefit of Sam Harrison on his debt to Elmore-Cooper. These facts created an effectual estoppel against any assertion of title or interest in the cattle by Sam Harrison and his privies. No subsequent act or statement by him to the contrary could in any wise or degree impress or affect the title, rights, or

interest of the defendant under its said mortgage, "or alter the condition of the estate conveyed to the injury of the mortgagee." *McShane v. City of Moberly*, 79 Mo., loc. cit. 43. The referee in his report attaches material importance to the fact that, in the mortgage made five months subsequently to the defendant's mortgage, Sam Harrison gave descriptive terms to the cattle mortgaged by him to the plaintiff sufficiently comprehensive to cover the cattle under the defendant's mortgage. This entirely ignores the attitude and rights of the defendant as an innocent purchaser for value, both as against A. C. Harrison and Sam Harrison.

Again the referee fell into a hurtful error of law by admitting in evidence the report made by one Kelly, who was sent out by the plaintiff's agent and representative to examine the cattle, in which report it is claimed he gave description of the cattle and their location. This was objected to by the defendant's counsel, and is sufficiently embraced within the sixth exception taken by the defendant to the report. It is stated that Kelly has since died. But how does that fact render his report made to Pinnell, plaintiff's agent, competent evidence against the defendant in these lawsuits. Kelly was not the agent of the defendant, nor was his report made to it, nor in their hearing, nor did it ever assent to its truth. It was the unsworn, *ex parte* statement made in pais to the plaintiff's agent. It was as much mere hearsay testimony as if the statement had been made by Kelly, *ore tenus*, to the plaintiff's agent, and the latter had undertaken on the trial of this case to narrate what Kelly said to him. This evidence was clearly inadmissible. *Nevada Co. v. Farnsworth*, 102 Fed. 573, 42 C. C. A. 504; *Lemon v. U. S.* (C. C. A.) 164 Fed. 953; *Sorenson v. U. S.* (C. C. A.) 168 Fed. 785. On that report the referee predicated material findings of fact as to the quantity, description, and locality of the cattle mortgaged by Sam Harrison to the plaintiff. That mortgage purported to cover 1,500 head of cattle located in Chase and Morris counties, Kan., and was drawn with such varying, adjustable, and comprehensive descriptions as would cover nearly all ages and sexes of cattle, with or without minute description in the mortgage. As Sam Harrison by no statement made in his mortgage to the plaintiff could in any wise affect the rights of the defendant under its anterior mortgage from A. C. Harrison, the only evidence, aliunde, respecting the number, description, and location of cattle, was the testimony of the witnesses Reeves and Smalley mentioned in the report. Reeves was a hired man under Sam Harrison, who went to work for him the last of February, 1901, and remained until the 20th of November, 1901. He was not there when the mortgage of A. C. Harrison to the defendant was made, and hence knew nothing about the then location of the cattle. He testified that there were 96 head on Sam Harrison's premises when he went there. On the 10th day of April 110 head of cows and heifers were brought there from Marion county, and on the 25th of April 210 head of steers from Marion county, dehorned, and on May 1st 103 head, making in all 519 head of cattle; and in a general way his testimony was that there were about 1,000 head of cattle on the different places while he was there. The witness

Smalley says there were about 700 head of cattle on hand in May, 1901.

The answer of the defendant to the second and third counts tenders the general issue. The burden of proof rested on the plaintiff, and did not shift in the course of the trial, until the proposition of fact affirmed became established, in such sense that it ceased to be controverted upon the record, so that it becomes established as a conclusion of law. *Bunker v. Hibler*, 49 Mo. App. 537; *Schaefer v. St. Louis & S. R. Co.*, 128 Mo. 64, 30 S. W. 331. This burden is fixed "by the nature of the allegations of the pleading, and it is settled as a question of law and does not change during the course of the trial," until the plaintiff has presented a *prima facie* case, and the defendant, "instead of producing proofs to negative the same fact, proposes to show another and distinct proposition, which avoids the effect of it." *Nichols v. Winfrey*, 79 Mo., loc. cit. 550.

As the plaintiff propounded right and title under a chattel mortgage from Sam Harrison, it was not sufficient for it to prove simply that the cattle which came within the comprehensive description of its mortgage corresponded with the cattle alleged to have been converted by the defendant. Its proof must go further and show that, at the time of making the mortgage, Sam Harrison was the owner of the cattle in question, as under the general issue the defendant could present any evidence to show that Sam Harrison at the time of the plaintiff's mortgage did not own the cattle. Such evidence would defeat the action. *Greenway v. James*, 34 Mo. 326-328. The burden did not shift to the defendant by introducing evidence tending to show that Sam Harrison hitherto parted with his interest in the cattle to A. C. Harrison, who, with Sam Harrison's assent, mortgaged them to the defendant.

The mortgage of A. C. Harrison to the defendant by force of its recitation, in so far as the defendant is concerned, stands as a bill of sale from Sam Harrison to A. C. Harrison. That mortgage, after giving the description of 180 native and western steers, 3's, most all dehorned, some branded S-Y, balance H on right hip, 102 native and western cows, 3's to 5's, some branded S-Y, but most branded H on right hip, added the following:

"All of the above cattle are the same cattle that were held under mortgage by Elmore-Cooper Live Stock Commission Company, dated March 8, 1900, executed by Sam Harrison of Latimer, Kan., but have been sold to party of the first part by said S. Harrison, and the aforesaid mortgage has been fully satisfied and released. The above-mentioned cattle are to be kept separate from any of the cattle now owned by party of the first part. All of the above cattle have been delivered to party of first part and located as described, with the exception of 62 head of the cows, and they will be delivered within 10 days. The same being now located and to be located on farm owned by Mrs. M. H. Hewitt 2½ miles East of Elk, Chase county, Kan."

The existence of the Elmore-Cooper mortgage is conceded. It was not attempted to be shown by evidence that no cattle were mortgaged to Elmore-Cooper. It is true that the Elmore-Cooper mortgage stated the cattle, when it was given the year before, were in Sam Harrison's pasture in Morris county, 1½ miles southwest of Latimer, Kan.; but why attach any importance to this latter situs, when the

evidence shows, as is nearly always the case with herds of cattle, that Sam Harrison was a cattle dealer of vast proportions, whose holding of farms, pastures, and ranches extended into three counties, cornering on each other, and that the cattle were constantly shifting from place to place for feeding and pasturage. So if the Elmore-Cooper cattle were in Morris county in 1900, was it incumbent on the defendants, as the referee seems to suggest, to show affirmatively how and when they got into Chase county? The mortgage to the defendant, made in the presence and under the claimed direction of Sam Harrison, stated that the cattle were in Chase county at the Hewitt place, except 62 head of cows which were to be delivered within 10 days, which A. C. Harrison directly testified were so delivered. The reasonable and natural inference is that the cattle, or at least 282 head of steers and cows covered by the Elmore-Cooper mortgage, were at the time of the taking of defendant's mortgage in Chase county.

By a most critical analysis of comparison, the referee undertakes to show discrepancies between other descriptive parts of the Elmore-Cooper and the A. C. Harrison mortgages. The former called for 325 head of cattle, while the defendant's called for 282. The words, "all of the above cattle are the same cattle that were held under mortgage by Elmore-Cooper," do not necessarily imply that it embraced all of the cattle under the Elmore-Cooper mortgage. Its reasonable meaning is that the 282 head of cattle were the same held under the Elmore-Cooper mortgage. The difference as to number might well have resulted from deaths, straying, or other causes. The defendant's mortgage covered 282 head then on the Hewitt place in Chase county, except the 62 head which were soon to be there delivered. If those cattle were under the Elmore-Cooper mortgage, the defendant had a right to demand and hold them if delivered to A. C. Harrison.

It is conceded that the description of 102 cows in the mortgage of A. C. Harrison to the defendant is practically the same as in the Elmore-Cooper mortgage. In the latter there were 77 western cows coming 3's and up, and 25 native Kansas cows full age. The description in the former comprehends all cows 3 years to 5 years. This would embrace cows of full age as well as those that were 3 years and up. In the Elmore-Cooper mortgage 110 native steers were described as coming 4's, which, according to the referee's finding, would make them 3 years old in March, 1900, and, according to his finding, they would still be 3 years old in January, 1901, when the defendant's mortgage was taken. Seventy-five native steers and 38 western steers in the Elmore-Cooper mortgage were described as coming 3's, which, according to the reasoning of the referee, would make them 3's in March, 1901, so that it is quite apparent how in the defendant's mortgage the whole was classified as 180 native and western steers 3's; the mortgage being given nearly a year later. But it does seem to me that such technical refinement is too abstract in the administration of simple justice. As already stated, the mortgage shows on its face that it was intended to cover 180 head of the cattle, steers, and cows which were under the Elmore-Cooper mortgage, as well as the increase from the cows, stating that all of the above cattle had been and would be delivered by Sam Harrison to A. C.

Harrison, and giving the farm where they were located. The very purpose of this recitation manifestly was to obviate any possible discrepancy or variation in the mere matter as to whether the cattle were 3's in March, 1900, or 3's in January, 1901.

I am unable to find any evidence in this record to warrant even a suspicion that the cattle mortgaged to the defendant were not on the Hewitt place in Chase county. A. C. Harrison testified affirmatively to this fact. No witness contradicted him. The owner of the cattle, just prior to the making of the mortgage, in effect asserted by the recitations in the mortgage that these cattle were then on the Hewitt farm, except 62, which were soon to be delivered, and A. C. Harrison testified that the latter were so delivered. A. C. Harrison testified that he took charge of the cattle, cared for, and fed them on that place until the latter part of February following, when he moved them to the Krueger farm in Marion county, where they remained until put on grass; that they were then taken to the pasture near Latimer, the steers on what was known as a section pasture, and the cows were on a pasture north of Latimer. All of them except 30 head were on the Burke farm. While the Burke farm had been leased by Sam Harrison, A. C. Harrison moved onto it with his family about the 1st of March, 1901, and so remained there until March, 1902, farming it, pasturing, and feeding cattle there. There is not a particle of tangible testimony to contradict this testimony. The witnesses Reeves and Smalley, mentioned in the referee's report, upon whom the plaintiff has to rest for nearly everything descriptive of and the location of the cattle, did not work on the Burke farm, and knew nothing about the arrangement between Sam Harrison and A. C. Harrison. They baldly assumed that everything in that country belonged to Sam Harrison. A. C. Harrison further testified that a bunch of the cows were at the Burke farm all summer, excepting two weeks. Thirty cows were there all the time during the two weeks. They were in the pasture north of Latimer. One hundred and seventy head of steers were brought to the Burke pasture, and 146 steers he testified were taken to the Wing pasture for the balance of the season, which was a little late for the pasture season. A. C. Harrison is corroborated in material respects by other witnesses. Burke testified that there were no other cattle on his place than those A. C. Harrison had there branded H, about 175 head, which he thought were 2's and 3's. The plaintiff's witness Reeves testified that cattle were taken to the Burke place in May. He did not know who took them. Mrs. A. C. Harrison testified that she remembered her husband buying a bunch of cattle from Sam Harrison and making a chattel mortgage thereon; that they were delivered at the Hewitt ranch in Chase county, and were fed and taken care of by her husband; that they were moved from the Hewitt place to the Burke place, which was run exclusively by her husband; and that she saw the cattle often as they were in the pasture close to the house. A. C. Harrison is further corroborated by the testimony of Mr. Wing, to whose pasture steers were moved from the Burke place.

The testimony of Mr. Wing in this connection is important and most persuasive. It is of no consequence in this issue between the

plaintiff and the defendant whether or not Sam Harrison made the arrangement with Wing for pasturing the cattle claimed by A. C. Harrison. Wing's evidence tends to show that A. C. Harrison gave him check for the pasturage of the cattle, and he thinks Sam Harrison signed the check with him. The testimony of A. C. Harrison, without contradiction, is that Sam Harrison was to furnish this pasture, and he was to pay for it out of the cattle. Be that as it may, A. C. Harrison drove from the Burke place 146 steers and turned them into Wing's pasture, a memorandum of which was contemporaneously made by Wing in his pocket memorandum book. Another most important identifying fact is developed by the testimony of Wing, and that is that these cattle were first taken to the stock yards, where the brushes were cut from their tails in order to identify them from other cattle then in his pasture, and those cattle were taken from Wing's in the fall to the Burke place. The plaintiff's own witnesses testified that the last shipment of cattle came from the Burke place, and the evidence also shows that there were other cattle at the Burke place not taken to the Wing pasture. It is true that the evidence tends to show that some of the cows in question were taken to the Gist place, one of Sam Harrison's feeding lots, and were taken from there when shipped to the defendant. There is no ground for the contention that all the cattle, with the exception of one derelict shipped in October and December to the defendant, did not bear the brand given in the mortgage of A. C. Harrison to the defendant.

It is perfectly clear to my mind that the man Kelly sent out there by Pinnell in June, 1901, never saw the cattle that were at the Burke place or at the Wing place. The witness Smalley testified that he saw Kelly out at Sam Harrison's riding around with him in the pasture, but even he does not state that Kelly visited the Burke place, and A. C. Harrison testified directly that Kelly was not at his place on that visit.

The witness Smalley, so much relied on by the plaintiff, the evidence shows, had been sent to the insane asylum four times prior to his taking service under Sam Harrison, and since the departure of Sam Harrison, in November, 1901, and during the litigations had by the plaintiff bank with other parties out in Kansas and with this defendant, he has been in the employ of the plaintiff, assisting it in the matter of his services and evidence; but, giving to this witness the fullest credence, I perceive nothing in his testimony that should make it the predicate of a finding of the issues for the plaintiff. The fact that the Harrisons did not confide to this hired man their arrangements respecting the transaction of the sale and the mortgage of the cattle in question is not worthy of consideration. He admits in his testimony that 170 head of cattle were driven to the Burke farm, where A. C. Harrison lived, in June, and the taking of cattle to the Wing pasture, and then some of them were taken to the Gist place, and it is quite clear that the 69 head of cattle shipped in September, 1901 (concerning which, it is suggested that it was a recognition or concession by A. C. Harrison and the defendant that the plaintiff's mortgage covered at least part of the cattle claimed by

defendant under the mortgage), were evidently not embraced in the defendant's mortgage because they are represented as 2's past, and they bore only the brand T.

Neither is there anything in the testimony of the man Reeves to impeach or impair the mass of evidence in behalf of the defendant's claim. Evidently he tried to be superserviceable to the plaintiff when he testified that the 69 head of steers shipped October 20, 1901, on which the second count of the petition is based, were 2's, coming 3's. The petition itself alleges that the 69 steers were 3 years old. If his testimony therefore in this respect were accepted, the plaintiff would be plagued with a material variance. As illustrative of the lack of breath in the testimony of this witness touching A. C. Harrison's control of the Burke place, when interrogated as to how he knew Sam Harrison had the Burke pasture, his answers were:

"He rented that place from Burke, and he was going to move me onto it, and then him and A. C. Harrison got into a deal and he moved A. C. there.

"Q. How do you know but what A. C. moved himself there? A. Well, he had A. C. there.

"Q. Did you do any work on that place that summer? A. No, sir.

"Q. Didn't attend to any cattle on that place that summer? A. No, sir.

"Q. Had nothing to do with it, did you? A. No, sir.

"Q. Then how do you know that Mr. Harrison controlled that place that summer? A. Well he had cattle there.

"Q. How do you know he had cattle there? A. He took them there.

"Q. Who took them there, did you help drive them? A. No, sir. Well he went over there with the cattle, and I went over and helped fetch them back from there.

"Q. When was that? A. In December.

"Q. Mr. Harrison wasn't in the country there in December, was he? A. No, sir.

"Q. How did you come to drive them back in December? A. Mr. A. C. Harrison came over on the 2d day of December, and he says: 'I have got a demand for 111 head of steers and 102 head of cows for Trower Bros. to be shipped,' and he says, 'Will you help take them down to the station?'

"Q. How did you come to drive the cattle away from this Burke place in December, 1901? A. A. C. Harrison told me to go down there to the Bill Burke place with him and get 111 head of steers.

"Q. And you went there? A. Yes, sir.

"Q. And, that is all there was to it? A. Yes, sir.

"Q. How did you know that those were Mr. Harrison's cattle? A. They had Sam Harrison's brand on them.

"Q. That is all you know about it, isn't it? A. Yes, sir."

So it is perfectly clear that the 111 steers and 102 cows shipped in December, covered by the third count of the petition, came from the Burke place. And, again, the witness Reeves, in order to help, as he supposed, the plaintiff's cause, testified that these last cattle were 2's and 3's, while the petition alleges that the steers were 3 years old, and nothing is alleged about the ages of the cows. There is no evidence that the cattle shipped by Sam Harrison in September came from the Burke place, and there is not a word of evidence to show that prior to September, 1901, either Sam or A. C. Harrison sold any of the cattle mortgaged.

This record fails to bear any evidence whatever of bad faith or concealment by the defendant respecting the A. C. Harrison mortgage. It was promptly placed on record in Chase county, Kan.,

where the cattle at the time were located, and out of abundance of caution it was afterwards recorded in Morris county, where the Burke farm is located. Under the Kansas statute (Gen. St. 1901, §§ 4510, 4511), the mortgagee under chattel mortgage has the alternative of filing his mortgage in the county where the property was then situated, or in the county where the mortgagor resides. See *Bank v. Bond*, 64 Kan. 346, 67 Pac. 818. On the filing of the mortgage in the proper county, the Supreme Court of Kansas, in *Brown v. Campbell*, 44 Kan. 237, 24 Pac. 492, 21 Am. St. Rep. 274, held that it is notice to all the world. And that lien followed the cattle wherever they may be removed. Superadded to all this, there is not room for reasonable doubt that Pinnell, the acting agent for the plaintiff in taking the mortgage from Sam Harrison, had notice of the mortgage in question. O. B. Trower testified directly that, at the time he and Mr. Pinnell had under discussion the taking up by the plaintiff of the blanket mortgage held by the defendant on all of the cattle of Sam Harrison, he distinctly stated to Pinnell the fact that Sam Harrison was surety on the note of A. C. Harrison to it, and that he showed him the chattel mortgage given it by A. C. Harrison. Mr. Pinnell, when recalled as a witness to testify in respect of this matter, with an air of autocratic assumption, waived the matter off as of no consequence, on the ground that he was not concerned about A. C. Harrison's mortgage. He would not deny that he saw it, or that he was told about Harrison being a surety on said notes; but in a general way he understood that he was to get a mortgage on all of Sam Harrison's cattle. This was either an evasion, or a failure to contradict the positive testimony of Trower. Aside from all this, Trower was under no obligation to inform Pinnell anything about the independent mortgage from A. C. Harrison. Speaking of a not dissimilar matter in *McShane v. City of Moberly*, 79 Mo., loc. cit. 45, the court said:

"The mortgagee was not guilty of any concealment. His mortgage was on record, and this fact the law of the statute declares the defendant shall be presumed to know. \* \* \* If a man holds title to his land by deed, which has been duly recorded, it is all the notice he is bound to give so long as he remains passive."

After notice that Sam Harrison was on the notes of A. C. Harrison to the defendant, and after notice of the chattel mortgage on the cattle in that locality, responsibility, both in law and morals, rested upon the plaintiff to see to it that he did not interfere with the cattle of the defendant. I know of no law that would suffer the later mortgagee to claim all the cattle under an omnium gatherum descriptive clause in his mortgage to take any and all cattle found, on the ground that the cattle of an independent mortgagee from a different mortgagor may have possibly become mixed up with cattle included in the second mortgage without any fault of the first mortgagee; and, when such later mortgagee comes to claim such disputed cattle, the burden is upon him to show that they are his, and not those of the unoffending first mortgagee; and where, as in this case, the evidence leaves the fact in extreme doubt, that doubt should be resolved in favor of the first bona fide mortgagee. It was



as much the duty of Sam Harrison and his mortgagee, the plaintiff, to see that its cattle did not become mixed up with those of the first mortgagee, as it was of the latter; and, if both were in fault in this respect, the burden remained with the plaintiff to show to the common understanding that the title it asserts is clear. This the plaintiff has not done.

A. C. Harrison shipped to the defendant no more cattle than his mortgage called for, which he testified were the identical cattle he got from Sam Harrison, and this is supplemented by the testimony of O. B. Trower that he sent an inspector out to see the cattle, perhaps the following spring or summer, and that in October, 1901, he took with him a copy of the mortgage and went out and inspected the cattle and identified them as corresponding with the mortgage. That was before any controversy arose respecting the existence of the identity of the cattle, and he testified that the cattle which he so identified were the same cattle afterwards shipped to the defendant by A. C. Harrison.

I am so profoundly impressed with the conviction that injustice has been done the defendant, both on the facts and the law of the case, that I am unwilling to enter up judgment as recommended by the referee. If this special verdict had been returned by a jury, I would feel compelled to set it aside on the ground of failure of proof sufficient on the part of the plaintiff to sustain it.

On the indisputable facts, the exceptions to the referee's report must be sustained, and judgment go that the plaintiff take nothing by its petition.

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#### UNITED STATES v. CLEMENT.

(District Court, D. South Carolina. June 5, 1909.)

##### 1. SLAVES (§ 24\*)—"PEONAGE"—DEFINED.

"Peonage," within the meaning of Rev. St. §§ 1990, 5526 (U. S. Comp. St. 1901, pp. 1266, 3715), which make the same unlawful, and the holding of any person to peonage a criminal offense, is the holding of persons in unwilling servitude in payment of debts, by means either of force or intimidation.

[Ed. Note.—For other cases, see Slaves, Dec. Dig. § 24.\*]

[For other definitions, see Words and Phrases, vol. 6, pp. 5281, 5282.]

##### 2. SLAVES (§ 24\*)—PEONAGE—INTIMIDATION.

Inducing a person to labor in payment of debts by threats of prosecution may constitute intimidation and amount to peonage, if by reason of the different character of the parties such threats overcame the will of the servant and the service was involuntary.

[Ed. Note.—For other cases, see Slaves, Dec. Dig. § 24.\*]

##### 3. SLAVES (§ 24\*)—PEONAGE—STATUTORY PROHIBITION—ELEMENTS OF CRIMINAL OFFENSE.

In order to constitute the crime of holding another person in peonage, it is not necessary that the defendant should have acted corruptly.

[Ed. Note.—For other cases, see Slaves, Dec. Dig. § 24.\*]

##### 4. SLAVES (§ 24\*)—PEONAGE—ELEMENTS OF OFFENSE.

The fact that persons were induced to work for another in payment of debts through fear of prosecution if they refused did not render the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

master guilty of peonage, unless such fear was caused by threats of prosecution made by him at the time.

[Ed. Note.—For other cases, see *Slaves*, Dec. Dig. § 24.\*]

5. CRIMINAL LAW (§ 381\*)—EVIDENCE OF GOOD CHARACTER—WEIGHT.

While evidence of the good character of a defendant charged with crime is always admissible, and to be considered by the jury, yet, in determining the weight to which it is entitled, they should take into account the nature of the offense charged, and the nature and disposition of the witnesses; and if the jury believe that such witnesses are in sympathy with the act of the defendant, and would as readily testify to his good character, even if they believed him guilty, the testimony is not sufficient alone to raise a reasonable doubt of his guilt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 846; Dec. Dig. § 381.\*]

E. F. Cochran, U. S. Atty., and Abial Lathrop, Asst. U. S. Atty.  
W. H. Parker, for defendant.

BRAWLEY, District Judge (charging jury). This is an indictment for the violation of what is generally known as the "peonage statute." It was enacted in 1867, and is now embodied in sections 1990 and 5526 of the Revised Statutes (U. S. Comp. St. 1901, pp. 1266, 3715). This statute was considered by the Supreme Court in the case of *Clyatt v. United States*, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726, wherein that court defined peonage as a status or condition of compulsory service based upon the indebtedness of the peon to the master, the basal fact being indebtedness, and adopted the opinion of Judge Benedict in *Jaramillo v. Romero*, 1 N. M. 190, where for the first time, I think, in our judicial records, the system known as peonage had judicial interpretation. This system existed in New Mexico and certain other territories derived from Spain, and was a system of modified slavery. After the ratification of the thirteenth amendment, which abolished slavery, the Congress passed this act for the purpose of eradicating any form or kind of involuntary servitude. A cardinal feature of the system of peonage was the holding of persons in involuntary servitude in liquidation of debts. The beginning of such service was generally the voluntary act of the peon, and the intention of this legislation was to abolish this system wherever it prevailed, and to prohibit its extension or establishment in any state or territory where the conditions were such as to make it probable or possible that an ignorant and helpless population might be induced to submit themselves to a degrading and oppressive system, where under the color of legal rights the ignorant might be held in involuntary servitude in liquidation of debt or other obligations, and thus a new and odious form of slavery might be established.

In the *Clyatt* Case the defendant was charged with coming with two companions, each armed with shotguns, and carrying handcuffs and warrants for the arrest of five men; *Clyatt* claiming that they were indebted to him. They were carried off against their will to *Clyatt's* place of business, and I believe kept in the stockade under guard. The facts in the case which you are now to consider differ materially from those in the *Clyatt* Case. There is no proof whatever of any

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of those brutalities and outrages which have so greatly shocked the public conscience in some of the peonage cases of which we have had reports; but slavery was none the less slavery when the master was mild and humane, and there may be a system of peonage wholly unattended by any circumstances of brutality. It is for you to determine, upon the testimony which has been offered here, whether the defendant has held any of the persons named in the indictment to involuntary service or labor in liquidation of any debt or obligation or otherwise. It is the holding of persons in unwilling servitude in payment of debts that is the gist of the offense denounced by the statute. There is nothing in the law which forbids voluntary service in liquidation of debts, and common honesty would require that a man who receives money or supplies, and promises to work and repay such advances by his labor, should fulfill his obligation; and it is not unlawful for any person who so makes advances upon those terms to use every proper means of persuasion to induce his debtor to perform his contract, but it is unlawful to compel such performance by force or by intimidation. What constitutes force or intimidation is a question of fact, and each case must depend upon its own circumstances. The character and condition of life of the two parties are always to be considered in deciding a question of this nature.

The specific charge here is, not that the defendant used any physical force to subdue the wills of the parties named in the indictment, and thus compelled them against their wish to remain in his service, for there is no proof whatever of any physical force or threat thereof; but the government's case is that the defendant, by threatening the parties named with prosecutions under the labor contract law of the state as it then was, or prosecutions for other offenses, induced these parties to remain in his service against their will, in order that he might secure by their labor the payment of their indebtedness to him. It is for you to say whether the government has made out its case. If you are satisfied beyond a reasonable doubt that the defendant by such threats of prosecution induced these parties, or any of them, to remain in his service against their will, overmastering their weakness by his strength, and thus subduing their wills to his, then it is your duty to convict him. If not, it is equally your duty to acquit. In determining this question, it is of no consequence whether the indebtedness claimed was an honest indebtedness or otherwise; nor should you consider whether or not it was a moral obligation of the parties named to pay their debts and to work in fulfillment of their contracts. A man may be bound by every sanction of common honesty to pay his debts and to work for another in fulfillment of such obligations; but the law forbids you to compel him to work against his will. There is no need to vindicate the wisdom of such a law. Without it a system of involuntary servitude, in which the weak, the dependent, the helpless, would be brought under subjection of the strong and masterful, and a system would be established as degrading to the humble as slavery itself, without any of the alleviating and beneficent features which made that institution so long enduring.

The court is requested by the learned counsel for the defendant to give you certain instructions:

(1) Where an indictment charges that the defendant held a party in involuntary servitude at a certain date, and the proof is such as to leave on the minds of the jury a reasonable doubt as to whether he was so held at that date, no matter what they may believe as to his having been so held at some earlier time before that date, the jury are instructed that the offense has not been proved as alleged, and they must acquit. (Request withdrawn. Refused.)

(2) Peonage is the unlawful holding of a man in involuntary servitude, compelling him to labor for another against his will, in liquidation of a debt, and this compulsion may be exerted either by force, threats, or intimidation; but the jury are instructed that the force exerted, of whatever kind, to constitute peonage, must be such as to subdue and constrain the will, and must have been willfully and knowingly exerted by the defendant. (Granted.)

(3) There is no law against any man working for another in payment of a debt, so long as he is not compelled so to work by force, threats, or intimidation. (Granted.)

(4) While the force exerted may be less than actual violence or physical restraint, while it is sufficient if the jury believe that the laborers were so influenced by fear of the defendant that their wills were subdued, yet this fear, in order to make the offense of peonage, must have been exerted by the defendant, and by him willfully, knowingly, and corruptly.

The Court: The court gives you that instruction, striking out the words "and corruptly." If he compels them by force, or by intimidation or threat, or otherwise, against their will, to remain in his service, the offense is complete. No allegation of corruption in it is charged.

(5) It is not sufficient that the laborers worked because they were in fear, if the fear were not excited by the defendant, and by him willfully, knowingly, and corruptly.

The Court: The court will strike out the word "corruptly," as it did before. The court instructs you that if the laborers worked for him, believing that if they did not work they might be prosecuted, and the defendant, the time he induced them to work, if they desired to leave, said nothing to them to remind them of their obligation, and did not at that time threaten them that if they left he would prosecute them, if they had in their own minds a conviction that under their contract they were bound to work, and they were not influenced by him to remain against their wills by any threats, or by being told at that time that they would be prosecuted if they did not work, and he brought no pressure upon them to overmaster their wills, by threatening to prosecute them, that charge, No. 5, is given.

(6) While it is true, in general terms, that if a party is under arrest for a criminal charge, and under promise to abandon the criminal charge he makes a contract to labor, such contract is a void contract, yet the jury are instructed that the promise in question, in order to make out peonage, must have been made by the person bringing the charge or procuring the charge to be brought, and by him for the purpose of returning the party into involuntary servitude.

The Court: The court does not understand exactly what is meant by that request.

Mr. Parker: The idea of that request is to bring home the responsibility of the act to the party, the party who is charged with peonage because of it, to exclude those cases where a criminal charge being brought against a man, and where there comes the abandonment of the criminal charge, and the subsequent entry of that man into the service of the defendant, that wherever the charge was not brought for the purpose of bringing about that condition, where, as it happens sometimes, and frequently must happen, wherever kindly relations obtain between the master and the servant, the servant gets into trouble, goes to his master, says somebody has prosecuted him, and has convicted him, asks the master to pay the fine, and says he will work for the master, the master, absolutely indifferent, except to help out the poor creature, if the master has procured the charge, then it is a subterfuge; but, if somebody else, then he should not be held responsible because he helps the poor creature out of his trouble and gives him another chance.

The Court: The court gives you that instruction with that explanation. It does not understand that that is part of the government's case in this case at all.

(7) If the party remained in the defendant's service, fearing that if he left it he would be arrested on some charge, real or feigned, the jury is charged that that is peonage, but only provided the fear in question is so induced by the defendant, and by him willfully, knowingly, and corruptly.

The Court: The court gives you that instruction, striking out the word "corruptly"; that is, you must be satisfied beyond a reasonable doubt that the defendant, by his words or conduct, induced the parties named in the indictment to remain in his service against their will by threats of a criminal prosecution. Then that would be a case of peonage.

(8) The character of the defendant is always in issue, in a criminal charge, as an element for the jury to consider in determining the guilt or innocence of the defendant. (Granted.)

(9) Proof of character, in any case, may alone serve, in the absence of all other evidence, to raise in the minds of the jury a reasonable doubt as to the guilt of the defendant; and, where the character proved does raise such reasonable doubt in the minds of the jury, that alone entitles the defendant to an acquittal.

The Court: That is correct as a general proposition; but, in determining the weight to be given to testimony as to character, the jury should consider the nature of the offense with which the defendant is charged. If he is indicted for larceny, forgery, or other offense of a kind which implies moral obliquity, proof that he is a man of high character and unquestioned integrity would of itself raise a doubt whether a man of that character could be guilty of such an offense: but not so if the charge, for example, was for an assault and battery, for men of the highest integrity may be men of violent passions and have ungovernable tempers. Proof that a man is a man of integrity would not raise a doubt as to whether he is guilty of an assault and

battery. The question of character there, character of integrity, does not come into play, for the reasons stated. He may be of the highest character, and yet be of a very violent disposition, while proof of character as a peaceable man would have its weight in such a case. So, too, in considering the weight to be given to testimony as to character, you must consider the nature and disposition of the witnesses who have so testified, and how far they are likely to be in sympathy with the defendant, and whether they would look with disfavor upon him if they believed that he has really committed the offense charged.

Now, one of the legacies of that institution of slavery is that there are a number of people who believe that the negro will not work unless he is forced to work, and there is a strong disposition towards legislation of a kind which would compel work in payment of a debt. There is something to be said in favor of that view. It has found favor in the Legislature of the state, and this court has lately had in review certain labor contract laws of this state, where that was really apparently the intention of the Legislature. That particular law has been held unconstitutional in this court. It has been held unconstitutional by the Supreme Court of the state. A large majority of the judges of our own state have so held. But, notwithstanding that, there is a feeling that in some way or another there should be special legislation to compel the performance of these labor contracts. The court is not called upon to express its opinion as to the new legislation on that subject; but in considering the testimony of character, which has been offered, and upon which the defendant relies, and asks the court, in the instruction which has just been read, to instruct you that proof of character alone is sufficient to raise a reasonable doubt as to whether the defendant was guilty of this charge, the court instructs you that you should consider the character of that testimony, and the standpoint of those respectable gentlemen who gave their testimony, and consider, in determining the weight which you are to give to the testimony as to character, as to how far, or whether, these witnesses have any abhorrence of the offense charged against this defendant. If you have any reason to believe that they would give the same testimony even if they supposed that he was guilty of the charge, then such testimony is not sufficient to raise a doubt as to whether or not he is guilty of the charge.

There is a public sentiment in some parts of the South which finds expression in labor contract laws, that there is need of special legislation to compel the negroes to the performance of their contracts by imposing penalties for their violation, and in considering the testimony as to character the jury should consider, whether or not the witnesses are so far influenced by that sentiment that they would not be inclined to judge harshly any one who endeavored to put under pressure parties indebted to him for the purpose of securing performance of their obligations. Testimony of such witnesses to the good character of the defendant would not tend to raise any presumption of his innocence; for they might still believe him to be a man of integrity and character, although guilty of the specific offense charged against him.

Take the record.

## LA MOINE LUMBER &amp; TRADING CO. v. KESTERSON et al.

(Circuit Court, D. Oregon. July 26, 1909.)

No. 3,135.

## 1. CORPORATIONS (§ 499\*)—CAPACITY TO SUE—CORPORATE POWER—RIGHT TO RAISE.

A corporation's incapacity to sue because of want of corporate power can be raised only by the state.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 499.\*]

## 2. CORPORATIONS (§ 672\*)—FOREIGN CORPORATIONS—ACTIONS—PLEADING.

In an action by a California corporation for breach of contract for the sale of lumber in Oregon, the denial of an allegation in the complaint that the lumber was to be shipped into California raised a material issue in connection with a further claim by defendant that plaintiff or its assignor had no right to do business in Oregon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2646; Dec. Dig. § 672.\*]

## 3. CORPORATIONS (§ 636\*)—FOREIGN CORPORATIONS—EXCLUSION.

A state may, if it desires, exclude foreign corporations from doing business within its borders, or it may admit them on such conditions and limitations as it may prescribe.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505-2509; Dec. Dig. § 636.\*]

## 4. CORPORATIONS (§ 661\*)—FOREIGN CORPORATIONS—RIGHT TO SUE—STATE LAW—FAILURE TO COMPLY.

A foreign corporation, not having complied with Laws Or. 1903, p. 44, § 6, requiring all foreign corporations before transacting business in the state to file a declaration and appoint an agent to accept services, and declaring that until it has done so it shall not transact any business within the state nor maintain any action in its courts, cannot maintain an action in either a federal or state court within such state to enforce a contract made in the conduct of business in violation of the statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2544, 2564; Dec. Dig. § 661.\*]

## 5. COMMERCE (§ 10\*)—REGULATION—EXCLUSIVE OR CONCURRENT POWER.

State statutes, imposing conditions on corporations precedent to their right to transact business within the state, are ineffective to prevent transactions constituting interstate commerce, which is within the exclusive jurisdiction of Congress, whether Congress had exercised such authority or not.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 10.\*]

## 6. COMMERCE (§ 12\*)—INTERSTATE COMMERCE—REGULATION.

Corporations possess the same rights as citizens with respect to freedom from state regulation of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 12.\*]

## 7. CORPORATIONS (§ 661\*)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—ACTIONS—DEFENSES.

In an action by a foreign corporation's assignee for breach of a contract for the sale of lumber, a defense that plaintiff's assignor was a foreign corporation, that it entered the state and engaged therein in the business of buying and selling lumber without having complied with Laws Or. 1903, p. 44, § 6, prescribing the conditions on which foreign

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

corporations may transact business within the state, stated a sufficient defense.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2544, 2563–2567; Dec. Dig. § 661.\*]

What constitutes "doing business" in state, see notes to *Wagner v. J. & G. Meakin*, 33 C. C. A. 585; *Ammons v. Brunswick-Balke-Collender Co.*, 72 C. C. A. 622.]

#### 8. SALES (§ 412\*)—CONTRACT—BREACH—ACTION—DEFENSES.

In an action for breach of a contract for the sale of lumber, a special defense, alleging that plaintiff's assignor fraudulently graded lumber shipped under the contract, because of which defendants rescinded and thereafter sold the lumber to others, and that the total amount cut, which in any event was sold under the contract, was but 4,000,000 feet and was of a value of no more than \$12.50 per 1,000, was relevant to the amount of plaintiff's recovery, if any, and was therefore not demurrable.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 412.\*]

#### At Law.

This is an action by the La Moine Lumber & Trading Company, a corporation organized and existing under the laws of the state of California, against H. G. Kesterson and A. W. Silsby, who are citizens and residents of the state of Oregon, to recover damages for the breach of a contract entered into between the Griffin & Skelley Company, which is also a California corporation, and the defendants. By the terms of the contract the defendants undertook and agreed to deliver to Griffin & Skelley Company, and the latter agreed to receive, at Woodville Station, in the county of Jackson and state of Oregon, the entire cut of lumber of the defendants for the season of 1906; all of said lumber to be delivered on or before the 15th day of November, 1906, and the said Griffin & Skelley Company agreeing to pay the defendants therefor within 10 days after delivery. It is alleged in the complaint that the lumber comprised by such contract was so purchased and sold, to be shipped, immediately on delivery, as agreed, from said Woodville Station, in the state of Oregon, to San Francisco and other points in the state of California, and the portion delivered was actually so shipped and transported. The plaintiff is the successor by assignment of this contract from Griffin & Skelley Company, and brings this action for a breach thereof.

The answer puts in issue the allegations touching the purchase and sale of such lumber to be shipped on delivery to California, and for a first, further and separate defense it sets up the want of capacity in the plaintiff corporation to buy, take, or hold such contract, or to collect or sue upon claims for damages arising from a breach of the same.

For a second further and separate defense, it is alleged that Griffin & Skelley Company, being a foreign corporation, failed to comply with the laws of the state of Oregon by which it was entitled to be admitted to transact business within the state, and that it, without authority or license from the state of Oregon so to do, engaged in the business of buying and selling lumber, and continued in such business of buying and selling lumber from the plaintiffs and others, in the counties of Jackson, Josephine, and Douglas, within the state of Oregon, until the year 1907.

For a third answer and defense, it sets up that the plaintiff is the successor by assignment of the contract with Griffin & Skelley Company, and that it also transacted business in the state of Oregon without complying with the laws of the state entitling it to do business herein, or paying the requisite license.

And for a fifth defense it is alleged: That plaintiff, in receiving and scaling the lumber delivered by the defendant at Woodville, Or., defrauded the defendants by grading said lumber below its actual grade to their loss and damage in the sum of \$1,000; that, because of the fraudulent acts of the Griffin & Skelley Company and plaintiff in grading the said lumber to the defendants' loss and damage, the defendants, in the month of September, 1906,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



rescinded the said contract and refused to deliver the lumber; that after the rescission of the contract, as aforesaid, the defendants sold the lumber out that was to be delivered under said contract, but the amount cut was 4,000,000 feet, board measure, and no more, and the same was sold for the sum of \$12.50 per 1,000, and no more, and was of no greater market value than \$12.50 per 1,000.

To these several separate answers and defenses the plaintiff interposed a demurrer, and the cause was heard thereon.

Platt & Bayne, Ben C. Dey, and Wm. D. Fenton, for plaintiff.  
Robert G. Smith and J. M. Long, for defendants.

WOLVERTON, District Judge (after stating the facts as above). The demurrer to the first separate defense should be sustained, as the defendants are not in a position to raise the question of plaintiff's capacity to sue because of its want of corporate power. That is a matter for the state, not for a private party, to assert. *Clark & Marshall, Private Corporations*, vol. 1, § 229.

The demurrer, however, should be overruled as to the second and third separate defenses. The allegation in the complaint that the lumber contracted for was purchased for shipment into the state of California stands denied by the answer. This constitutes an issue under the pleadings. Supplementing this issue, then, is the further matter contained in said defenses.

It is explicitly admitted that the contract set up in the complaint was entered into and executed in Oregon. Now the question arises upon the pleading whether these answers constitute good defenses to plaintiff's cause of action. The statute of Oregon makes this provision (Sess. Laws 1903, pp. 44, 45, § 6):

"Every foreign corporation, and every foreign joint-stock company or association, before transacting business within this state, shall file the declaration and pay the entrance fees hereinafter provided, and shall duly execute and acknowledge a power of attorney, and cause the same to be recorded in the office of the Secretary of State, which power of attorney shall be irrevocable, except by the substitution of another qualified person for the one mentioned therein as attorney in fact. \* \* \* It shall be the duty of every such foreign corporation, joint-stock company, or association, to maintain, at all times within this state, some qualified person as its attorney in fact, as herein provided, and in default thereof, it shall not be entitled to transact any business within this state or maintain any suit, action, or proceeding in its courts."

It is no longer a disputed question that a state may, if it so desires, exclude foreign corporations from doing business within its borders, or it may admit them to do and transact business therein, upon such conditions and limitations as it may desire. Foreign corporations therefore, not complying with the prescribed statutory prerequisites for doing business and maintaining suits or actions in another state, will not be permitted to sue in such other state to enforce contracts made with the view to the conduct of, or while transacting, business therein. *Cyclone Mining Co. v. Baker Light & Power Co.* (C. C.) 165 Fed. 996. Statutes, however, inhibiting foreign corporations from doing business within a state, or imposing restrictions thereon, may not be allowed to impair the power of Congress, under article 1, § 8, of the federal Constitution, to "regulate commerce among the several states."

Nor will they be permitted to intrench upon the rights of citizens to engage in commerce between the states.

"Commerce," says Mr. Pomeroy (*Pomeroy on Constitutional Law*, p. 376), "includes the fact of intercourse and of traffic, and the subject-matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the acts of carrying them on at these places, and by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons. All these may therefore be regulated." And "Commerce among the states," says Mr. Justice Field, "consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities." *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 5 Sup. Ct. 826, 828, 29 L. Ed. 158.

The regulation of commerce between the states is of such comprehensive reach as to affect all the citizens of all the states of the Union, and it is unnecessary that Congress should first exercise its authority to regulate before the states would be restricted in their legislative power. The federal Constitution is itself restrictive of such local authority, and the power of Congress is accordingly exclusive. This right of citizens of different states to engage in interstate commerce is therefore beyond the authority of the state to impair or circumscribe. Corporations possess the same rights as citizens in this respect, and are entitled to like privileges. In support of these propositions, I need refer to but few authorities in addition to the *Gloucester Ferry Company Case*. See *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; *Coit & Co. v. Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819; *McNaughton Co. v. McGirl*, 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367, 63 Am. St. Rep. 610; *Ware v. Hamilton Brown Shoe Co.*, 92 Ala. 145, 9 South. 136.

The headnote in the last case is apposite here for illustration. It reads:

"A contract for the purchase of goods, made between a citizen of Alabama and a Missouri corporation, whether made in Alabama or Missouri, is within the congressional power to regulate interstate commerce; and the corporation may maintain a suit on the contract in Alabama, without alleging or showing a compliance with our constitutional and statutory provisions as to having a resident agent and a known place of business."

Now, if it were admitted, as alleged in the complaint, that the lumber which constitutes the subject-matter of the contract was purchased and sold to be shipped on delivery into the state of California, the transaction would signify a dealing, between citizens of different states, beyond the authority of the state to regulate; but, being denied, and it being alleged in further defense that Griffin & Skelley Company entered the state and engaged therein in the business of buying and selling lumber from plaintiffs and others, makes of it a transaction of business within the state. It would appear therefore that the second defense was sufficient. The discussion has extended to the question whether

the dealing comprised other than a single transaction, and therefore whether the Griffin & Skelley Company were chargeable with the transaction of business within the state. The pleading, however, shows more than this, and it must be taken to be true.

As to the third defense, if Griffin & Skelley Company could not maintain the action, the plaintiff, being its assignee, and a foreign corporation also, without having been admitted to transact business within the state, would stand in no better plight.

The fifth separate answer contains matter pertinent for determining the amount of the plaintiff's recovery.

The demurrer will therefore be sustained as to the first separate defense, and overruled as to the second, third, and fifth separate defenses.

### GENERAL ELECTRIC CO. v. HURD et al.

(Circuit Court, D. Oregon. July 26, 1909.)

No. 3,151.

#### 1. JUDGMENT (§ 853\*)—"DORMANT JUDGMENT."

A "dormant judgment" is one that has become inoperative so far as the right to issue an execution thereon is concerned.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 853.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2183; vol. 8, p. 7642.]

#### 2. COURTS (§ 355\*)—FEDERAL COURTS—ADOPTING PRACTICE OF STATE COURTS—STATUTES.

Rev. St. § 916 (U. S. Comp. St. 1901, p. 684), providing for the execution of judgments of federal courts, made applicable to decrees solely for the payment of money by equity rule 8, adopted the remedies established by law in the several states at the time the section became a law, but not the subsequent state enactments regulating such remedies; they being left for adoption by rule as the federal court might deem advisable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 935; Dec. Dig. § 355.\*]

#### 3. COURTS (§ 354\*)—FEDERAL COURTS—ADOPTING PRACTICE OF STATE COURTS—JUDGMENT—LIEN—LIMITATIONS.

Where, under the law of a state in force prior to 1872, made applicable to federal judgments and decrees by Rev. St. § 916 (U. S. Comp. St. 1901, p. 684), and equity rule 8, the lien of a judgment lapsed at the end of 10 years from the entry thereof unless execution was issued in the meantime, and requiring leave of court to issue an execution after five years have elapsed without an execution being issued, the lien of a federal decree, on which no execution had been issued since March 28, 1894, had lapsed.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 354.\*]

Conformity of practice in common-law actions to that of state courts, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

#### 4. CREDITORS' SUIT (§ 16\*)—CONDITIONS PRECEDENT—RIGHT TO EXECUTION.

Where complainant had no execution pending on a decree and was not entitled to execution except by leave of court on appropriate motion and notice to the judgment debtor, it could not maintain a suit in equity in aid of the execution.

[Ed. Note.—For other cases, see Creditors' Suit, Dec. Dig. § 16.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**5. EXECUTION (§ 72\*)—RIGHT TO ISSUANCE—LEAVE OF COURT.**

Where a judgment creditor is only entitled to an execution by leave of court, his right is only established when he obtains an order of court directing that execution issue.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 72.\*]

**6. COURTS (§ 354\*)—FEDERAL COURTS—ADOPTING PRACTICE OF STATE COURTS—EXECUTION.**

B. & C. Comp. Or. § 241, provides that if, at any time after the entry of judgment, 10 consecutive years have elapsed without execution, no execution shall thereafter issue on the judgment which shall thereafter be conclusively presumed to be paid. *Held*, that such section, being a statute of limitations, was a rule of property binding on the federal court sitting in Oregon under Rev. St. § 721 (U. S. Comp. St. 1901, p. 581), declaring that the laws of the several states are to be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply, and hence a federal decree recovered in Oregon, on which no execution had been issued for more than 10 years, was barred.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 934; Dec. Dig. § 354.\*]

**In Equity.**

The facts attending this cause, necessary to an understanding of the present controversy, are as follows:

On April 14, 1893, the Northwest Electric Company recovered a decree in this court against L. L. Hurd, defendant above, and his wife, Josephine Hurd, for the sum of \$13,138.50. H. W. Goode, who was a defendant in that suit, by a cross-bill recovered a decree against Hurd also for the sum of \$2,694.08. Under an execution and order of sale, certain property was sold at master's sale, and the proceeds applied in part satisfaction only of these decrees. Thereupon, to wit, on November 16, 1893, a deficiency decree was rendered, in favor of the complainant and against Hurd, for the sum of \$5,296.93 and also a like decree in favor of Goode for \$2,006. On the 28th day of March, 1894, an alias execution was issued upon the Goode decree, upon which the sum of \$934.50 was realized, and the decree in his favor was satisfied to that extent, and no further. The complainant in this suit has succeeded, by assignment, to the ownership of both these decrees. Since the issuance of the last execution upon the Goode decree, the judgment debtors have had no visible property subject to execution and sale. This fact is set forth as a reason why no subsequent execution has ever been issued upon either of said decrees.

In addition to these facts, it is further alleged, by the bill of complaint herein: That, in the year 1900, S. C. Flint, by contract with the defendant Oregon & California Railroad Company, acquired the right to purchase certain real property, of large value; that Hurd, by agreement with Flint and the advancement of one-half of the purchase price of said real property, is entitled to and is the owner of a one-half interest in the contract, and is the equitable owner of a half interest in said real property; but that Flint is holding the same in secret trust for the defendant Hurd, with intent, on the part of both Flint and Hurd, to cheat and defraud the creditors of the latter—all of which matters and things concerning the contract of sale and the secret trust obtaining with reference to said real property were and remained wholly unknown to the complainant until about the 1st day of February, 1907—and that said Hurd, and his wife Josephine, were and are insolvent.

A discovery is prayed, and that the alleged equitable interest of Hurd in the contract with the railroad company be subjected to the satisfaction of said decrees theretofore rendered against him.

The cause has been submitted upon demurrer to the bill for insufficiency.

Albert Abraham, for plaintiff.

Coshow & Rice, Wm. D. Fenton, and R. A. Leiter, for defendants.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WOLVERTON, District Judge (after stating the facts as above). The theory upon which this suit is instituted is that it is an ancillary proceeding in aid of an execution for the enforcement of subsisting decrees for the payment of money. The decrees themselves, however, have concededly become dormant; that is to say, they have become inoperative so far as the right to issue execution thereon is concerned. They may be more than dormant; they may be dead; but of this later.

By section 916 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), which was enacted June 1, 1872:

"The party recovering a judgment in any common-law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such Circuit or District Court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

In pursuance of section 8 of the rules of practice in equity, this section, as it relates to remedies by execution, applies also to decrees solely for the payment of money. It may be observed, which is apparent from its reading, that section 916 adopts the remedies which were established by law in the several states at the time the section became a law; but it did not adopt subsequent enactments of the states regulating such remedies. These were left for adoption by rule of court, as the federal courts might deem advisable. So that no state law, passed subsequent to the adoption of section 916, could be effective to modify the practice then in force under federal procedure, unless it had the sanction of a rule of court. The principle has the explicit approval of the federal Supreme Court. See *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *Bank of the United States v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264; *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145.

There exist no rules of court in this jurisdiction adopting any subsequent legislation of the state of Oregon relating to the regulation of final process. In logical sequence, it is now pertinent to inquire what remedy the complainant had, or now has, for the enforcement of its decrees.

The statutory regulations in the state prior to 1872 were that, immediately after the entry of judgment, the plaintiff was entitled to have the same docketed. From the date of such docketing, the judgment became a lien upon the real property of the judgment debtor. This lien lapsed at the end of 10 years from the date of entry of judgment, unless execution was issued thereon in the meantime. It was further provided that whenever, after the entry of judgment, a period of five years elapsed without an execution being issued on such judgment, thereafter an execution should not issue except as in the section prescribed. The proceeding was, by motion in the cause, addressed to the court, asking leave to issue the execution. The order of the court was required to specify the amount for which execution was to issue, and the order itself was entered and docketed as a judgment, and treated as a final record. Sections 266, 267, and 292, *Deady & Lane's Civ. Code*. Thus is prescribed the relief or remedy to which complain-

ant was entitled, by way of execution, under section 916 of the Revised Statutes.

Having issued no execution upon its decrees within 10 years, the liens thereof have lapsed, whatever property may have been affected thereby in the meanwhile; but, what is of more serious account, complainant is proceeding upon the hypothesis that its suit is in aid of an execution to enforce the decrees. By its own showing it has no execution, nor can it have any unless by leave of the court, granted upon appropriate motion addressed to it, and notice to the judgment debtor. The very theory of the suit is therefore without foundation or basis for its own support. Without an execution, or a right to have one issued, it is difficult to understand upon what principle the suit can be maintained. Judgments are enforceable through the instrumentality of an execution, and, unless that instrumentality is applied, there is no other way for their enforcement. Equity may interpose in an ancillary way to make the execution effective; but without the execution, or right to its issuance, even equity is powerless to enforce the judgment. If complainant was entitled to its executions on these decrees under the old law, it should have taken the proper steps for leave to issue the same, and, when granted, have had the execution issued. Then, and not until then, would it have laid the proper foundation for a suit in aid thereof. Without these prerequisites the suit will not lie. The decrees are, in effect, dormant and insusceptible of enforcement except by the process of execution. If the execution was issuable as of course, the right thereto would be apparent; but, if it must first issue by leave of court, the right is not established unless by order of the court. Such an order has not been obtained in this case, and the complainant must fail for this reason, if for none other.

The principle involved finds support in the cases of *Mullen v. Hewitt*, 103 Mo. 639, 15 S. W. 924, and *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358. In the former case the purpose of the bill was to collect a dormant judgment by decree of equity, without reviving the judgment or being entitled to an execution, and it was held insufficient by the test of a demurrer. And in the latter case it was said:

"In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor, for its payment, or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property or a lien thereon created by contract or by some distinct legal proceeding."

I have proceeded thus far by giving the complainant the full benefit of its own theory of suit. There is another view to be taken of the situation. By a later statute of the state, adopted in 1893, it is provided that:

"If, at any time after the entry of judgment, a period of ten consecutive years shall have elapsed without an execution being issued on such judgment during such period, no execution shall thereafter issue on such judgment, and such judgment shall thereafter be conclusively presumed to be paid and satisfied unless an execution be issued thereon within one year from the passage of this act." Section 241, B. & C. Comp. Or.

This is a limitation, and not a process statute. When there is want of the issuance of an execution within 10 years, the judgment becomes not only dormant, but dead. No execution can thereafter issue, and no action can be maintained upon the judgment, because it is conclusively presumed to have been paid. By section 721 of the Revised Statutes (U. S. Comp. St. 1901, p. 581), the laws of the several states are to be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply. This is the purport of section 34 of the original judiciary act of September 24, 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 92). Under this law section 241 of the Oregon statute becomes a rule of property, and it precludes complainant's right of suit for the enforcement of its decrees under any contingency. The very question was decided early in 1839 in the case of *Ross v. Duval*, 13 Pet. 45, 10 L. Ed. 51. By an act of the state of Virginia, it was provided that:

"Judgments in any court of record within the commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of such judgment, and not after." 1 Rev. Code 1819, p. 489, § 5.

The court, having under consideration this act in connection with the United States process acts of 1789 and 1792, has this to say:

"And here the question arises whether the Virginia act of 1792, having been passed subsequent to 1789, can have any effect in the present case. So far as this act can be held to regulate executions, it is clearly inapplicable under the process acts of 1789 and 1792 to the Circuit Court; but the act is substantially and technically a limitation on judgments. It is not therefore an act to regulate process. Executions are named in the act, and are authorized to be issued under certain circumstances, within a limited time; but this is only another mode of limiting the judgment, and is strictly and technically as much a limitation on the judgment, as is imposed in the first part of the same section in reference to a *scire facias* or action of debt. The act provides that after the lapse of 10 years from the rendition of a judgment, where no execution has been issued, neither an action of debt nor a *scire facias* shall be brought on it, and that, where an execution has been issued and not returned, other executions and proceedings may be had within the 10 years, but not afterwards. If this, then, be a limitation law, it is a rule of property, and, under the thirty-fourth section of the judiciary act, is a rule of decision for the courts of the United States. As an act of limitation, it is impossible to distinguish this from other acts which limit the time of bringing certain actions, either by a designation of the ground or the form of the action."

To the same purpose, see *Newell v. Dart*, 28 Minn. 248, 9 N. W. 732; *Miller & Co. et al. v. Melone et al.*, 11 Okl. 241, 67 Pac. 479, 56 L. R. A. 620.

The act of 1893 of the state therefore, being a limitation statute, is a rule of property, and is binding upon the federal courts, under section 721 of the Revised Statutes, as well as upon the state courts, and by the rule complainant is without a cause of suit.

From these considerations, the demurrer to the bill of complaint will be sustained, and the bill dismissed.

## ALBERS BROS. MILLING CO. v. ACME MILLS CO.

(Circuit Court, D. Oregon. July 19, 1909.)

No. 3,291.

## TRADE-MARKS AND TRADE-NAMES (§ 21\*)—WORDS SUBJECT TO APPROPRIATION—PREVIOUS USE IN DESCRIPTIVE SENSE.

The word "cream," where not previously used in that connection, may be appropriately adopted by a manufacturer as a trade-mark for a superior brand of rolled oats made by him; but its prior use by other manufacturers generally as a descriptive term to denote the first quality, either alone or in combination in the term "extra cream," in which sense it had come to be understood in the trade, would preclude its exclusive appropriation as a trade-mark by any one manufacturer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. § 21.\*]

Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to Searle & Hereth Co. v. Warner, 50 C. C. A. 323.]

## In Equity. On motion for preliminary injunction.

Complainant seeks by this suit to enjoin the defendant from using the word "cream" to designate the defendant's product of rolled oats, which it has put upon the market in competition with complainant's trade in the same commodity. From the bill of complaint, it appears that the Albers & Schneider Company, a corporation, heretofore began the manufacture, in Portland, Or., of rolled oats from specially selected stock, to which product, or "brand," as it is termed, the said company, in about November, 1897, applied the name "cream" as a trade-mark, thus designating the same as "Cream Rolled Oats." It then further appears: That the company continued from that time to manufacture a superior quality of rolled oats, to which it always applied the designation "cream" as a trade-mark; that, in the course of time, its product became favorably known in the markets, and was extensively dealt in and used by merchants and consumers throughout the Pacific Coast States and in British Columbia; that said company continued in the exclusive use of said trade-mark "cream" to designate the said particular and superior brand of rolled oats, placing the same upon all sacks, bags, boxes, and other containers of the product put upon the market, until about January, 1903, when it disposed of its entire business, including the good will thereof, and especially the trade-mark "cream," whereby its special brand of rolled oats was designated and distinguished as the product and commodity of said company solely, to the complainant herein; that complainant has from that time continued the production of rolled oats from specially selected stock, thus producing a superior quality or brand of the commodity, to which it has always attached the trade-mark "cream"; that such product, so designated, has continued to be extensively dealt in upon the markets, and used by consumers throughout the said Pacific Coast States and British Columbia, up to the present time; that by virtue of the large, extensive, and universal use of the said trade-mark within the territory named, in connection with the special product or brand of complainant's rolled oats, it has come to specially designate and distinguish complainant's product from other products of rolled oats; that dealers and consumers purchase the commodity so designated as and for a superior quality of rolled oats manufactured by complainant; that, upon proper application of complainant, its said trade-mark "cream," as used in designating its special product, was admitted to registration in the United States Patent Office, and a certificate of such registration was, accordingly, issued to complainant on December 17, 1907.

Following this, it is further shown, in effect: That defendant is manufacturing an inferior quality of rolled oats; that to the boxes, bags, and pack-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



ages containing the same it is attaching complainant's trade-mark "cream," and, thus designated, it is placing such inferior product upon the market in the Pacific Coast States and British Columbia, not only in competition with complainant's superior product, but for the purpose of deceiving the public and inducing dealers and consumers to believe that defendant's said product is the commodity of rolled oats manufactured by complainant, by which practice it has greatly injured, and is continuing so to injure and impair, the trade and business of complainant. The prayer is for a temporary restraining order, to be followed, after full hearing, by a perpetual injunction enjoining and restraining defendant from offering for sale, or selling, rolled oats put up in bags, sacks, or other containers inscribed, in imitation of complainant's said trade-mark, "cream," or from advertising itself as being the lawful producer of a brand of rolled oats under the designation or trade-mark "cream."

To this bill the defendant has interposed a demurrer, challenging its sufficiency upon which to base the relief prayed. In support of the bill for a provisional injunction, the complainant has filed several affidavits. These are controverted by numerous affidavits filed by the defendant. A hearing was had upon both the demurrer and the application for a preliminary injunction at the same time, and the cause was thus submitted.

T. J. Geisler and Chas. J. Schnabel, for complainant.  
Teal & Minor and A. B. Winfree, for defendant.

WOLVERTON, District Judge (after stating the facts as above). I am impressed that the bill of complaint states a cause of suit for injunctive relief restraining the defendant from the use of the word "cream" as a trade-mark to designate its product in the market. The word as employed by complainant to designate its product, used in connection with the corporate name of the concern, is appropriate for adoption as a trade-mark. It is not in any particular or peculiar sense descriptive of the article produced; nor would it seem that it was indicative of quality, grade, or class. In general use, the word is not employed adjectively or in a qualifying sense, but denotes in one of its significations the best of a particular thing. So that it would appear from the bill that the complainant's use of the word was arbitrary, and designed and intended to denote origin and ownership. In this sense it was susceptible of appropriation as a trade-mark. The complainant having therefore alleged that it was the original, first, and exclusive appropriator of the word "cream" as applied to its product of rolled oats, it was entitled to have it registered as such. See *Price Baking-Powder Co. v. Fyfe* (C. C.) 45 Fed. 799.

Further than this, the bill shows, in effect: That defendant is putting upon the market an inferior quality of rolled oats, under the designation of "Cream Rolled Oats," in imitation of complainant's trade-mark; that thereby the public is being deceived, and imposed upon, and induced to buy the defendant's inferior product as the complainant's superior and choice grade or brand of rolled oats. Thus does the bill, in legal effect, characterize the dealings of the defendant in the commodity of rolled oats in competition with those of the complainant in the same commodity as unfair; the result being that defendant is passing off its inferior goods upon the market for the product of complainant. In this sense there can scarcely be a doubt that the bill states a cause of suit. The demurrer should therefore be overruled.

Coming to a consideration of the affidavits filed in support of and against the application for a preliminary injunction, quite a different state of facts is disclosed.

Henry Albers, the president of the complainant company, deposes: That the complainant's predecessor adopted the trade-mark comprised of the words "Cream Rolled Oats" about the month of December, 1897, and that it and the complainant have ever since applied such trade-mark to the commodity of rolled oats manufactured by them; that such trade-mark was duly admitted to register December 17, 1907; and that at all times the same was exclusively so used by complainant and its predecessor. Reference is made to particular instances showing that parties had purchased rolled oats of the defendant's manufacture believing the same to be the product of complainant. The deponent then further states: That the commodity of rolled oats had never been placed upon the market within the Pacific Coast States, or sold under the trade-mark "Cream Rolled Oats," until said trade-mark was applied and used by the complainant's predecessor; that the defendant adopted the designation "Cream Rolled Oats" for the first time about October, 1901, and not earlier; that somewhat later defendant discontinued the use of such designation; but that about April, 1906, it adopted another trade-mark in close resemblance to that of complainant, namely, the arrangement of the words "Extra Cream Rolled Oats," and is now using said trade-mark, to the injury of complainant's trade.

On the other hand, Walter Goss, who is the president and general manager of the defendant company, deposes: That the Acme Mills Company has been engaged in the manufacture of rolled oats since the year 1897, which it has marketed in sacks or containers of three different sizes, containing quantities of 9, 45, and 90 pounds, marked and branded with the words "Extra Cream"; that such product has become well and favorably known to the public as "Acme Mills Company Extra Cream Rolled Oats"; that the terms "cream" and "extra cream" are now, and have been for 12 years last past, used by the various manufacturing institutions and mills and dealers in general, and applied in the trade at large, as indicative of and denoting the first quality of rolled oats; that such designations have been applied in buying and selling, ordering, marketing and branding the commodity as handled in the markets, and, by the custom of the trade, are not employed to denote any particular brand or product of rolled oats, nor do they bear any special signification in an arbitrary sense; but that they have come to mean, and do mean, first quality, in a descriptive sense. In support of the statement, certain price lists are produced, as follows:

Yolo Mills, Hinze & Plagemann, of San Francisco, Cal., bearing date May 20, 1899, "Yolo Mills Extra Cream Rolled Oats." R. Palitzsch, of Portland, Or., bearing date August 10, 1900, "Cream Rolled Oats." Capitol Mills, Deming-Palmer Milling Company, San Francisco, Cal., bearing date October 16, 1899, "Capitol Mills Extra Cream Rolled Oats." Mission Mills, Del Monte Milling Company, San Francisco, Cal., April 4, 1903, "Extra Cream Rolled Oats." Portland City Mills & Peerless Pure Food Company, P. Johnson & Co., Portland, Or.,

bearing date November 1, 1901, "Peerless Cream Rolled Oats." Pacific Cereal Association, of San Francisco, Cal., bearing date January 4, 1904, "M. Buyer Rolled Oats Extra Cream." Pacific Milling Company, San Francisco, Cal., bearing date February 15, 1906, "Extra Cream Rolled Oats."

Thereupon the affiant further states that he is familiar with the custom and usage of the mills and trade upon the Pacific Coast, and that the terms "cream" and "extra cream," as applied to the product rolled oats, were used in the trade in general long prior to any use made thereof by Albers Bros. Milling Company, or its predecessor, as a trade-mark or otherwise.

Six other affidavits are produced, all corroborative of the statement of Goss that the terms "cream" and "extra cream" have, by the custom and usage of the trade upon the Pacific Coast, acquired a meaning and signification denoting quality, and nothing beyond in a special sense. By a counter affidavit the complainant shows: That rolled oats was first produced in about the year 1885, and that, as indicative of quality, the words "extra cream," denoting choice or extra grade, were then, and ever since have been, applied to the product in a descriptive sense; that such words were never applied as a trade-mark; and that the word "cream" was not used by itself, or otherwise except in connection with the word "extra."

Upon a consideration of these affidavits pro and con, it is by no means clear that complainant's predecessor was the first to employ the word "cream" in application to the product rolled oats in any sense, and it is very much in doubt whether such predecessor was the first to adopt and use the word as a trade-mark. A trade-mark is acquired by prior and exclusive user, or it may be acquired by registration. The complainant asserts prior user, and then a subsequent registration. User as a trade-mark signifies that the mark shall be affixed, either upon the goods themselves, or upon the boxes or wrappers containing them, or is in some other way physically attached to the goods. It is not sufficient that the word or symbol be employed as a means of advertisement merely. It must be applied as a mark upon the goods or their container. 28 Am. & Eng. Enc. of Law, 351, 352; Battle Creek Sanitarium Co., Limited, v. Fuller, 134 O. G. U. S. Patent Office, 1299.

By defendant's showing, the terms "cream" and "extra cream" have been used as descriptive of the product and as denoting quality—that is, a choice or first-grade article—for 12 years last past, which antedates complainant's first alleged use of the word "cream" as a trade-mark; but it is, however, contended that, while others may have used the term in a descriptive sense or as denoting quality, the complainant and its predecessor were the first and only concerns to use it as a trade-mark, and hence that the complainant has acquired the right to use it in that way.

The manner of the use of these terms "cream" and "extra cream," as shown by Goss, if they have not acquired a secondary meaning in the trade, would indicate that both such terms were used as trade-marks previously to the complainant's alleged use of the word "cream" in that sense. The usual and common way of distributing the product

in the market was in containers of some sort, with the name of the producer marked thereon, and a designation of the contents, and it is quite probable that the word "cream" and the words "extra cream," as the case might be, were used in connection with the designation of such contents. This use would make of such terms technical trade-marks, unless employed in a descriptive sense to denote quality, as the defendant alleges. So that, taking either aspect of the situation you will, the complainant must fail. If the use of the word "cream" was as a term denoting quality, and was so understood and treated in the market and in trade relations prior to the use of the same by complainant as a trade-mark, then it was not adapted for appropriation as a trade-mark. If, on the other hand, it was used in the manner indicated in connection with the producer's name and a designation upon the bags, packages, and containers indicating the contents thereof, then its use was as a trade-mark. This use, antedating, if Goss' assertion be true, the use by complainant, would preclude complainant from adopting the word as a trade-mark. However, whatever may be the real fact as to the manner and priority of use of the word, there is a maze of uncertainty about it, leaving the question in much doubt and dispute. In such a state of the case, a preliminary injunction will not issue.

Nor does it seem to me that counsel's argument touching the significance of the word "extra," when applied to the word "cream," is tenable. They say:

"We submit that there is a difference between the words 'extra cream' and 'cream,' because of the inherent property of the word 'extra' to define grade and quality. The word 'cream' by itself was never used by any one for any purpose prior to the time of its adoption by plaintiff. The association of the word 'cream' with the word 'extra,' and constituting the only use of the latter word for any purpose by anybody prior to its adoption by plaintiff, had a qualifying effect, it imposed a secondary meaning upon the word 'cream.' Take from 'extra cream' the word 'extra,' and its arbitrary character is re-established. No prior use of a word in the secondary sense for the purpose of designating grade or quality can prevent the subsequent use of the word as a trade-mark, unless the word has been used as a trade-mark. The only function of the words 'extra cream' was to convey to the public the idea that the package or container on which they were used contained the choicest part, selected and segregated by the manufacturer from his general stock."

If the combination means the choicest part of a thing, then we have an expression signifying the choicest of the choice or best part of the product, which is tautological, to say the least. If the word "cream" has an arbitrary sense shorn of any secondary meaning it might have acquired in trade usage, the words "extra cream" are doubly arbitrary, and hence would have been more entitled to selection as a trade-mark than the word "cream"; but, as previously shown, it has not been made to appear satisfactorily that the complainant is entitled to the use of the word as a trade-mark, or at least it is so doubtful that the court will not decree a preliminary injunction restraining its use by others. The case made so far is not persuasive that the defendant is engaged in unfair competition with the complainant, however strongly it may be made to appear at the final hearing.

The preliminary injunction will therefore be denied.

## In re ÆTNA COTTON MILLS.

Ex parte KNIGHT, YANCEY &amp; CO.

(District Court, D. South Carolina. July 16, 1909.)

**BANKRUPTCY (§ 314\*)—CLAIMS PROVABLE—LEGALITY—GAMING CONTRACTS BY CORPORATION.**

A contract made by a cotton mill company for a purchase of cotton for deferred delivery at different times, but which also contained a put and call clause, under which the parties had actually settled one loss by the company without any delivery, taken in connection with extrinsic testimony tending to show that no deliveries were intended by the parties, *held* to be a gambling contract which the corporation had no power to make and which created no liability provable against its estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.\*]

In Bankruptcy. On review of order of referee.

Miller & Whaley, for bankrupt.

Sanders & De Pass, for Knight, Yancey & Co.

**BRAWLEY**, District Judge. This is a petition to review the order of the referee allowing a claim of Knight, Yancey & Co. The claim is for a balance alleged to be due upon an account for losses sustained upon certain contracts for the future delivery of cotton. There are four contracts for the sale of 250 bales, each dated June 2, 1905, and in form are for the sale of 250 bales of cotton deliverable at Union, S. C.; the first being for delivery in October, and the others for deliveries in November, December, and January, respectively, the price fixed being at 30 points on January delivery in New York, the price to be called at buyer's option on any day prior to September 25, 1905; and, if the price is not called by buyer prior to September 25th, the seller has the option to fix the price within five days thereafter. The third stipulation in the printed form of contract is as follows:

"Buyer has the option on any day prior to September 25, 1905, to put the cotton to the seller at 23½ points on January delivery, in New York."

The fourth stipulation is:

"Buyer having exercised the option to put must again call as provided for in section 1."

Fifth:

"If the price is not fixed after the put at buyer's call, as provided for in section 1, it shall be fixed by seller, as provided for in section 2."

Sixth:

"Put and call to be repeated one or more times at buyer's option, prior to September 25, 1905."

Seventh:

"Cash settlements to be made on each put, based on an average weight of 500 lbs. per bale."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Each of the contracts is signed "Ætna Cotton Mills, W. H. Sartor, President and Treasurer." The Ætna Cotton Mills is a corporation in the state of South Carolina, engaged in the business of manufacturing cotton. At the head of each contract, under the heading, "W. D. Nesbitt & Company, Cotton Brokers," there are the words, "Contract for deferred delivery of spot cotton."

There is no doubt that the Ætna Cotton Mills, engaged in the business of manufacturing cotton, could lawfully buy cotton for future delivery; but it ought to be equally clear that the interest of the stockholders of that company is that its capital shall not be subjected to the risk of enterprises not contemplated in its charter. It is to the interest of the public that corporations shall not transcend the powers granted; and every one entering into a contract with a corporation must take notice of the legal limits of its powers. Upon the face of these contracts it is apparent that provision is made for a speculation in cotton. By the terms of paragraph 3, the buyer has the option on any day prior to September 25th to put the cotton to the seller at 23¾ points on January delivery in New York, and by paragraph 6 the "put and call" to be repeated one or more times at buyer's option prior to September 25, and by paragraph 7 cash settlements to be made on each "put" based on an average weight of 500 pounds per bale. On these puts and calls it is not pretended that actual cotton was to be delivered or received, and what was actually done was what presumably was intended to be done at the time the contracts were made, and what in terms they permitted to be done; that is to say, Sartor, as president of the cotton mills, exercised his option to put the cotton as provided in the contract within less than a month after the contracts were executed, and as the result of that operation nearly \$12,000 was lost by the Ætna Company; settled in part by payments in cash, and in part by notes given in July, 1905, which have since been paid, and which Sartor contends was intended to be a settlement in full of the contracts.

The testimony of Sartor is that some three or four days before the contracts were made he met Nesbitt, one of the partners of Knight, Yancey & Company, at the office of Mr. Duncan at Union, and he says:

"We wanted to go into this speculation, or whatever you might call it [that is, he and Duncan]. We did not want to take spot cotton, so we talked it over."

He thus states the agreement with Nesbitt:

"Well, Mr. Nesbitt agreed to give us a contract of that kind, that we were not to take any spot cotton, and I then agreed to take the 1,000 bales, and Mr. Duncan agreed to take 6,000 bales, and then Mr. Nesbitt sent those contracts to us from Spartanburg."

He at first refused to sign the contracts which Nesbitt had forwarded, and repeats this conversation with Nesbitt:

"I told him that the contract read that I was to take the cotton, that that was not what I wanted, and he had agreed to allow me to deal in the cotton without taking it, that I could take a speculative contract. He then came to Union after we had refused to sign the contracts. I met him at Duncan's, and he objected to putting in this clause. I would not sign the contract the way it was written, so finally he said, 'Well, we cannot use those contracts

if we modify them or state that you are not to take the cotton, for we are to put these contracts up as collateral, for it takes money to run our business.' Then he said, 'I tell you what I will do, I will state to you as a member of the firm that, if you will go on and sign this contract, and have witnesses to it, we will not demand you to take the spot cotton.' I then signed the contract under that agreement."

Mr. Duncan testifies as follows:

"Mr. Sartor objected to signing the contract on the ground that it contemplated the actual delivery of this cotton, and he did not expect to receive the cotton and did not want it, and would not sign the contract if he had to receive it. Mr. Nesbitt, after discussing it for some time, said he could not change the contract, as he had to put it up as collateral, 'but,' says he, 'I am willing to give you my word in the presence of Mr. Duncan and Mr. Patton (Patton is my stenographer) that you will not be forced to receive this cotton.' As to when Sartor signed the contract, I do not know. I do not know that he ever signed it. That is to my personal knowledge."

Mr. Nesbitt, who was examined on this point, says:

"In making this contract Mr. Sartor wanted Knight, Yancey & Co. to agree that, in case he did not want to take spot cotton under the contract, he would not have to do it, and I tried to explain to him that such a contract would be illegal, that what we wanted and that what he wanted was a legal contract, that when the time came when he did not want the cotton, if it was convenient to us to take the cotton, we would try to take it, that we would try to arrange to take it."

I am of opinion: That the preponderance of the testimony is that these contracts were, and were intended to be, speculative contracts; that they were disguised under the form of contracts for deferred delivery of spot cotton. Both Sartor and Duncan testified that it was not Sartor's intention to buy actual cotton, and to have it delivered to the mills, and Nesbitt's testimony is not an unequivocal denial of the conversation that took place. The fact that the parties had actually settled differences arising out of the "put" transaction, and that the cotton bargained to be delivered was not actually delivered, tends to show that at the inception of the contract the parties intended to settle differences, and not deal in actual cotton. A gambling contract disguised under the form of legitimate business is none the less obnoxious. The learned referee, who saw the witnesses and heard the testimony, it seems to me, is evidently of the same opinion. He says in his report:

"The inclination of my mind is decidedly against the validity of the claim. It seems to me that while it may be perfectly legitimate and proper that a corporation, organized for the manufacture of cotton goods, should enter into a contract for the purchase of cotton deliverable at a future date, yet there is no good reason why such a contract should contain a 'put and call' gambling clause, by which a corporation is bound to follow the fluctuations of the cotton market upward and downward in the interval between the date of the contract and the day fixed for the delivery of the cotton, and to pay or receive margins as the case may be, to the prejudice always of the stockholders."

"It appears in evidence that these claimants have already received in cash under the automatic operation of these contracts nearly \$12,000 of the money of the stockholders of this corporation, for which they have given nothing in return, and are now claiming some \$1,500 more. Such a contract seems to me to be not only ultra vires, beyond the scope of powers granted in the charter to the incorporators, but to place the capital of the corporation at the mercy of any reckless or dishonest officer who may happen to have control

of the corporate funds, and at the same time a taste for 'puts and calls' on the Cotton Exchanges, but at the same time I think that we are bound by the decisions above cited."

The cases cited are *Parker v. Moore*, 115 Fed. 799, 53 C. C. A. 369, *Springs v. Carpenter*, 154 Fed. 487, 83 C. C. A. 327, and *Sampson v. Camperdown Mills* (C. C.) 83 Fed. 833. *Parker v. Moore* was an action to recover margins advanced by plaintiffs as brokers for defendants on purchases of cotton for future delivery made by defendants' order on the New York Cotton Exchange. Plaintiffs introduced evidence showing that in each case they advised defendant that the purchase was made with the distinct understanding that actual delivery was contemplated, to which he expressed no dissent. Upon the trial of the case the defendant testified that he did not intend to actually receive the cotton ordered by him through the plaintiffs, and the court, *suo motu*, directed a nonsuit. The Court of Appeals, considering the case, says:

"Evidence had already been introduced by the plaintiffs tending to show that the defendant intended to receive the cotton he had ordered to be bought for him. He was notified from time to time by the plaintiffs, who acted as his agents, that it had been bought in conformity with the rules and customs of the New York Cotton Exchange, and that the orders had been received and executed with the distinct understanding that actual delivery was contemplated, and in no single instance had he demurred to this action of his agents, or repudiated it, but had by silence assented to the purchase upon the conditions stated, and surely it was a question for the jury to say whether the evidence adduced by the plaintiff as to his intent, evidenced by a course of dealing extending over a considerable period of time, should or should not outweigh a self-serving declaration made by the defendant at the time of trial that he did not mean to do that which the correspondence introduced in evidence tended to show he had done. The jury, upon the submission of the question to it, might have thought that actions speak louder than words, and might have thought that at the time the cotton was ordered defendant really did want to buy it subject to actual delivery, notwithstanding his denial on the stand."

And again:

"In the record of the case at bar we do not find any evidence to show that the plaintiffs knew of the intention of the defendant not to receive the cotton bought, upon the several orders; but, even if such evidence had appeared, it would have been for the jury to pass upon."

A new trial was therefore ordered.

*Springs v. Carpenter* was a suit upon a note given to cotton brokers in New York in settlement of losses which had accrued in circumstances similar to the transaction referred to in *Parker v. Moore*, and in a short opinion in the Court of Appeals the court says:

"The plaintiffs testified that they had no knowledge of the intention of the defendants not to receive or deliver cotton when the contracts matured. The evidence offered by the defendants did not show knowledge on the part of the plaintiffs of the intention of defendants not to receive or deliver the cotton on the maturity of the contracts, other than that indicated by the character of the contracts themselves."

—and refers to its opinion in *Parker v. Moore* as controlling the case, holding that the court below should have directed a verdict for the plaintiff, saying:



"We find nothing in this record showing that the plaintiffs below knew of the intention of the defendants below, if in fact they had such intention, not to receive the cotton bought for them under their contracts, upon their orders."

In *Sampson v. Camperdown Cotton Mills*, Hammett, president of the cotton mills, had made contracts through his own brokers, Woodward & Stillman, for the purchase of cotton for future delivery. Sampson & Co. were the commercial agents of the Camperdown Mills, advancing money to it from time to time. They had no interest in these contracts at all, Hammett, as president of the mills, furnishing the money necessary to keep up his margins, but after a time he began to draw on Sampson & Co. to furnish the money. The court says:

"The record does not disclose any knowledge on their part of the inception of and the early payments upon this transaction."

And commenting on a letter of the president of the company, the learned judge says:

"It clearly appears from this letter that the purpose of purchasing cotton deliverable in the future was to advance the business of the Camperdown Mills, in the course of that business, and it was deemed a wise, perhaps necessary, precaution in the business, that they were not entered into as a speculation, or for the purposes of speculation."

It was contended that under the statute of South Carolina these contracts for the purchase of futures were illegal. Upon the facts of that case, the record not showing, as the court held, any direct evidence that the contract, valid on its face, was invalid, the decision was in favor of Sampson & Co.

It does not seem to me that any of the cases referred to by the referee are controlling here. They are all based upon contracts which differ essentially from those now under consideration, and the facts are different.

I am of opinion that the referee was in error in allowing the claim, and his order is set aside, and the claim is allowed.

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In re *HERSEY*.

(District Court, N. D. Iowa, E. D. August 3, 1909.)

No. 601.

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 4\*)—NATURE OF INSTRUMENT—EFFECT—RIGHT OF ASSIGNEE.

A written instrument, by which a bankrupt conveyed his entire stock of merchandise and substantially all his property not exempt from execution to a trustee in trust to effect a settlement and composition with his creditors, authorizing the trustee to sell the property in bulk or at retail, and after taking from the proceeds his expenses and compensation for his services to distribute the remainder among the creditors of the bankrupt, etc., and if he was not able to make such composition to account for the proceeds to the bankrupt, though not a technical assignment for the benefit of creditors within the state statute, was such in effect, and constituted the trustee the bankrupt's agent.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Dec. Dig. § 4.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 288\*)—PROPERTY IN THE HANDS OF THIRD PERSONS—CLAIMS—ADJUDICATION—JURISDICTION.

A bankrupt conveyed all his property not exempt from execution to a trustee to make a composition with his creditors, authorizing the trustee to sell the property in bulk or at retail, and after taking from the proceeds his expenses and compensation for his services to distribute the remainder among the creditors, and if there was a surplus, or if he was unable to make a compromise, to account to the bankrupt. The trustee was unable to make the composition, and, bankruptcy, having intervened, turned over to the trustee in bankruptcy the assets received by him, except \$409 received from sales of goods at retail, which he claimed as compensation and for expenses. *Held*, that since such claim was not merely colorable, but made in good faith under a claim of right by virtue of the conveyance, it was determinable only by a plenary suit, and not in a summary manner by the referee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.\*]

In Bankruptcy. On petition of Wm. S. Hart for review of an order of the referee summarily requiring him to pay \$369 to the trustee. See, also, 171 Fed. 1001, 1004.

Wm. S. Hart, in pro. per.

Douglas Deremore, for trustee.

REED, District Judge. January 22, 1908, the bankrupt, then a merchant at Waterville, in Allamakee county, by an instrument in writing conveyed to the petitioner, Wm. S. Hart, his stock of merchandise and substantially all of his property, not exempt from execution, in trust for the purpose of effecting a settlement and composition with his creditors. The instrument authorized Hart to sell the property in bulk or at retail, and after deducting from the proceeds his expenses and compensation for his services to distribute the remainder among the creditors of the bankrupt if he effected a settlement or composition with them, and, if not, required him to account therefor to the grantor, or to such other person or official as may be entitled to receive the same. Hart at once took possession under such instrument of all of the property of the bankrupt not exempt from execution under the Iowa statute, and endeavored to effect a composition with his creditors, but, after a good deal of correspondence and negotiations with them, was unable to do so, and on February 17, 1908, he advised the bankrupt to file a voluntary petition in bankruptcy, which the bankrupt did on February 24th, and he was adjudged bankrupt thereon that day. During the time that Hart was so in possession and control of the property, he continued to sell therefrom at retail, and received from such sales about \$409. He incurred expenses in making such sales and in caring for the property, and devoted a good deal of his own time to the management thereof and in endeavoring to effect a settlement with the bankrupt's creditors. Upon the appointment of the trustee in bankruptcy, Hart turned over to him all of the remaining property of the bankrupt in his custody or under his control, but retained the \$409 to cover his compensation and the actual expenses incurred in the management of the property under the conveyance thereof to him.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The trustee thereupon applied to the referee for an order requiring Hart to show cause why he should not be required to turn over this \$409 to the trustee. In response to a notice of such application, Hart appeared before the referee and claimed the right to retain the \$409 both as against the bankrupt and the trustee, and objected to the jurisdiction of the referee to require him to turn the same over to the trustee, or to determine the question of his right thereto. The referee overruled the objections and entered a summary order requiring Hart to turn over to the trustee \$369 of such \$409, permitting Hart to retain the remainder for the actual expenses incurred by him in caring for the property. It is this order of the referee that Hart petitions to have reviewed.

It appears from the evidence that, before the instrument in question was made, the bankrupt had on January 17th made a mortgage for \$300 upon his stock of merchandise to Hart, and on January 18th one for \$2,800 to the Waukon State Bank for the benefit of the B. A. Hersey estate. These mortgages, upon being recorded, at once precipitated a demand by all other creditors of the bankrupt for payment of or security for their debts, and some of them commenced, and others threatened, attachment proceedings against him. In this situation the bankrupt sent for Hart at Waukon to come to Waterville to counsel with and advise him what to do. In response to such request Hart went to Waterville, and as a result of the conference with the bankrupt it was deemed best to make the instrument in question, and Hart at once took possession thereunder. The instrument provides that Hart shall be first paid from the proceeds of the sale of the property for his services and for the expenses that may be incurred by him in caring for and disposing of the same, and in effecting a settlement with the creditors of the bankrupt, or in attempting to do so. While the instrument is not an "assignment" under the state statute for the benefit of creditors, such is its effect, and Hart thereunder was but the agent of the bankrupt, with the rights given him by the instrument, for the sale of the property and distribution of its proceeds as provided therein. *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814.

Hart recognized this, and promptly turned over to the trustee in bankruptcy upon his appointment and qualification as such the portion of the property not disposed of by him, but claimed the right as against the bankrupt and the trustee to retain the \$409 as compensation for his services rendered and expenses incurred prior to the bankruptcy, and at the very threshold of the proceedings challenged the jurisdiction of the referee to determine the question of his right thereto. While Hart was not, as before stated, technically an assignee for the benefit of creditors under the state statute, the claim made by him to the \$409 is within the principle of the rule held in *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. The determination of the question of Hart's right to this \$409 does not pertain to the bankruptcy proceeding proper, but is a question arising in the course of such proceeding which should be determined by a plenary action or suit against him in a court hav-

ing jurisdiction to determine such question. *Bush v. Elliott*, 202 U. S. 477-482, 26 Sup. Ct. 668, 50 L. Ed. 1114, and cases cited.

In *Re Walsh Bros.* (D. C.) 163 Fed. 352, the question was considered and determined when a referee or court of bankruptcy might, and when they might not, make a summary order requiring third parties to turn over to the trustee property coming into their possession prior to the bankruptcy. After referring to decisions of the Supreme Court, it is said in that case:

"The rule deducible from these decisions is that, where a third party holds property at the time of the bankruptcy merely as agent or bailee of the bankrupt, he may be summarily required by the referee or the court of bankruptcy to turn the property over to the trustee; but where he acquires the possession prior to the bankruptcy, and claims the right to hold the property as against the bankrupt or the trustee, then the authority of the referee, and of the court of bankruptcy in summary proceedings, is limited to determining whether the claim made is colorable merely, or is in fact adverse to the bankrupt, and according as it determines that question will it deny or retain jurisdiction of the controversy. *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051."

It is obvious that the claim of Hart to this fund is not a merely colorable one, but it is one made in apparent good faith under a claim of right thereto, by virtue of the conveyance of the bankrupt to him, and his possession thereunder for more than a month before the bankruptcy. The merits of such claim, however, will not be considered, for, when it was made to appear before the referee that Hart's possession of the \$409 and the instrument under which he asserted his right thereto both antedated the bankruptcy by more than a month, the referee should have dismissed the application of the trustee without prejudice to his right to bring an action or suit to recover the same from Hart in any court having plenary jurisdiction to determine his right thereto.

The order of the referee is therefore vacated, and the matter is referred back to him to enter an order of dismissal of the application of the trustee without prejudice, as above indicated.

It is ordered accordingly.

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In re HERSEY.

(District Court, N. D. Iowa, E. D. August 3, 1909.)

No. 601.

1. BANKRUPTCY (§ 347\*)—CLAIMS—PRIORITIES—RENT.

Whether an allowance to a bankrupt's landlord for rent during the period that the bankrupt's goods remained in the storeroom after the bankruptcy, and until sale, is allowed as rent due from the bankrupt and entitled to priority, or as an expense of administration is immaterial.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 347.\*]

2. LANDLORD AND TENANT (§ 242\*)—LANDLORD'S LIEN.

Code, Iowa, § 2992, declares that a landlord shall have a lien for his rent on any personal property of the tenant which has been used or kept on leased premises during the term not exempt from execution, etc., for a year, after a year's rent or the rent of a shorter period falls due, etc.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

*Held*, that as between landlord and tenant the lien attaches in all cases of tenancy, whether for a definite term or at will.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 242.\*]

**3. BANKRUPTCY (§ 350\*)—LANDLORD'S LIEN.**

Where a bankrupt occupied a part of the leased premises as a store-room and the balance for living quarters, the landlord had a preferred claim on the bankrupt's goods in the storeroom for the amount due for the entire premises under Code Iowa, § 2992, declaring that a landlord shall have a lien on any property of the tenant occupied or used on the leased premises at any time during the term for one year, after a year's rent or the rent of a shorter period falls due.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. § 350.\*]

**4. BANKRUPTCY (§ 347\*)—RENT.**

Where a bankrupt occupied a part of leased premises for a store and lived in the balance, and after his adjudication the trustee permitted the goods in the store to remain until they were sold, the rent for the rooms used as a residence after the bankruptcy could not be allowed as an expense of administration.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 347.\*]

In Bankruptcy. On petition of the trustee for review of an order of the referee allowing a claim of Stevens & Pedersen for rent, and entitled to priority under section 64b (5) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]).

See, also, 171 Fed. 998, 1004.

Douglas Deremore, for trustee.

Wm. S. Hart, for creditors.

REED, District Judge. The trustee petitions for review of an order of the referee allowing the claim of Stevens & Pedersen to the amount of \$323.33 for rent of the building, in which the bankrupt resided and conducted his business, up to the time the goods were disposed of by the trustee and entitled to priority of payment because secured by a landlord's lien under section 2992 of the Iowa Code. The bankruptcy was on February 24, 1908, and the goods were sold by the trustee about April 13th following.

The allowance of that part of the claim for the use of the store-room subsequent to the bankruptcy as rent due from the bankrupt may be technically erroneous, for the room was not used by him after the bankruptcy, but was then used for the safe-keeping of the goods until they could be disposed of by the trustee, and such use should be paid for as part of the expense of administration; but the net result to the estate is the same, whether this amount is allowed as rent owing by the bankrupt, and entitled to priority, or is paid as part of the expense of administration. At least the bankrupt estate does not suffer by reason of its allowance as rent and entitled to priority under section 64b (5) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), instead of paying it as part of the expense of administration.

The trustee contends that inasmuch as the tenancy was one at will, and that no definite time was fixed for the payment of rent, no lien attached for the rent prior to the bankruptcy under the Iowa statute,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and he relies mainly upon *German State Bank v. Herron*, 111 Iowa, 25, 82 N. W. 430, in support of such contention. The Code of Iowa of 1897 provides as follows:

"Sec. 2991. Any person in the possession of real estate, with the assent of the owner is presumed to be a tenant at will until the contrary is shown, and thirty days' notice in writing must be given by either party before he can terminate such a tenancy, but when, in any case, a rent is reserved payable at intervals of less than thirty days, the length of notice need not be greater than such interval. \* \* \*

"Sec. 2992. A landlord shall have a lien for his rent upon all crops grown upon the leased premises, and upon any other personal property of the tenant which has been used or kept thereon during the term and not exempt from execution, for the period of one year after a year's rent, or the rent of a shorter period, falls due; but such lien shall not in any case continue more than six months after the expiration of the term. In the event that a stock of goods or merchandise, or a part thereof, subject to a landlord's lien, shall be sold under judicial process, order of court, or by an assignee under a general assignment for benefit of creditors, the lien of the landlord shall not be enforceable against said stock or portion thereof, except for rent due for the term already expired, and for rent to be paid for the use of demised premises for a period not exceeding six months after date of sale, any agreement of the parties to the contrary notwithstanding."

Under the latter-named section the lien is given in all cases of tenancy to the owner of the premises, and the fact that the tenancy is one at will, instead of for a definite term, is not material as between the landlord and the tenant, however that might be as between the landlord and one holding an incumbrance upon the property made subsequent to the tenancy.

In *German State Bank v. Herron*, 111 Iowa, 25, 82 N. W. 430, above, the controversy was between the landlord and a holder of a chattel mortgage upon personal property of the tenant kept upon the leased premises made after the expiration of a tenancy for years, but under which the tenant continued to occupy the premises after the expiration of such term with the consent of the owner without any agreement as to the time of such continued occupancy. It was held: That the continued occupancy of the premises with the assent of the owner was a tenancy at will, which might have been terminated under the statute by either party upon giving 30 days' notice in writing to the other; that the landlord's lien upon the property of the tenant continued as against subsequent incumbrances only for the period requisite for the termination of the tenancy at will under the statute; and that a lien for the rent accruing subsequent to such time was inferior to a chattel mortgage made by the tenant before the accrual of such subsequent rent. No such question is involved in this case, and the trustee succeeds only to the rights of the bankrupt as against these creditors and takes the property subject to their lien for rent.

The bankrupt resided with his family in rooms on the second floor of the same building in which he conducted his business and kept his merchandise, and it is objected that rent for the use of such rooms cannot be charged as a lien upon the goods kept in the storeroom below; but the statute gives to the landlord a lien upon all personal property of the tenant, not exempt from execution, used or kept by him on the leased premises. It is immaterial that the tenant uses

a part of the leased premises as a residence for himself and family, and a part upon which to conduct his business. Upon the occupancy of the premises by the tenant the lien for the rent attaches to any property not exempt from execution that he may keep upon any part of the premises during the term. The rent for the rooms used as a residence by the bankrupt subsequent to the bankruptcy could not, of course, be allowed as an expense of administration, and was not allowed by the referee as rent to the claimants, and they ask that the order be modified so as to include the rent of these rooms for such time; but they have not petitioned for a review of the order in this respect, and the matter cannot be considered.

The result of the order of the referee is not prejudicial to the estate, and it is therefore approved.

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In re HERSEY.

(District Court, N. D. Iowa, E. D. August 3, 1909.)

No. 601.

1. BANKRUPTCY (§ 340\*)—CLAIMS—REVIEW—EVIDENCE.

Where a claimant against a bankrupt had no notice, at the time the bankrupt and other witnesses were examined before the referee at meetings of creditors, that the evidence would be used on the hearing of his claim, such evidence was inadmissible against him.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.\*]

2. BANKRUPTCY (§ 166\*)—PREFERENCES—LIENS.

A creditor of a bankrupt employed claimant, an attorney, to assist in securing payment or security for claim of \$280, and on January 17, 1908, it was agreed that the attorney should pay such amount to the creditor and receive a chattel mortgage on the bankrupt stock to secure the bankrupt's note for the amount, due in 60 days. The mortgage was duly executed and filed and the money paid to the creditor by claimant. The bankrupt was then insolvent and intended to grant a preference; but there was no proof that either the bankrupt or claimant intended to hinder, delay, or defraud the bankrupt's creditors, nor did the bankrupt receive any advantage to himself, being adjudged a bankrupt on February 24th thereafter. *Held*, that the mortgage was not a preference in so far as the \$280 loan was concerned, having been given for a present consideration, but was a valid lien under Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), providing that liens given or accepted in good faith and not in fraud of the act and for a present consideration shall not be affected thereby.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 166.\*]

3. BANKRUPTCY (§ 188\*)—LIENS—STATUTES.

Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), providing that liens given in good faith and not in contemplation of or in fraud of the act, and for a present consideration, shall not be affected thereby, was designed to protect liens valid under the state law.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188.\*]

4. BANKRUPTCY (§ 159\*)—PREFERENCES—PRE-EXISTING DEBT.

Execution of a chattel mortgage by an insolvent less than two months before bankruptcy to secure a pre-existing debt intending to prefer the creditor, and the latter having reasonable cause to believe that the bank-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rupt was then insolvent and intended such preference, was voidable as a preference under the express provisions of Bankr. Act July 1, 1898, c. 541, § 60d, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3446).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 159.\*]

**5. BILLS AND NOTES (§ 534\*)—ACTION—AMOUNT OF RECOVERY—ATTORNEY'S FEES.**

Under Code Iowa, § 3869, authorizing recovery of an attorney's fee in suits on notes contracting therefor provided the attorney files with the clerk when commencing the suit an affidavit that there is no agreement for division or sharing of the fee, a claim for such fees may be properly denied where no such affidavit has been filed.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 534.\*]

**6. BANKRUPTCY (§ 322\*)—CLAIMS—NOTES—ATTORNEY'S FEES.**

Where a note providing for attorney's fees in cases of collection by suit was filed by the payee, who was an attorney, as a claim against the maker's estate in bankruptcy, he was not entitled to an additional allowance for attorney's fees as costs in determining the amount of the claim; there being no provision in the bankruptcy act for the allowance of attorney's fees in bankruptcy proceedings except section 3e (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3422]), on the withdrawal or dismissal of a petition in bankruptcy, and section 64b (3), on behalf of certain attorneys to the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 322.\*]

In Bankruptcy. On petition of Wm. S. Hart for review of an order of the referee.

See, also, 171 Fed. 998, 1001.

Dexter D. Hersey, a merchant doing business at Waterville in Allamakee county, was adjudged bankrupt by this court February 24, 1908, upon his own petition filed that day. January 27th preceding he made a chattel mortgage upon his stock of merchandise to the petitioner, Wm. S. Hart, to secure two notes, one for \$280, due in 60 days, and one for \$20, due in 30 days from that date, bearing 8 per cent. interest, which mortgage was duly recorded the same day. Hart presented to the trustee a claim for these two notes, and asked that it be allowed as a secured claim against the bankrupt estate under this mortgage. On objections by the trustee, the referee denied the claim upon the ground that the mortgage was made to hinder and delay the creditors of the bankrupt, and therefore void under section 67e of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3449]). Hart petitions for review of this order.

Wm. S. Hart, in pro. per.

Douglas Deremore, for trustee.

REED, District Judge (after stating the facts as above). Upon the hearing of the claim, and the objections of the trustee thereto, the testimony of the bankrupt and other witnesses examined before the referee at the first and other meetings of the creditors was offered by the trustee and admitted in evidence over the objections of the petitioner that no notice had been given him that such testimony was to be used in any proceeding whatever against him. Hart was also examined at such meeting, and was present at the examination as attorney for the bankrupt while the latter was being examined, but was not present when the others were examined, and was not notified at any time before the testimony was taken that it was to be used against him. It seems clear that, aside from his own examination,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



none of this testimony was admissible against the petitioner upon the hearing of this claim, and it will not be considered as against him.

From Hart's examination before the referee, and his testimony upon the hearing of the objections to his claim, it appears: That Mr. V. H. Stevens for some time prior to the bankruptcy held a claim against the bankrupt for \$280: that on January 17, 1908, he requested the petitioner, Hart, who then was, and still is, a practicing attorney at Waukon, Allamakee county, to go with him to Waterville to assist him in collecting or securing such claim. They went to Waterville, that day, and, after some negotiations, and inquiries of the bankrupt as to the amount of his debts and property, Hart agreed with the bankrupt to loan him \$280, with which to pay the debt of Stevens, and take a chattel mortgage upon his stock of goods, to secure the same and \$20 that the bankrupt was owing Hart. Notes were accordingly made by the bankrupt to Hart for said amounts, one for \$280 due in 60 days, and one for \$20 due in 30 days, each bearing 8 per cent. interest, and a chattel mortgage upon the stock of goods of the bankrupt to secure them. The notes and mortgage were delivered to Hart, he and Stevens returned to Waukon the same day, and Hart filed the mortgage for record and at once paid Stevens the amount of his debt \$280. That the bankrupt was insolvent at this time is clear under the testimony; but it is not certain that he then knew it. It is certain, however, that he was desirous of paying both Stevens and Hart their respective debts, and the testimony convinces that they each had reasonable cause to believe that the bankrupt was insolvent and intended to prefer them; but there is an entire absence of evidence that either the bankrupt in giving, or Hart in taking, the mortgage in question, intended to hinder, delay, or defraud the creditors of the bankrupt. Nor did the bankrupt secure by the mortgage any advantage to himself, out of what should have gone to his creditors, for he paid the entire amount of the loan upon the debt he was owing Stevens. While the evidence is conclusive that Stevens intended to enforce payment of, or security for, his claim when he went to Waterville, yet, if the mortgage had been made direct to him, that alone would not be sufficient to convict either him or the bankrupt of an intent to hinder, delay, or defraud the creditors of the latter. The distinction between an attempt to prefer, or an actual preference for that matter, and a conveyance by the bankrupt with intent to hinder, delay, or defraud creditors, is clear and must not be overlooked, and, unless the mortgage in question was made for the latter named purpose, it is not void under the bankruptcy act. *Coder v. Arts*, 152 Fed. 943-947, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372, affirmed 213 U. S. 223, 29 Sup. Ct. 436-443, 53 L. Ed. —.

If the mortgage had been made direct to Stevens, it would under the testimony have been a preference under section 60b of the bankruptcy act, which is as follows:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy,

as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

It was Stevens alone who was benefited by the payment of his debt of \$280, and he, if any one, should respond to the trustee for the preference so received. Hart received no benefit whatever from such payment, and was not, and could not have been, preferred thereby, for an indispensable requisite of a preference is a pre-existing creditor who may be preferred. In re Clifford (D. C.) 136 Fed. 476. Hart, as to such \$280, was not, prior to the mortgage, a creditor of the bankrupt, and his only connection therewith was the loan by him to the bankrupt of that amount with which the latter might pay his debt to Stevens, and for which Hart took the mortgage in question as security at the time of making such loan. Such transaction is not fraudulent, but falls directly within section 67d of the bankruptcy act, which is as follows:

"Liens given or accepted in good faith, and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

This section is designed to save and protect from the operation of the bankruptcy act liens that are valid under the state law. Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, reaffirmed in Security Warehouse Co. v. Hand, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117; Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436-443, 444, 53 L. Ed. —.

In Hewit v. Berlin Machine Works, above, it is said:

"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at the time of the bankruptcy as against the debtor and as against all of his creditors shall remain undisturbed."

That this mortgage to Hart upon its execution became a valid lien under the law of Iowa against the bankrupt, and upon its being recorded a valid lien as against his creditors, is not doubted. It is therefore valid as against the trustee of this estate to the extent of the loan of \$280 made by Hart to the bankrupt; but, as to the \$20 note, it stands upon a different basis. That note was given for a prior indebtedness of the bankrupt to Hart, and to that extent the mortgage is a preference, which may be avoided by the trustee.

Hart also claims an attorney's fee upon each of the notes under a stipulation therein which is as follows:

The maker "further agrees that if this note is not paid within thirty days after maturity and is placed in the hands of an attorney for collection, to pay five per cent. of the amount as collection fee and penalty for nonpayment; and in case suit is brought hereon a reasonable attorney's fee shall be taxed as costs of such suit."

Section 3869 of the Iowa Code authorizes an attorney's fee to be taxed as part of the costs if suit is commenced upon any contract providing for such a fee, which shall not be greater than a specified

amount, providing the attorney claiming such fee shall file with the clerk at the time of commencing the suit an affidavit that there is no agreement, express or implied, between him or his client for any division or sharing of the fee to be so taxed. The purpose of this statute, and of the stipulation in these notes, is to save the payer or holder the expense of collection fees if the note is not paid within the time stipulated, or if suit is commenced thereon. Hart is an attorney, and it does not appear that the notes were ever placed in the hands of any other attorney for collection, or that suit was ever commenced upon either of them; in fact, this larger note was not due at the time of the bankruptcy. Nor has the affidavit required by the state statute as a condition precedent to the allowance of such fees been filed. The claim therefore, if made under the state statute, might well be denied upon these grounds alone; but costs are only taxable under some provision of law authorizing their allowance, and Congress has provided, for the allowance and taxation of costs pending in the federal courts, and it may be doubtful, to say the least, if attorney's fees are taxable as costs in those courts other than as allowed by Congress to be taxed; but it is obvious that the bankruptcy act does not contemplate the allowance of attorney's fees as costs or otherwise upon proving claims against a bankrupt estate. No provision is made by that act for the allowance of attorney's fees in bankruptcy proceedings proper, except in behalf of a respondent under section 3e, upon the withdrawal or dismissal of a petition in bankruptcy, or in behalf of attorneys, as authorized by section 64b (3), and neither of these provides for the allowance of attorney's fees upon proving claims against the bankrupt estate. The claim for attorney's fee must therefore be denied.

The conclusion therefore is that the note of Hart for \$280 should be allowed, without an attorney's fee, against the bankrupt estate as a claim secured by his mortgage of \$300, and the note for \$20, without an attorney's fee, as an unsecured claim upon the surrender of his mortgage to that extent. The matter is referred back to the referee that they may be so allowed.

It is ordered accordingly.

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In re BURNS.

(District Court, S. D. Georgia, W. D. May 12, 1909.)

1. FRAUDS, STATUTE OF (§ 131\*)—CONVEYANCE OF LAND—EQUITABLE MORTGAGE.

A bankrupt borrowed \$1,500 from decedent, and executed as security a warranty deed, taking back a bond for title, providing for reconveyance when the debt was paid. Two years thereafter the bankrupt obtained an additional loan from decedent, making the total indebtedness \$3,593.53. The original note was then canceled, a new one made, and the bond for title altered by striking out the due date and interlining a description of the new note; but by inadvertence the words "fifteen hundred dollars," originally appearing in the bond, were not stricken, nor was the bond re-executed. *Held*, that the deed and bond, as a mortgage for the in-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

creased indebtedness, was not unenforceable under the statute of frauds, on the theory that the new agreement was by parol.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 131.\*]

## 2. MORTGAGES (§ 257\*)—LIENS—PRIORITY.

A bankrupt executed a deed to decedent to secure a loan for \$1,500, and afterwards borrowed more money, so as to increase the debt to \$3,593.53; the bond for reconveyance being then changed to describe the new note, but omitting to strike the words "fifteen hundred dollars," originally describing the debt. Thereafter the bankrupt conveyed all his interest in the bond for title to petitioner. *Held*, that petitioner was charged with notice of the fact that the deed and bond were intended to secure the increased indebtedness, and was therefore not entitled in equity to a reconveyance of the property on payment of the \$1,500 and interest.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 684; Dec. Dig. § 257.\*]

In Bankruptcy. Petition of Virginia-Carolina Chemical Company to review order of referee.

Walter T. Johnson, for petitioner.

M. P. Hall, in pro. per.

SPEER, District Judge. On January 15, 1903, Burns, now bankrupt, borrowed from one Leonard \$1,500, and gave as security a warranty deed for certain valuable lands. Contemporaneously Leonard gave to Burns a bond for title, conditioned to reconvey the land when the note given in evidence of the debt was paid. Thereafter, on December 12, 1905, Burns obtained from Leonard an additional sum, making his total indebtedness to the latter, including interest, \$3,593.53. The original note was canceled, and a new note was given to Leonard by Burns for the entire amount of the first loan and the second, and this was made payable April 12, 1906. Leonard was very ill at the time, and in fact died in four days. The second contract was made at his bedside. It is not in dispute that it was the intention both of Burns and Leonard that the warranty deed would secure, and that the bond for title would relate to, the entire indebtedness. With this end in view, certain interlineations were made in the bond for title. The words "on May 15, 1903," were stricken, and the promissory note was described as "dated Dec. 12, 1905, for \$3,593.53, due April 12, 1906." This sum, expressive of the entire loan thus secured, was written in figures on the face of the bond for titles. By inadvertence the words "fifteen hundred dollars," originally appearing therein, were not stricken. Subsequently thereto Burns, who had a current account with the Virginia-Carolina Chemical Company for fertilizers sold him, conveyed to that company his interest in the bond for title. This conveyance was made on the 19th day of August, 1908. It obviously conveyed his equity of redemption only.

The conflict here is between the administrator of Leonard, whose claim is sufficient to cover almost the entire proceeds of the lands conveyed to secure the debt of Leonard, and the Virginia-Carolina Chemical Company, which insists that it has a lien of prior dignity, because it holds Burns' equity of redemption. This is based upon the contention that the extension of the original indebtedness between Burns and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 171 F.—64

Leonard was merely a parol agreement, that there was no additional or new signature to the original instrument, and that the only amount which can be held to be secured by the deed to Leonard was the original \$1,500. Upon this contention the Chemical Company bases its claim for the surplus in the proceeds of the property sold by the trustee, over and above that sum. A very learned and interesting argument in support of the latter contention has been made by the counsel for the Chemical Company. It is contended that the transaction at the bedside of Leonard cannot be construed to extend the conveyance of the land, so as to secure the second advance made by Leonard, for the reason that it was not signed anew; and many authorities are referred to in support of this contention. It is said to be merely a verbal understanding between Leonard and Burns, and as violative of the statute of frauds, and also of section 2693 of the Civil Code of Georgia of 1895, which provides:

"That any contract for sale of lands, or any interest in or concerning them, \* \* \* must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized."

After giving careful consideration to the technical contention of the Chemical Company, it is found that the true equity of the case depends upon the considerations following: The original deed of warranty was undoubtedly valid to convey lands much more valuable than the small debt which it was intended to secure. The genuineness of the entire transaction between Leonard and Burns is unquestioned. It was all consummated before the Chemical Company appears on the scene. The additional loan, the distinct interlineation in the bond for title, although unsigned, and the execution of the new note, would in equity unquestionably be binding on Burns in a controversy between Burns and Leonard. Such a court, if necessary, would oblige Burns to perfect his conveyance, so as to secure the additional loan. Between the parties, equity would require that to be done which clearly ought to have been done. The transaction, however, cannot be determined as strictly verbal. The execution of the new note and the interlineation in the bond for titles shows this to be true. It may be conceded that this might not present an equitable lien which would be good against the pledge of an innocent third party who had no knowledge of the facts, or a bona fide purchaser without notice. No such person appears in this case. The Chemical Company, when it sought to secure a debt long antecedent to the transfer from Burns of his equity of redemption, did so with full knowledge that Burns owed Leonard a sum largely in excess of the \$1,500 he had originally borrowed. This appeared also from the face of the bond for titles and the interlineation making the debt read \$3,593.53. Clearly this was sufficient to put the Chemical Company on notice of Burns' obligation to Leonard. The duty of inquiry followed, and inquiry would have demonstrated the prior and superior right of Leonard as evidenced by his second note, the interlineation in the bond for titles, and the warranty deed. Since the facts were such as to put the Chemical Company on notice, it is chargeable with notice of all the facts that inquiry might have developed, and that it failed to inquire does not help its contention.

Both of the claimants have equities; but the equity of the administrator of Leonard is deemed superior to that of the Chemical Company, which took only the right remaining to Burns. As Burns would have had no right at all as against Leonard, the Chemical Company takes nothing.

For these reasons, I conclude that the finding of the referee was correct, his judgment will be affirmed, and the petition for review denied.

### THE MATANZAS.

(District Court, W. D. Wisconsin. July 31, 1909.)

#### No. 37.

#### SALVAGE (§ 13\*)—NATURE OF SERVICE—SALVAGE OR TOWAGE SERVICE.

A schooner, which had been cast adrift by her towing steamer in a gale on Lake Superior, after anchoring during the night, made sail and was proceeding down the lake toward the Portage with a fair wind, but slowly, when she engaged a small fishing tug which came alongside to assist, and by means of the tug and sails she reached the Portage, where, after once stranding, she was safely anchored. Although there was some wind, the weather was fair, and neither tug nor tow was in any serious danger. Held, that the service of the tug was not a salvage, but only a towage, service, and entitled to compensation as such.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 25; Dec. Dig. § 13.\*]

In Admiralty.

Davis & Hollister, for libelants.

Goulder, Holding & Masten, for respondent.

SANBORN, District Judge. On the 21st day of November, 1906, as the steamer Panama, with the barge Matanzas in tow, was proceeding across Lake Superior, she encountered a heavy gale of wind from the northeast, accompanied by snow, and, because of laboring badly in the heavy sea which prevailed, the Panama was so badly strained that she sprang a leak, and, as the storm and sea continued, she was continually making more water. About 9 o'clock p. m. she was making water so rapidly that it was found necessary to let go the tow line and try and get the Panama into shallower water to keep from sinking and becoming a total loss. The barge Matanzas had her sails up, and after the tow line was let go she continued to sail, but could not get her tow line in because of the heavy sea, so just let it drag. After sailing from 9 o'clock until along in the morning it was deemed advisable not to sail any longer in the direction in which they were going as it was still snowing, and they could not see where they were, so they took in their sails and prepared to let go their anchors. When she lost the steadying power of her sails and lost steerageway, the heavy seas pounded heavily against her rudder, and the jerking and kicking of this caused the chains to fall off the quadrant. It then became necessary to put the relieving tackles on the tiller to hold the rudder in place until the chains were put back on the quadrant, and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the heavy seas continued to pound the rudder so hard that the strain caused the tiller to bend. The lashings of the tiller, however, held the rudder sufficiently steady that the chains were again attached to the quadrant, when the ship was fetched up into the wind and her anchors let go. She then rode to her anchors until the storm abated and the sea ran down. The weather cleared, and after daylight on the morning of the 22d they saw that they were 8 or 10 miles off the beach, and as the wind continued to abate, and the sea got down to what is termed "a dead swell," they hoisted a flag to attract the attention of anything passing so that they could effect communication with their owners, and proceeded to get their tow line in. Along about 9 or 10 o'clock, the steamer Rogers, coming from Ashland, stopped alongside, and the captain of the Matanzas asked the Rogers what they would charge to tow him to Portage. There was some talk back and forth in regard to towage, but as the Rogers would only tow them down off the Portage, and let them go again, the offer was refused. Shortly after the Rogers left them, they hove up their anchors, and, the wind having shifted to the westward, they made sail and proceeded down the lake with a fair wind, heading for the Portage. Along about 1 or 2 o'clock p. m., when sailing along about 12 miles from Ontonagan, and 55 miles from the Portage, the little fishing tug Tramp, from Ontonagan, came alongside, and a conversation was had about tugs at the Portage, and the Tramp said there were none. Then the ability of the Tramp to handle the Matanzas at the Portage, and whether she could be of any service, was discussed, and finally it was decided that, as the wind was fair, she might help the sails some and could probably be of some service after arriving at the Portage. A line was passed to her; and after towing a short time she let go and went back to Ontonagan for fuel and came out again, overtaking the Matanzas about 10 o'clock p. m., whereupon the line was again passed, the sails were taken in, and they arrived off the Portage without further incident.

There are four piers at the Portage, two outside and two inside piers; the outside pier being about 1,000 feet from the inside pier. The wind was from the northwest, blowing about 10 miles an hour; but some time before the Matanzas was finally pulled up the wind reached the velocity of 20 miles an hour. In entering the Portage the Matanzas was close to the west outside pier to avoid being carried by the winds toward the east pier, and for some reason the captain of the Matanzas let go his starboard anchor, and the boat swung around stern foremost. It was then going  $4\frac{1}{2}$  or 5 miles an hour, which was steerage headway. This stopped the towage, and the Tramp was carried nearly to the east pier. The tug then worked over to the west side, and the Matanzas, having taken up her anchor, floated down toward the east pier, and finally got onto a sandy bottom between the two easterly piers. The Tramp came up close and found the Matanzas in a safe position. The tug pulled awhile on the Matanzas to get her in from the bottom, but could not do so. The Matanzas stayed in that position until about 9:30 the next morning. After attempting to pull her in, the tug blew four whistles for assistance, but got no answer, and went and laid alongside of the Matanzas. A tug was telephoned

for to Houghton, and the Cora Sheldon arrived about 9:30, and the two tugs got the Matanzas in and tied her up in a canal, about 10:30, in what is called the "Lily Pond." About this time it was blowing quite a strong wind from the northwest, and quite cold; all boats remaining in shelter until the next day.

The libelants claim that the service rendered was a case of salvage, while the respondent insists that it was merely towage service.

The evidence seems to show that the Matanzas was never at any time in any serious danger, and that the Tramp was probably in no great danger. The captain of the Tramp says that, if the weather got too severe, and he could not take care of the Matanzas and his own boat also, he would let her go and take care of himself, and that he knew he could make the canal because he would be running before the wind with the sea. He said he could have taken care of the Matanzas and his own boat also, and that he would have done so had he found it necessary. The fireman of the tug testifies that there was nothing out of the usual about the way they had to handle the Matanzas, except that there was some difficulty in getting the lines aboard, but that the course was a safe one, and that the tug took no water inside, although the sea ran across her deck. The owner of the Tramp testifies that, from the time he took the vessel's line up to the time he left it, nothing of a dangerous character occurred, and the boats both made good weather. Another fireman on the Tramp says that the sea did not break over the deck, but merely splashed over it so as to keep its surface wet, that there was a little freezing, but the deck was wet all the time without ice. There was a good strong wind, he says, but nothing to make it dangerous for a tug like the Tramp. In the morning when he went out, he did not feel alarmed at the time. The Tramp is a good, substantial, wholesome, strong tug, capable of standing a heavy gale, and that there was no risk in going out to the Matanzas.

It appears clearly that the Matanzas had met with no disaster which in any way imperiled her seaworthiness. The accident to the steering gear was of little consequence. When the Tramp arrived, the Matanzas was making headway through the water, sailing ahead, and drifting toward the shore. There was good holding ground for the anchors, and the barge could easily have weathered the storm. The mate of the Matanzas said that they were able to hold steerageway on the Matanzas, and that they were not gradually nearing shore. One of the seamen on the Matanzas says she was making about two miles an hour at the time the Tramp reached her.

The libelants should be allowed fair compensation for a towage service, which is fixed at \$100, together with their costs in said action to be taxed.



GUARANTY TRUST CO. OF NEW YORK v. METROPOLITAN ST.  
RY. CO. et al.

(Circuit Court, S. D. New York. June 22, 1909.)

COURTS (§ 385\*)—SUPREME COURT—REVIEW OF DECISIONS OF CIRCUIT COURT.  
A Circuit Court should not grant an appeal direct to the Supreme Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), in a case involving a large number of miscellaneous and complicated questions, merely because a constitutional question may be incidentally raised.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 385.\*]

In Equity. Application by complainant for allowance of an appeal to the United States Supreme Court from decree of foreclosure and sale (168 Fed. 937) made herein March 18, 1909.

Davies, Stone & Auerbach, for complainant.

J. Parker Kirlin, for defendant Metropolitan St. Ry. Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. Examination of the assignments of error shows that it is sought to present upon this appeal multitudinous questions—largely questions of chancery practice—involving all the intricate details of the situation presented on the trial of this suit. The relationships of the various interests are involved and the necessities of operation by the court have still further complicated them, with the result that provision has had to be made in the decree for minute details which are usually omitted. It was one object of the Appeal Act of March 3, 1891 (chapter 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 488]), to relieve the Supreme Court of the burden of considering such questions—at least until after the local Court of Appeals should have considered them, whereupon, in the event of apparent error being disclosed they might be brought up on certiorari. It would seem that the references in three or four of the assignments of error to the provisions of the fifth amendment to the Constitution of the United States are not sufficient to warrant the Circuit Court in sending the cause upon appeal direct to the Supreme Court under the fourth subdivision of section 5 of the appeal act. Certainly the construction or application of the Constitution was not the controlling or dominant feature of the case. It is thought therefore that the application for allowance of such appeal should be refused. *Carey v. Houston & Texas Central Ry. Co.*, 150 U. S. 170, 14 Sup. Ct. 63, 37 L. Ed. 1041; *In re Lennon*, 150 U. S. 393, 14 Sup. Ct. 123, 37 L. Ed. 1120; *Ansbro v. U. S.*, 159 U. S. 695, 16 Sup. Ct. 187, 40 L. Ed. 310; *Cornell v. Green*, 163 U. S. 75, 16 Sup. Ct. 969, 41 L. Ed. 76; *Empire, etc., Co. v. Hanley*, 205 U. S. 225, 27 Sup. Ct. 476, 51 L. Ed. 779.

If this court is in error as to construction and application of the authorities above cited, the complainant will be in no way prejudiced thereby, since application for allowance of the appeal can be made to one of the justices of the Supreme Court. Refusal does not put appellant to the trouble of moving for a mandamus.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GUARANTY TRUST CO. OF NEW YORK v. METROPOLITAN ST.  
RY. CO. et al.

(Circuit Court, S. D. New York. July 22, 1909.)

1 STREET RAILROADS (§ 58\*)—RECEIVERS—OPERATION OF PROPERTY.

In the operation by a court, through its receivers, of an extensive system of street railroads, the first consideration is the maintenance of an adequate service to the public, and the current accounts of the receivers, if the expenditures shown were made to that end, should be passed without being complicated by controversies between the parties interested in various parts of the system, as to which interest or property should be charged with a particular expense.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.\*]

2. STREET RAILROADS (§ 58\*)—RECEIVERS—METHOD OF KEEPING ACCOUNTS.

Directions to receivers operating a system of street railroads, as to the manner of keeping accounts, considered and amended.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.\*]

In Equity.

This is an application made by receivers to amend an order, entered March 17, 1908, appointing receivers under bill of complaint of the Guaranty Trust Company, trustee under the first mortgage. The portions of the order which it is sought to amend read as follows:

"That said receivers are hereby required to keep proper books of account, wherein shall be separately stated the earnings and income of the lines of railway and other properties charged in the bill of complaint to be subject to the lien of complainant's mortgage, together with the expenses and disbursements of the receivers with respect to said lines of railway and other properties, and said receivers are hereby required to preserve proper vouchers for all payments made by them in the execution of their said trust.

"The receivers shall enter or cause to be entered in said books from day to day all items of receipts and disbursements which do not require apportionment or which can be apportioned by recognized rules of railroad accounting; and they shall apportion and enter all other items, as soon as may be after receiving a direction in writing as to the method of such apportionment, signed by the Metropolitan Street Railway Company and by the trustees acting under the two mortgages of said company, dated respectively February 1, 1897, and March 21, 1902, and referred to in the bill of complaint herein. All items requiring apportionment, as to which such direction is not given, shall be entered in a separate account or accounts, and reported to the court as part of the bimonthly accounting of said receivers, and the special master charged with the examination of said bimonthly accounts is hereby authorized and directed to classify and apportion such unapportioned items and to correct and complete the separation of the earnings and income of said property mortgaged to the complainant, from the earnings and income of the remainder of the property operated by the receivers, and to report his conclusions thereon to the court. The rulings of the special master in stating such accounts shall be subject to review by the court upon exceptions filed by any party in interest."

Davies, Stone & Auerbach, for complainant.

J. Parker Kirlin, for defendant Metropolitan St. Ry. Co.

Masten & Nichols, for receiver of Metropolitan St. Ry. Co. and others.

LACOMBE, Circuit Judge (after stating the facts as above). The order as it now stands is objectionable in two particulars:

1. The first of these is due to the inadvertence of the court. It was necessary to provide that certain questions of apportioning items in the accounts, as to the proper classification of which all sides might not agree, should be passed upon by a special master. At that time there were several special masters to whom various matters had been assigned for examination and report, and the court was solicitous that the order should provide that all questions as to apportionment of accounts should be disposed of by the particular special master who was passing the bimonthly accounts of the receivers, and it so directed. When the order was submitted, however, the court overlooked the circumstance that it required such special master to classify and apportion such items "as part of the bimonthly accounting of said receivers." This should not be. The questions presented on such apportionment are different from those which arise on the bimonthly accountings, and hearings on the latter should not be complicated and delayed by the introduction of proofs and contentions which concern peculiarly the distribution of the cost of operating the system between the different interests. It may be well to state specifically what it is that the special master has to pass upon (subject to review by the court) when bimonthly (or monthly) accounts come before him.

The entire property covered by both mortgages and some little additional property not covered by either came into the custody of the court, under a creditor's bill against lessee, supplemented by an application to intervene made by lessor—a practice approved by the United States Supreme Court. In *re Konrad*, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403. Subsequently the trustees under the two mortgages brought separate suits, under which the same receivers were appointed. The court at the outset was thus charged with the care and custody of a unitary system of connecting street railroads which was in active operation in a populous city. In placing this system in the hands of its receivers, the court instructed them that:

"The controlling element in the operation of the property by [them] will be the circumstance that such property is devoted to the public service. The traveling public are to be first considered; the service already performed by the roads must be kept up and improved upon so far as may be. In the matter of improvements, \* \* \* the Public Service Commission \* \* \* is making a careful and exhaustive investigation \* \* \* and may prescribe various changes in construction, equipment, or operation devised and adapted to secure better service. These directions of the Public Service Commission will be carried out by the receivers so far as the income from operating the roads will permit. Whether they should also undertake to borrow money in order to complete such changes is a question which can be determined subsequently when it is known just what those changes are." *Pennsylvania Steel Co. v. N. Y. City Ry.* (C. C., Oct. 8, 1907) 157 Fed. 443.

Of these directions the Supreme Court was kind enough to say:

"The orders \* \* \* giving receivers instructions are most conservative and well calculated to bring about the earliest possible resumption of normal conditions when those who may be the owners of the property shall be in possession of and operate it." In *re Konrad*, *supra*.

So far as the court is advised, the receivers have operated the whole system in conformity with these instructions, and the examination conducted by the special master on bimonthly accountings is for the purpose of determining whether their statement of receipts is accurate, and whether their disbursements are reasonable and proper under their general powers and the general and specific directions of the court. These questions must, of course, be determined in consideration of the whole property as a unitary system of public service. It has been most unfortunate that the zeal of counsel who represent the respective mortgage trustees seems to make it impossible for them to appreciate that those mortgages are based upon property devoted to a public use. As between themselves there are many questions to be settled, when we come to the distribution of items of receipt or disbursement which the special master may have decided to have been properly received or made by receivers as receivers of the whole property. For example, out of money received generally from the operation of the whole system, some car barn may have been rebuilt upon land which is covered only by the second mortgage, and the trustee of the first mortgage may wish to have that item of expenditure for permanent improvement of land on which he has no lien so charged that no portion of it shall fall on receipts (or corpus) of property which is covered by his mortgage, and which is not directly benefited by such expenditure. We had such an instance on the hearing of the cross-bill of the present complainant, defendant in the Morton Trust Company suit. See decision on motion to dismiss cross-bill May 6, 1909. *Morton Trust Co. v. Metropolitan Street Railway Company* (C. C.) 170 Fed. 336.

But the propriety of receivers' expenditures in carrying on the operations of this unitary railway system and conserving its whole property is not affected by the circumstance that the second mortgage covers the whole property and the first mortgage covers a part of it. If any particular item be an expenditure necessary and proper to be made for the operation and conservation of the property, it will be passed by the special master, and, when it is approved by the court, neither the receivers nor their bondsmen may thereafter be called in question as to the propriety of such expenditure.

The circumstance that the income from operating the system in such a manner as to afford a reasonably efficient public service is not large enough to pay all fixed charges and leave any surplus applicable to mortgage indebtedness is unfortunate; but, so long as the system is in the hands of the court, it will be operated in conformity with the instructions, quoted *supra*, even though the result may be some impairment in the value of these mortgages. That is the risk which every one takes who invests in the securities of a public service corporation. If the mortgagees are dissatisfied with this method of administering the estate, they have their remedy. If they will be more expeditious in the future than they have been in the past, they can secure an opportunity to buy in the property and run it to suit themselves, or sell out its component units for what they will bring. The sooner the court and its officers are relieved of it, the better for all parties.

All questions as to apportionment of items of receipt and disbursement properly between all conflicting interests will be examined into and reported on by the special master and reviewed by the court at the proper time, or they may be disposed of under one or other of the cross-bills, and the court, by reserving a lien upon proceeds or corpus of property covered by second mortgage, will secure the trustee of the first mortgage against loss; but such questions should not be injected into the proceedings upon the bimonthly (or monthly) accounting.

2. When the order of March 17, 1908, was made, it was of course, understood that it would be highly desirable that the accounts of the receivers should be so kept that the earnings and income of the lines of railway and other properties covered by the first mortgage only, together with expenditures and disbursements in respect to the same, should be so kept as to facilitate the separate statement of such items of income and expenditure. It was also fully understood that it was not possible to do this with absolute accuracy. It is needless to rehearse here the repeated deliverances of the court as to the complications of receipts and disbursements, which rendered it necessary that some arbitrary system of distribution should be agreed to by all parties, or in the event of their failure so to do settled by the special master, since the "recognized rules of railroad accounting" would not be a sufficient guide for the auditor's office. When the order was being settled, it was stated that the two trustees and the company would agree in writing upon a method of apportionment which would eliminate all difficulties, and the court gathered the impression that this would be done within a few days. Under that impression the order was signed as submitted, although it contained a requirement as to keeping accounts, which could not be complied with unless such agreement were made.

Despite repeated inquiries and suggestions by the court, weeks and months elapsed without the filing of any such agreement, and it is now stated that counsel for one of the trustees insists that receivers are in default for not complying with the requirements of the order. Counsel for first mortgage trustee asserts that he at one time submitted a form of agreement as to method to one of the receivers, who after consultation with the auditor criticised it as impracticable and unnecessarily expensive. Apparently the force of such objection was appreciated; at any rate, the paper so submitted was taken back, and no written directions such as the order contemplated have been filed. It is understood that an agreement as to method of accounting has now been reached, and that the matter is in shape to be regulated by a specific order, which the court is prepared to make when the written agreement is submitted; but the order of March 17, 1908, should be amended so as to put it in the form it would have taken had the court been advised at the time that it would take the trustees and the company over a year to settle upon some method of keeping books and filing reports which would be satisfactory to them.

The order of March 17, 1908, is therefore amended, nunc pro tunc, by striking out the paragraphs above quoted and substituting therefor the following:

"The receivers will supplement their present system of accounting by making such additions or changes as may be agreed upon in writing by all parties interested and approved by the court, and all questions as to the manner and form of keeping their books and records, and as to the time and manner of their accounting separately as to the receipts and disbursements on behalf of conflicting interests, are reserved for further determination by this court."

Then, if counsel for trustees will prepare an order providing specifically for such details as may now be agreed upon, and referring to the special master such matters of detail as cannot be agreed upon, the same will be signed.

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PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.  
MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. (two  
cases). GUARANTY TRUST CO. v. SAME.

(Circuit Court, S. D. New York. August 10, 1909.)

Nos. 2-9, 2-33, 2-149, 3-37.

**STREET RAILROADS (§ 58\*)—RECEIVERS—OPERATION OF PROPERTY.**

In the operation by a court, through its receivers, of an extensive system of street railroads, expenditures necessary to maintain adequate public service on the entire system must be made by the receivers on the assumption that the property will continue to be devoted to such use.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.\*]

In Equity. Petition of receivers for instructions with reference to expenditures upon carhouses at Lenox avenue and 146th street and elsewhere.

See, also, 170 Fed. 626.

Masten & Nichols, for receivers.

Davies, Stone & Auerbach, for Guaranty Trust Co.

Bronson Winthrop, for Morton Trust Co.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. This application for instructions was induced by a letter to the receivers from the Morton Trust Company, dated June 24, 1909, protesting against further expenditures on these carhouses save such as may be necessary for maintenance and preservation, and especially against their further improvement for railroad uses. The facts are sufficiently set forth in the petition.

The mortgage to the Morton Trust Company covers the entire property of the Metropolitan Street Railway Company of every kind and description. When it was executed that property was devoted to the service of an aggregation of street railroads in this city operated as a unitary system. The protest of the trust company apparently contemplates a disruption of this system and the future appropri-

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\*For other cases see same topic & § NUMBER in 'Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ation of the various enumerated parcels of real estate to general commercial purposes. It does not seem that either the receivers or the court can now act on such an assumption. It must be presumed that the several railroads now in receiver's possession will in the future, as in the past, be operated either by the parties now interested or by the purchaser at foreclosure sale, so as to render the public service for which they were created. If some special items of work now under way were shown to be of such a character as to be of no benefit to the property as a railroad system, they might be suspended; but no such are indicated, and the expenditures of the receivers necessary to put the system into proper condition to render efficient public service are apparently in the line of the instructions given immediately after their appointment. 157 Fed. 443.

All questions as to distribution of expenses as affecting the respective liens of the two mortgages will be disposed of as they come up, either before the master or the court in proceedings now in progress; but the court now finds no grounds for instructing the receivers not to use the income coming into their hands from the operation of the system for the purpose of putting it into a thoroughly first-class condition.

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GUARANTY TRUST CO. OF NEW YORK v. SECOND AVE. R. CO. et al.

(Circuit Court, S. D. New York. August 3, 1909. Additional Opinion, August 30, 1909.)

Nos. 3-14.

COURTS (§ 492\*)—PRIORITY OF JURISDICTION—FEDERAL OR STATE COURTS.

Where street railroad property, which was in the possession of receivers of a federal court appointed for a lessee, has been turned over by them to the receiver of a state court appointed in a suit to foreclose a mortgage thereon, the federal court is without jurisdiction to entertain a suit in relation thereto in which there is no diversity of citizenship, although it was commenced before the one in the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1345; Dec. Dig. § 492.\*]

Jurisdiction in mortgage foreclosure, see note to Seattle, L. S. & E. Ry. Co. v. Union Trust Co., 24 C. C. A. 533.]

In Equity.

See, also, 165 Fed. 487.

Davies, Stone & Auerbach, for Guaranty Trust Co.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

Bronson Winthrop, for Morton Trust Co.

LACOMBE, Circuit Judge. On July 12, 1909, an order was signed extending the time for taking proofs under the rule to October 9th. The order was submitted with the usual daily package of ex parte orders and, being assented to by every one, was signed without particular investigation. Since then the court has looked into the situation and has doubts as to the propriety of any such order.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The suit is for foreclosure of a mortgage, and was begun September 3, 1908. Application was at once made for the appointment of a receiver. The court called attention to the circumstance that the mortgaged property was held under lease to the Metropolitan Street Railway Company by the receivers of that company, that negotiations looking towards a reduction of rent had been undertaken without success, and added:

"The mere circumstance (in the absence of diversity of citizenship) that the Second avenue property has remained in the hands of Metropolitan receivers during the pendency of these negotiations should not be controlling as to the forum in which complainant may obtain relief, since receivers have offered to return the property and are ready to deliver to owners or owners' representatives at any time. The petition is denied without prejudice to its renewal in a state court." 165 Fed. 487.

Subsequently a bill of foreclosure was filed in the state court, a receiver appointed by that court, and the property turned over to him. It is now in the custody of the state court.

Under these circumstances it would seem that this court is powerless to administer the relief prayed for. There is no diversity of citizenship, and the property is not in the custody of the court. There is jurisdiction neither of the parties nor of the subject-matter. The taking of proofs would therefore seem to be a waste of time and money.

The case may be put on the motion calendar for August 25th, when the court will hear what parties may have to say as to the vacating of the order extending time for taking proofs.

#### Additional Opinion.

As indicated in memorandum filed August 3d, I am convinced that this court is without power to give the relief prayed for. Inasmuch, however, as it is stated that all parties, though recognizing this situation, wish to have the cause kept alive pending efforts at reorganization, the order extending time for taking proofs, which has been consented to, is signed.

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#### UNITED STATES v. KEMPF.

(District Court, E. D. Wisconsin. August 25, 1909.)

#### INDIANS (§ 38\*)—JURISDICTION OF FEDERAL COURTS—PROSECUTION FOR TRESPASS ON INDIAN LANDS.

Congress has the constitutional power to enact laws to punish criminally the unauthorized cutting of timber on unallotted lands in an Indian reservation within a state, the title to which is in the United States, and to confer jurisdiction on the federal courts to enforce the same.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 38.\*]

On Motion in Arrest of Judgment. This is an indictment under section 5388, Rev. St. (U. S. Comp. St. 1901, p. 3649), for cutting timber upon certain unallotted lands, being a portion of the Menominee Indian reservation in the state of Wisconsin.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



E. J. Henning, Asst. Dist. Atty., for the United States.  
Paul J. Winter, for defendant.

QUARLES, District Judge. It is contended in support of the motion that the state of Wisconsin was admitted into the Union upon the same footing, possessing the same powers and jurisdiction, as one of the original states; that in the enabling act the federal government made no reservation of jurisdiction over the Indian country lying within the territorial limits of the state; that therefore the criminal jurisdiction of the state extends to all parts of its domain, and that, for the punishment of the crime of which the defendant was convicted, resort must be had to the Wisconsin statute and Wisconsin courts; that the Wisconsin statute has provided an appropriate remedy for the alleged wrong, and that the federal government must be held to have relinquished its jurisdiction over the territory in question.

This contention is bottomed upon the case of *state v. Doxtater*, 47 Wis. 278, 2 N. W. 439, wherein it was held that an Oneida Indian might be tried and punished in the state court for adultery committed within the reservation. The soundness of this decision has been questioned in this court, in *Re Blackbird* (D. C.) 109 Fed. 139, 142. It has been practically repudiated by the Supreme Court in *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228, and appears to have been entirely ignored by Congress in subsequent legislation. If this decision were good law, it would not rule the instant case, and therefore merits no further consideration. The United States has assumed guardianship over these Indians, and is vested with the title to large tracts of land which it holds in trust for its dependent subjects. This trust imposes the highest duty to preserve and protect the property of its wards. The government is not only a sovereign, but also a landed proprietor, charged with the preservation of the public domain. It is to conserve these interests that the act was passed under which the defendant is prosecuted.

We may start with the fundamental proposition that the Constitution of the United States, and any proper legislative enactment based thereon, become the supreme law of the land, before which state statutes, if inconsistent therewith, must give way. *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *McCulloch v. State of Maryland*, 4 Wheat. 316, 4 L. Ed. 579. In *Railroad Co. v. Husen*, 95 U. S. 465, 471, 24 L. Ed. 527, the Supreme Court stated the rule as follows:

"But, whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the federal Constitution."

We now turn to the Constitution, and in article 4, § 3, find:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States."

In *Jourdan v. Barrett*, 4 How. 168, 11 L. Ed. 924, construing this provision, the court held that, Congress having the constitutional power to pass the law, it is supreme, and that Congress may prohibit and punish trespasses on the public lands. Having the power of disposal and of protection, Congress alone can deal with the title, and no state law, whether of limitation or otherwise, can defeat such title.

In *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260, the court say:

"While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a state which it would have within a territory, we do not think the admission of a territory as a state deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation."

It has been a subject of dispute as to the civil remedies that the government was entitled to enforce where timber had been cut on the public domain. In *Cotton v. United States*, 11 How. 229, 13 L. Ed. 675, it was held that the United States may maintain a civil action for trespass on public lands. To the same effect is *United States v. Cook*, 19 Wall. 591, 22 L. Ed. 210. See, also, *United States v. Gratiot*, 14 Pet. 526, 537, 10 L. Ed. 573.

In *United States v. Gardner*, 133 Fed. 285, 66 C. C. A. 663, it was held that such a civil action could be maintained by the government to recover the value of timber unlawfully cut from lands of a reservation, although such lands had been allotted; and such action may be maintained in the federal court. This case is differentiated from *United States v. Hall and Stevens* (recently decided here) 171 Fed. 214. That case concerned the Oneida reservation, where the lands had been allotted, and the question was whether the government could legitimately exercise the police power over such allotted territory. In the instant case the criminal statute does not invade the police power of the state, but involves only the protection of the public domain where the title of the United States is absolute.

In some of the civil cases above cited, it was contended that the remedy by indictment was exclusive, and that, like any other owner, the United States could obtain redress of a civil nature in the state court. I have been unable to find any case where the authority of Congress to provide for the protection of the public domain by means of a criminal statute, has ever been doubted.

During the argument great reliance was placed by defendant's counsel upon *United States v. Penn* (C. C.) 48 Fed. 669; but the facts are so different that the authority is not in point. There the cemetery was originally the property of the state of Virginia, and had been acquired by the government by means of a tax title, and not in the manner pointed out by article 1, § 8, of the Constitution. The exact point decided was that, no cession having been obtained from the state, the provision of the Constitution had not been complied with, and therefore the federal jurisdiction failed.

I can see no reason to doubt the jurisdiction in this case, and the motion in arrest of judgment must be denied.